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SACRIFICING MOTHERHOOD ON THE ALTAR OF POLITICAL CORRECTNESS: DECLARING A LEGAL STRANGER TO BE A PARENT OVER THE OBJECTIONS OF THE CHILD'S BIOLOGICAL PARENT

Rena M. Lindevaldsen[*]

INTRODUCTION

Just as a single brush-stroke can dramatically alter a painting, the advent of assisted reproductive technology forever changed the legal landscape of parentage determinations.[1] Four decades ago, maternity determinations were typified by the simplicity of the Dr. Seuss classic, *Are You My Mother?*[2] A woman who gave birth to a child was not only unequivocally the child's mother, but could also be the child's only

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[1] Assisted reproductive technology refers generally to the various "techniques facilitating human procreation by means other than normal sexual intercourse." LYNN D. WARDLE & LAURENCE C. NOLAN, FUNDAMENTAL PRINCIPLES OF FAMILY LAW 275 (2002). The major techniques include *in vitro* fertilization, artificial insemination, and surrogacy. *Id.* at 275–76. "[*In vitro*] fertilization involves the removal of an egg or eggs from a woman, the donation of sperm from a man, and the combination of them [outside the uterus]." *Id.* at 276. The fertilized egg is then returned to the woman's body or donated to someone else. *Id.* Artificial insemination, however, does not require removal of the eggs from the woman's body. *Id.* at 275. Instead, the sperm is injected into the woman's body in the hopes that fertilization will occur. *Id.* Surrogacy refers to the situation where a woman (surrogate) carries and gives birth to a child for another person or couple. *Id.* at 276. The surrogate can use either an egg from another woman or her own egg that is fertilized by donated sperm. *Id.*

[2] In the book, a mother bird leaves her egg to gather food. While the mother bird is gone, the baby bird hatches and begins to look for its mother. As it encounters a cat, hen, dog, cow, car, and boat, the baby bird asks whether each is its mother, which of course none are. The answer was easy because the bird did not look like any of the other animals or objects and was not brought into this world by them. Finally, when the mother bird returns, the baby bird immediately recognized its mother. P.D. EASTMAN, ARE YOU MY MOTHER? (1960).

claimant to motherhood status.[3] Since the first successful birth using *in vitro* fertilization in 1978,[4] the door opened for situations where as many as three women can claim to be a child's mother: one woman donates an egg to be implanted into a second woman, the second woman agrees to be the gestational carrier for a third woman, and the third woman agrees to be the intended mother and raise the child.[5] Even King Solomon's wisdom is left wanting for a proper maternity determination under those circumstances.[6]

Another type of case, although factually less complicated, but no less emotionally charged, is becoming increasingly commonplace in today's courtrooms. Those cases concern two women involved in a same-sex relationship, claiming motherhood status to a child who is biologically related to only one of them.[7] Specifically, those cases involve a biological mother who is artificially inseminated with sperm from either a known or an anonymous donor and gives birth to the child while she is involved in a same-sex relationship. When the relationship ends, the partner who has no biological or adoptive relationship with the child seeks custody or visitation with her former partner's child. Courts have adopted various approaches to decide who is the child's mother and,

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[3] Not factored into the analysis are those rare cases where a biological mother attempted to regain custody of a child placed into an adoptive home. *See, e.g.*, *In re* Baby M, 537 A.2d 1227 (N.J. 1988).

[4] *See, e.g.*, Assisted Reproductive Technology (ART) Timeline, http://www.artparenting.org/about/index.html (last visited Dec. 1, 2008). Although artificial insemination had been successfully performed prior to the 1970s, the use of all forms of assisted reproductive technology dramatically increased after the first successful birth using *in vitro* fertilization in 1978. *See* D. Micah Hester, *Reproductive Technologies as Instruments of Meaningful Parenting: Ethics in the Age of ARTs*, 11 CAMBRIDGE Q. OF HEALTHCARE ETHICS 401, 401 (2002); *see also* Assisted Reproductive Technology (ART) Timeline, *supra.*

[5] *See, e.g.*, J.F. v. D.B., 897 A.2d 1261, 1265–67 (Pa. Super. Ct. 2006) (deciding whether gestational carrier had right to custody of the children she bore pursuant to a surrogacy agreement where the fertilized eggs from an egg donor were implanted into the surrogate who agreed to carry the children for a third woman).

[6] *See* 1 *Kings* 3:16–28. Two women came before King Solomon, both claiming to be the mother of a child. *Id.* The two women, who shared a home, both gave birth within three days of each other. 1 *Kings* 3:17–18. When one woman's baby died during the night, she exchanged the babies, claiming in the morning that the living child was her own. 1 *Kings* 3:19–22. To resolve the dispute, King Solomon ordered the living child to be cut in two, with one half given to each woman. 1 *Kings* 3:24–25. One woman stopped him, stating, "Please, my lord, give her the living baby! Don't kill him!" 1 *Kings* 3:26. The second woman replied, "Neither I nor you shall have him. Cut him in two!" *Id.* Concluding that the real mother would not allow her child to be killed, the King gave his ruling: "Give the living baby to the first woman. Do not kill him; she is his mother." 1 *Kings* 3:27. When he initially ordered that the baby be cut in two, King Solomon knew that the child's mother would be willing to lose her child to the other woman if it spared the child's life. *See* 1 *Kings* 3:28.

[7] *See* Robin Cheryl Miller, Annotation, *Child Custody and Visitation Rights Arising from Same-Sex Relationship*, 80 A.L.R.5th 1 (2000).

more particularly, whether the child can have two mothers.[8] None of those approaches, however, give proper constitutional deference to the biological mother's preference.

Part I of this Article briefly presents three recent cases where courts were asked to decide the parentage of a child born to a woman while she was in a same-sex relationship. This Part traces parental rights jurisprudence, discussing the fundamental rights of parents to direct the care and religious upbringing of their children. Part II analyzes the different legal approaches adopted throughout the nation concerning the rights of biological parents when faced with claims of parentage by third parties. Part III presents a proposal for the proper analysis of those parentage claims. It explains why any order that grants a third party visitation with, or custody of, a child over the objections of that child's biological or adoptive parent is unconstitutional unless it survives strict scrutiny: the government must have a compelling interest to issue the custody order, which is narrowly tailored to serve that interest.[9] Practically, unless a parent is unfit, the state lacks a compelling interest to interfere with parental decisions concerning third-party petitions for custody and visitation.

I. AN OVERVIEW OF THE FUNDAMENTAL PARENTAL RIGHTS ARGUMENT

Three recent custody disputes between former same-sex partners highlight the various legal approaches adopted by courts to determine parentage of a child born to one of the women during their relationship. A 2005 Washington Supreme Court decision opened the door for a child to have three parents: the biological mother, the known sperm donor (the biological father), and the mother's former same-sex partner.[10] A 2006 Vermont Supreme Court decision declared a woman to be a parent to her former same-sex partner's biological child,[11] affirming a trial court order that declared that "where a legally connected couple utilizes artificial insemination to have a family, parental rights and obligations are determined by facts showing intent to bring a child into the world and raise the child as one's own as part of a family unit, not by biology."[12] A

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[8] *See infra* Part II (discussing various approaches taken).

[9] *See infra* Part III (discussing the appropriate test to use).

[10] Carvin v. Britain, 122 P.3d 161 (Wash. 2005) (en banc); *see infra* Part II.B (discussing case).

[11] Miller-Jenkins v. Miller-Jenkins, 2006 VT 78, ¶ 63, 180 Vt. 441, 469, 912 A.2d 951, 972–73.

[12] Miller-Jenkins v. Miller-Jenkins, No. 454-11-03 Rddm, at 11 (Rutland Fam. Ct. Nov. 17, 2004) [hereinafter Parentage Order] (ruling denying Plaintiff's Motion to Withdraw Waiver to Challenge Presumption of Parentage) (on file with the Regent University Law Review); *see infra* Part II.C (discussing case).

2007 Utah Supreme Court decision refused to declare a former same-sex partner to be a parent to her former partner's biological child.[13]

In fact, in the past few years, at least fourteen state supreme courts and several intermediate appellate courts have been asked to determine whether a third party can be declared a parent over the objections of the child's biological parent.[14] None of those cases properly analyzed the constitutional rights of the biological parent. The analysis in third-party parentage cases should begin, as this Part lays out, with a discussion of the United States Supreme Court's parental rights jurisprudence.

A. The Original Understanding of Parental Rights

For nearly 100 years, the United States Supreme Court has protected a parent's fundamental, inalienable right to make decisions concerning her child's upbringing. A parent's fundamental right has been described as "perhaps the oldest of the fundamental liberty interests."[15] The Supreme Court has explained that because "[t]he child is not the mere creature of the State,"[16] "[i]t is cardinal . . . that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[17] The Court's parental rights cases, *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, *Prince v. Massachusetts*, and *Wisconsin v. Yoder*, are the foundation for analyzing any parental rights claim.

In *Meyer v. Nebraska*, the State made it unlawful to teach a foreign language to a child before she passed the eighth grade.[18] When a teacher was prosecuted for teaching German in violation of the statute, he challenged the constitutionality of the law.[19] In striking down the statute, the Supreme Court explained:

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[13] Jones v. Barlow, 2007 UT 20, ¶ 43, 154 P.3d 808, 819; *see infra* Part II.D (discussing case).

[14] Robinson v. Ford-Robinson, 208 S.W.3d 140 (Ark. 2005); Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005); *In re* Marriage of Simmons, 825 N.E.2d 303 (Ill. App. Ct. 2005); King v. S.B., 837 N.E.2d 965 (Ind. 2005); C.E.W. v. D.E.W., 2004 ME 43, 845 A.2d 1146; Janice M. v. Margaret K., 948 A.2d 73 (Md. 2008); E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999); V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000); *In re* Bonfield, 97 Ohio St. 3d 387, 2002-Ohio-6660, 780 N.E.2d 241; Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000); Jones v. Barlow, 2007 UT 20, 154 P.3d 808; Miller-Jenkins v. Miller-Jenkins, 2006 VT 78, 180 Vt. 441, 912 A.2d 951; Carvin v. Britain, 122 P.3d 161 (Wash. 2005); Clifford K. v. Paul S. *ex rel* Z.B.S., 619 S.E.2d 138 (W. Va. 2005); Holtzman v. Knott, 533 N.W.2d 419 (Wis. 1995); *see also infra* 106–107 (listing additional cases that have considered whether to grant parental rights to legal strangers).

[15] Troxel v. Granville, 530 U.S. 57, 65 (2000).

[16] Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

[17] Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (citing *Pierce*, 268 U.S. at 535).

[18] 262 U.S. 390, 396 (1923).

[19] *Id.* at 396, 399.

> [T]his Court has not attempted to define with exactness the liberty thus guaranteed [under the Fourteenth Amendment] . . . . Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[20]

Two years later, the Supreme Court again analyzed the scope of the Fourteenth Amendment liberty interest when it overturned an Oregon statute that prohibited parents from enrolling their children in private school.[21] The Supreme Court reaffirmed in *Pierce* that the parent's liberty interest in the child was superior to the State's interest in the welfare of the child.[22] The Court explained that the statute

> unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The child is not the mere creature of the State [and] those who nurture him and direct his destiny have the right, coupled with the *high duty*, to recognize and prepare him for additional obligations.[23]

Nearly two decades later, the Court revisited parental rights in *Prince v. Massachusetts*.[24] In *Prince*, a woman was prosecuted for taking her niece, over whom she had guardianship, with her to sell religious literature.[25] The Court affirmed the convictions, explaining that the state, as *parens patriae*, may, under certain circumstances, restrict the parent's right.[26] The state interest, however, is limited. "The religious training and indoctrination of children may be accomplished in many

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20 *Id.* at 399.

21 *Pierce*, 268 U.S. at 530.

22 *Id.* at 534–35.

23 *Id.* (emphasis added). Supreme Court precedent recognizes that absent harm to the child, government has no authority to interfere with parental decision-making of a biological parent. Further, the right and "high duty" to direct a child's upbringing flows directly from the God-given duty of parents to train their children according to the truths of Scripture. *See, e.g.*, *Deuteronomy* 6:6–7 ("These commandments that I give you today are to be upon your hearts. Impress them on your children. Talk about them when you sit at home and when you walk along the road, when you lie down and when you get up."); *Proverbs* 22:6 ("Train a child in the way he should go, and when he is old he will not turn from it."); *Isaiah* 59:21 ("'As for me, this is my covenant with them,' says the Lord. 'My Spirit, who is on you, and my words that I have put in your mouth will not depart from your mouth, or from the mouths of your children, or from the mouths of their descendants from this time on and forever.'"); *Ephesians* 6:4 ("Fathers, do not exasperate your children; instead, bring them up in the training and instruction of the Lord.").

24 321 U.S. 158 (1944).

25 *Id.* at 159–60.

26 *Id.* at 166, 171.

ways . . . . These and all others except the public proclaiming of religion on the streets . . . remain unaffected by the decision."[27]

In 1972, the Court again acknowledged the fundamental right of parents in directing the upbringing of their children, albeit in the context of a free exercise claim.[28] In *Wisconsin v. Yoder*, the Court upheld the right of Amish parents to educate their children at home notwithstanding a state law requiring education in a state-approved school.[29] The state's interest in providing universal education was secondary to the parents' rights.[30] The Court explained that

> [p]roviding public schools ranks at the very apex of the function of a State. Yet . . . . a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children . . . .[31]

The parents' duty to prepare a child for additional obligations "include[s] the inculcation of moral standards, religious beliefs, and elements of good citizenship."[32] *Yoder* emphasized the limitation on parental powers found in *Prince*: that a state can override a parent's decision where "it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."[33]

The importance placed upon the relationship between the child and a legal parent also has been emphasized by the higher standard of proof required before the state can substantially interfere with the parent's constitutional rights.[34] "[T]he interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to

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[27] *Id.* at 171. The propriety of the Court's decision to affirm the conviction in that case is beyond the scope of this Article.

[28] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[29] *Id.* at 231.

[30] *Id.* at 213–14.

[31] *Id.*

[32] *Id.* at 233.

[33] *Id.* at 233–34.

[34] *See* Santosky v. Kramer, 455 U.S. 745, 766–67 (1982) (suggesting that a "clear and convincing evidence" standard of proof is the minimal standard of proof required to satisfy due process in a termination of parental rights hearing); Garcia v. Rubio, 670 N.W.2d 475, 483 (Neb. Ct. App. 2003) ("[A] court may not, in derogation of the superior right of a biological or adoptive parent, grant child custody to one who is not a biological or adoptive parent unless the biological or adoptive parent is unfit to have child custody or has legally lost the parental superior right in a child." (quoting Stuhr v. Stuhr, 481 N.W.2d 212, 217 (Neb. 1992))).

liberties which derive merely from shifting economic arrangements.'"[35] "Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect."[36] The State's interest in caring for the child of a natural or adoptive parent is *de minimis* if that parent is shown to be a fit parent.[37]

For more than a quarter of a century after *Yoder*, the United States Supreme Court remained silent on the issue of parental rights to direct the upbringing of their child. In 2000, the Court explored the scope of parental rights in the context of a third-party *visitation* statute.

B. Troxel v. Granville: *A Framework for Analyzing Parents' Rights Vis-à-vis Third-Party Visitation Claims*

1. The Washington State Court Proceedings

In 2000, the United States Supreme Court declared Washington's third-party visitation statute unconstitutional because it failed, in the words of the plurality opinion, to "accord at least some special weight to the parent's own determination" concerning visitation.[38] The Washington Superior Court's order granting visitation to the grandparents over the objection of the sole biological parent "failed to provide any protection [to the mother's] fundamental constitutional right to make decisions concerning the rearing of her own daughters."[39] In *Troxel*, Tommie Granville and Brad Troxel, who never married, were in a relationship that ended in June 1991.[40] During the time they were together, the couple had two children.[41] After Tommie ("Granville") and Brad separated, Brad lived with his parents.[42] He regularly brought his daughters to his parents' home for weekend visitation.[43] In May 1993,

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[35] Stanley v. Illinois, 405 U.S. 645, 651 (1972) (quoting Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)) (dealing with rights of an unwed father).

[36] M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) (citations omitted) (quoting Boddie v. Connecticut, 401 U.S. 371, 376 (1971)).

[37] *Stanley*, 405 U.S. at 657–58. This Article does not address the special situation of a biological parent who is for some reason not fit to exercise custody or control over a child. Throughout this Article, therefore, it shall be understood that all references to a "biological parent" are to an adult who is fit to exercise the normal rights and duties of a parent.

[38] Troxel v. Granville, 530 U.S. 57, 70 (2000) (plurality opinion). Justice O'Connor announced the judgment of the Court, in which Chief Justice Rehnquist, Justice Ginsburg, and Justice Breyer joined.

[39] *Id.* at 69–70.

[40] *Id.* at 60.

[41] *Id.*

[42] *Id.*

[43] *Id.*

Brad committed suicide.[44] At first, the Troxels continued to see Granville's children, but in October 1993, Granville wanted to limit visitation between her children and Brad's parents.[45] At that time, the children were two and four years old.[46]

In December 1993, the Troxels filed suit in the Washington Superior Court, seeking visitation with their grandchildren.[47] The Washington statute at issue provided that *any* person could petition the court for visitation, at *any* time.[48] Pursuant to the statute, the court could order third-party visitation whenever it determined that visitation would serve the best interests of the child.[49] In 1995, the superior court entered an order granting visitation to the grandparents one weekend per month, one week during the summer, and four hours on both of the grandparents' birthdays.[50] The mother appealed.[51] During the appeal, Granville married Kelly Wynn.[52]

Before addressing the merits of the case, the Washington Court of Appeals remanded the case to the trial court for entry of written findings of fact and conclusions of law.[53] On remand, the trial court concluded that visitation with the grandparents was in the best interest of the children because the Troxels "are part of a large, central, loving family" all located in the same area who "can provide opportunities for the children in the areas of cousins and music," and the children would "be benefited from spending quality time" with the grandparents.[54] Approximately nine months after the trial court entered its order on remand, Granville's husband formally adopted the children.[55]

The Washington Court of Appeals reversed the trial court's visitation order and dismissed the grandparents' petition for visitation, concluding that nonparents lacked standing to seek visitation unless a custody action was already pending.[56] The court explained that this limitation on nonparental visitation was "'consistent with the con-

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44 *Id.*

45 *Id.* at 60–61 (citing Smith v. Stillwell-Smith, 969 P.2d 21, 23 (Wash. 1998), *aff'd sub nom.* Troxel v. Granville, 530 U.S. 57 (2000)).

46 Brief for Respondents at 8–9, *Troxel*, 530 U.S. 57 (No. 99-138), 1999 WL 1146868.

47 *Troxel*, 530 U.S. at 61.

48 *Id.* (quoting WASH. REV. CODE ANN. § 26.10.160(3) (West 2005), *declared unconstitutional by* Troxel v. Granville, 530 U.S. 57 (2000)).

49 § 26.10.160(3).

50 *Troxel*, 530 U.S. at 61 (citing *Smith*, 969 P.2d at 23).

51 *Id.*

52 *Id.*

53 *Id.* (citing *Smith*, 969 P.2d at 23).

54 *Id.* at 61–62 (citations omitted).

55 *Id.* at 62 (citations omitted).

56 *Id.*

stitutional restrictions on state interference with parents' fundamental liberty interest in the care, custody, and management of their children.'"[57] The court, however, did not expressly address Granville's federal constitutional challenge to the visitation statute. In a 5-4 opinion, the Washington Supreme Court affirmed on other grounds.[58] Contrary to the court of appeals, the Washington Supreme Court held that the plain language of the Washington statute, which gave the grandparents standing to seek visitation, unconstitutionally infringed the fundamental right of parents to rear their children.[59]

The court articulated two grounds for its decision on the constitutional issue.[60] First, the Constitution requires that "some harm threatens the child's welfare before the state may . . . interfere with a parent's right to rear his or her child."[61] The Washington statute, however, did not require any showing of harm.[62] Second, the statute swept too broadly insofar as it allowed "'any person' to petition for forced visitation of a child at 'any time' with the only requirement being that the visitation serve the best interest of the child."[63] The Washington Supreme Court explained that "[i]t is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a 'better' decision. . . . Parents have a right to limit visitation of their children with third persons" and, as between judges and parents, "the parents should be the ones to choose whether to expose their children to certain people or ideas."[64] The United States Supreme Court granted certiorari and affirmed the judgment of the Washington Supreme Court.[65]

2. Plurality Opinion of the United States Supreme Court

Explaining that the liberty interest "of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized" by the Court, the Court agreed that the Washington statute unconstitutionally infringed Granville's "fundamental parental right."[66] The Court traced its parental rights

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[57] *Id.* (quoting *In re* Troxel, 940 P.2d 698, 700 (Wash. Ct. App. 1997)).

[58] Smith v. Stillwell-Smith, 969 P.2d 21, 23 (Wash. 1998), *aff'd sub nom.* Troxel v. Granville, 530 U.S. 57 (2000).

[59] *Id.* at 29–30.

[60] *Id.*

[61] *Id.* at 29.

[62] *Id.* at 30.

[63] *Id.*

[64] *Id.* at 31.

[65] *Troxel*, 530 U.S. at 63.

[66] *Id.* at 65, 67.

precedent, including *Meyer v. Nebraska*,[67] *Pierce v. Society of Sisters*,[68] and *Wisconsin v. Yoder*.[69]

The Washington statute infringed Granville's constitutional parental rights because the statute gave a court the discretion to "disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision file[d] a visitation petition, based solely on the judge's determination of the child's best interests."[70] The statute contained no requirement that a court accord the parent's decision any presumption of validity whatsoever: if a judge disagreed with the parent's view of the child's best interest, the judge's view necessarily prevailed.[71]

The Court explained that the failure of the statute to give any weight to the parent's determination ignored the presumption that parents act in the best interest of their children.[72]

> [S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.[73]

The problem, the Court explained, "is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to Granville's determination of her daughters' best interests."[74] The Washington Superior Court seemingly "presumed the grandparents' request should be granted unless the children would be 'impact[ed] adversely.'"[75] "[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made."[76] As a result, the Washington Superior Court failed to provide

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[67] *Id.* at 65 (citing Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923)); *see supra* notes 18–20 and accompanying text (discussing *Meyer*).

[68] *Id.* (citing Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925)); *see supra* 21–23 and accompanying text (discussing *Pierce*).

[69] *Id.* at 66 (citing Wisconsin v. Yoder, 406 U.S. 205, 232 (1972)); *see supra* 29–33 and accompanying text (discussing *Yoder*).

[70] *Id.* at 67.

[71] *Id.*

[72] *Id.* at 69 (citing Parham v. J.R., 442 U.S. 584, 602 (1979)).

[73] *Id.* at 68–69. The Court explained that while "[i]n an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren . . . whether such an intergenerational relationship would be beneficial in any specific case is for the parent[, not the court,] to make in the first instance." *Id.* at 70.

[74] *Id.* at 69.

[75] *Id.* (alteration in the original).

[76] *Id.* at 72–73.

any protection to the biological mother's "fundamental constitutional right to make decisions concerning the rearing of her own daughters."[77]

Although the Court declared the Washington statute unconstitutional as applied to Granville, it did not answer "whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation," nor did it "define . . . the precise scope of the parental due process right in the visitation context."[78]

The Court also failed to address what a third party who seeks to be declared a parent, rather than to only obtain visitation, must prove in order to protect the biological parent's fundamental liberty interest.

3. Justice Souter's Concurring Opinion

In his brief concurring opinion, Justice Souter articulated a solid description of parental rights that gives parents the exclusive right to determine with whom their children associate.[79] He explained that although the Court's cases "have not set out exact metes and bounds to the protected interest of a parent in the relationship with his child," the fundamental parental "right of upbringing would be a sham if it failed to encompass the right to be free of judicially compelled visitation by 'any party' at 'any time' a judge believed he 'could make a "better" decision.'"[80]

> The strength of a parent's interest in controlling a child's associates is as obvious as the influence of personal associations on the development of the child's social and moral character. Whether for good or for ill, adults not only influence but may indoctrinate children, and a choice about a child's social [companions] is not essentially different from the designation of the adults who will influence the child in school. . . . It would be anomalous, then, to subject a parent to any individual judge's choice of a child's associates from out of the general population merely because the judge might think himself more enlightened than the child's parent. To say the least (and as the Court implied in *Pierce*), parental choice in such matters is not merely a default rule in the absence of either governmental choice or the

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[77] *Id.* at 69–70. The Court also found it significant that Granville never sought to cut off visitation entirely. *Id.* at 71. The dispute between Granville and the Troxels arose when Granville decided to limit visitation to one day per month and on special holidays. *Id.* The trial court rejected Granville's proposal, settling on a middle ground between the Troxels' visitation request and Granville's offer of visitation. *Id.* The Court pointed out that many states "expressly provide by statute that courts may not award visitation unless a parent has denied (or unreasonably denied) visitation to the concerned third party." *Id.* As discussed *infra* Part II, unless those statutes require the third party to show, at a minimum, actual harm to the child absent visitation, it infringes the parent's constitutional rights to order visitation over the parent's objections.

[78] *Id.* at 73.

[79] *See id.* at 75–80 (Souter, J., concurring).

[80] *Id.* at 78.

government's designation of an official with the power to choose for whatever reason and in whatever circumstances.[81]

4. Justice Thomas's Concurring Opinion

Justice Thomas criticized the opinions of the plurality, Justice Kennedy, and Justice Souter for failing to articulate what level of scrutiny should be applied to claims that implicate the fundamental parental right to direct the upbringing of children.[82] Justice Thomas stated he "would apply strict scrutiny to infringements of fundamental rights," which include parental rights.[83] He explained that the State of Washington lacked even a legitimate governmental interest "in second-guessing a fit parent's decision regarding visitation with third parties."[84]

5. Justice Stevens's Dissenting Opinion

Justice Stevens criticized the Court's decision to grant certiorari and the plurality's broad articulation of the fundamental right of parents to direct the upbringing of their children.[85] In his view, "[g]iven the problematic character of the trial court's decision and the uniqueness of the Washington statute, there was no pressing need to review a [s]tate [s]upreme [c]ourt decision that merely requires the state legislature to draft a better statute."[86]

With respect to the merits of the case, Justice Stevens explained that "we have never held that the parent's liberty interest in this relationship is so inflexible as to establish a rigid constitutional shield, protecting every arbitrary parental decision from any challenge absent a

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[81] *Id.* at 78–79 (footnote omitted). Justice Souter noted that the Supreme Court of Washington invalidated the statute on similar reasoning. The Supreme Court of Washington explained:

> Some parents and judges will not care if their child is physically disciplined by a third person; some parents and judges will not care if a third person teaches the child a religion inconsistent with the parents' religion; and some judges and parents will not care if the child is exposed to or taught racist or sexist beliefs. But many parents and judges will care, and, between the two, the parents should be the ones to choose whether to expose their children to certain people or ideas.

Id. at 79 n.4 (quoting Smith v. Stillwell-Smith, 969 P.2d 21, 31 (Wash. 1998)).

[82] *Id.* at 80 (Thomas, J., concurring).

[83] *Id.* Justice Thomas began his opinion by pointing out that neither party argued that the Court's substantive due process cases were wrongly decided or that the original understanding of the Due Process Clause precluded judicial enforcement of unenumerated rights under that constitutional provision. As a result, he agreed that the Court's precedent recognizing a fundamental right of parents to direct the upbringing resolved the case. *Id.*

[84] *Id.*

[85] *Id.* at 80–81, 86–89 (Stevens, J., dissenting).

[86] *Id.* at 80–81.

threshold finding of harm."[87] He agreed that it is a sound presumption that parents generally serve the best interests of their children, but noted that "even a fit parent is capable of treating a child like a mere possession."[88] Accordingly, the "constitutional protection against arbitrary state interference with parental rights should not be extended to prevent the [s]tates from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child."[89] Given the "almost infinite variety of family relationships that pervade our ever-changing society," Justice Stevens found it clear that the "Due Process Clause of the Fourteenth Amendment leaves room for [s]tates to consider the impact on a child of possibly arbitrary parental decisions that neither serve nor are motivated by the best interests of the child."[90]

6. Justice Scalia's Dissenting Opinion

In his dissenting opinion, Justice Scalia explained his view that the parental right to direct the upbringing of children is an "unalienable right" but not a constitutionally protected right.[91] He believed that while it would be appropriate to argue in

> legislative chambers or in electoral campaigns, that the State has *no power* to interfere with parents' authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right.[92]

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[87] *Id.* at 86.

[88] *Id.*

[89] *Id.* at 89. Justice Stevens's approach to third-party visitation claims fails to adequately protect a parent's rights. For example, under the Washington statute, once a third party filed a petition for visitation, the court determined whether visitation would be in the child's best interests. WASH. REV. CODE ANN. § 26.10.160(3) (West 2005). Under Justice Stevens's approach, once a third party files a petition, the court must determine whether the parents' refusal to grant visitation is *not* motivated by an interest in the welfare of the child. In reality, a court that believes it is in a child's best interest to have visitation with the third party will then find that the parent, who is denying the visitation, is not motivated by the child's best interests.

[90] *Troxel*, 530 U.S. at 90–91 (Stevens, J., dissenting). Justice Stevens also discussed his view that children have rights independent from their parents. He stated that it is "extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation." *Id.* at 88. The Court reserved consideration of this question when it decided *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989).

[91] *Id.* at 91–92 (Scalia, J., dissenting).

[92] *Id.* at 92.

He did not, however, advocate overruling the earlier parental rights cases. Rather, he opposed extension of the parental rights doctrine to new contexts, like the factual situation presented in *Troxel*.[93]

7. Justice Kennedy's Dissenting Opinion

Believing that the Washington Supreme Court erred in concluding that the best interests of the child standard is never appropriate in third-party visitation cases, Justice Kennedy would have vacated the decision and remanded the case to the state court for further proceedings:[94]

> I acknowledge the distinct possibility that visitation cases may arise where, considering the absence of other protection for the parent under state laws and procedures, the best interests of the child standard would give insufficient protection to the parent's constitutional right to raise the child without undue intervention by the State; but it is quite a different matter to say, as I understand the Supreme Court of Washington to have said, that a harm to the child standard is required in every instance.[95]

Although parents have the right to determine, "without undue interference by the State, how best to raise, nurture, and educate the child . . . courts must use considerable restraint, including careful adherence to the incremental instruction given by the precise facts of particular cases, as they seek to give further and more precise definition to the right."[96]

Justice Kennedy explained that the plurality's conclusion that the Constitution forbids application of the best interest of the child standard in any third-party visitation proceeding "rest[s] upon assumptions the Constitution does not require."[97] Justice Kennedy further explained:

> My principal concern is that the holding seems to proceed from the assumption that the parent or parents who resist visitation have always been the child's primary caregivers and that the third parties who seek visitation have no legitimate and established relationship

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[93] *Id.* Justice Scalia noted that whether parental rights constitute a liberty interest for purposes of procedural due process is a different question not implicated in *Troxel*. *Id.* at 92 n.1. Justice Scalia also suggested that there might be First Amendment claims a biological parent could bring on behalf of her children. Justice Scalia stated:

> I note that respondent is asserting only, *on her own behalf*, a substantive due process right to direct the upbringing of her own children, and is not asserting, *on behalf of her children*, their First Amendment rights of association or free exercise. I therefore do not have occasion to consider whether, and under what circumstances, the parent could assert the latter enumerated rights.

Id. at 93 n.2.

[94] *Id.* at 94 (Kennedy, J., dissenting).

[95] *Id.*

[96] *Id.* at 95–96.

[97] *Id.* at 98.

> with the child. That idea, in turn, appears influenced by the concept that the conventional nuclear family ought to establish the visitation standard for every domestic relations case. As we all know, this is simply not the structure or prevailing condition in many households.[98]

Justice Kennedy's dissent suggests that in third-party visitation cases, parents who have not always served as the child's primary caregivers do not have an absolute parental veto when "a third party, by acting in a caregiving role over a significant period of time, has developed a relationship with a child."[99] Under those circumstances, "'arbitrarily depriving the child of the relationship could cause severe psychological harm to the child.'"[100] He suggested that in creating their visitation laws, "[s]tates may be entitled to consider that certain relationships are such that to avoid the risk of harm, a best interests standard can be employed by their domestic relations courts in some circumstances."[101] He did not, however, provide any further insight into when the relaxed standard is appropriate. Nor did he suggest that the best interest standard should be applied when the parent has always been the child's primary caregiver.

Justice Kennedy concluded his dissenting opinion by articulating several competing policy considerations that should be considered in determining the constitutionality of applying the best interest standard to a third-party visitation petition. For example, "a fit parent's right vis-à-vis a complete stranger is one thing; her right vis-à-vis another parent or a *de facto* parent may be another."[102] Another competing concern is the disruption caused to a single parent when faced with visitation demands by a third party. A single parent struggling to raise a child could have all hopes and plans for the child's future destroyed through the expense of attorney's fees necessary to defend against third-party visitation claims.[103] "[I]n some instances the best interests of the child

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[98] *Id.*

[99] *Id.*

[100] *Id.* at 99 (quoting Smith v. Stillwell-Smith, 969 P.2d 21, 30 (Wash. 1998)).

[101] *Id.*

[102] *Id.* at 100–01 (Kennedy, J., dissenting). He did not explain who qualifies as a *de facto* parent. Earlier in his opinion, he characterized the plurality opinion as assuming "that the parent or parents who resist visitation have always been the child's primary caregivers and that the third parties who seek visitation have no legitimate and established relationship with the child." *Id.* at 98. Perhaps Justice Kennedy would draw on the American Law Institute's PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, which explains that before a person can be declared a *de facto* parent, she must have lived with the child "for a significant period of time *not less than two years*." § 2.03(1)(c) (2000) [hereinafter FAMILY DISSOLUTION] (emphasis added). Alternatively, he may have been referring to the situation where a third party has acted in a caregiving role when a parent has declined, or been unable, to do so.

[103] *Troxel*, 530 U.S. at 101 (Kennedy, J., dissenting).

standard may provide insufficient protection to the parent-child relationship."[104]

II. THE CONSTITUTIONAL QUAGMIRE OF DECLARING LEGAL STRANGERS TO BE PARENTS

As is frequently the case with United States Supreme Court opinions, *Troxel* left many questions unanswered. *Troxel* identifies two legal concerns: (1) in the context of third-party *visitation* cases, the best interest standard provides insufficient protection to the parents' fundamental rights, and therefore, (2) some "special weight" must be given to the parent's determination.[105] *Troxel* does not provide a framework for addressing third-party claims to *parentage* rather than *visitation*. Nor does *Troxel* provide ample guidance for the states to determine how much deference is required under the "special weight" standard to adequately protect a parent's fundamental rights.[106] Finally, because the plurality opinion did not address Justice Kennedy's suggestion in his dissent that some third parties could be considered *de facto* parents, we have no guidance on who, if anyone, can constitutionally be treated as *de facto* parents and what legal standard should apply when they seek a judicial declaration of parentage.

These unanswered questions have led to conflicting results in the various states. On the one hand, at least sixteen states grant rights to *de facto* parents, psychological parents, or people who stand *in loco parentis* to the child, over the objection of the child's biological or adoptive parent. These states include: Arizona, Arkansas, California, Colorado, Indiana, Maine, Massachusetts, Minnesota, New Jersey, New Mexico, North Carolina, Rhode Island, Vermont, Washington, West Virginia, and Wisconsin.[107] None of these states, however, have adequately examined

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[104] *Id.*

[105] *Id.* at 69, 73 (O'Connor, J., plurality opinion).

[106] *See, e.g.*, Leavitt v. Leavitt, 132 P.3d 421, 427 (Idaho 2006) (allowing grandparent visitation over parental objection upon clear and convincing evidence that visitation would be in the child's best interest); Davis v. Heath, 128 P.3d 434, 438–39 (Kan. Ct. App. 2006) (quoting KAN. STAT. ANN. § 38-129 (2000), *declared unconstitutional as applied by* State v. Paillet, 16 P.3d 962 (Kan. 2001)) (finding Kansas statute constitutional on its face and permitting a court to grant grandparent visitation over parental objection "upon a finding that the visitation rights would be in the child's best interests and when a substantial relationship between the child and the grandparent has been established"); Stadter v. Siperko, 661 S.E.2d 494, 497 (Va. Ct. App. 2008) (citing Williams v. Williams, 485 S.E.2d 651, 654 (Va. Ct. App. 1997)) (holding that "courts may grant visitation to [third parties, including grandparents,] in contravention of a fit parent's expressed wishes only when justified by a compelling state interest").

[107] *See, e.g.*, Riepe v. Riepe, 91 P.3d 312, 318 (Ariz. Ct. App. 2004) (allowing one standing *in loco parentis* to obtain visitation over objections of fit, biological parent without mentioning *Troxel*); Robinson v. Ford-Robinson, 208 S.W.3d 140, 144 (Ark. 2005) (granting a stepparent visitation because she stood *in loco parentis*); Elisa B. v. Superior Court, 117

the parent's constitutional rights. On the other hand, twelve states have refused to declare a third party a *de facto* parent for visitation or parentage purposes. These states include: Florida, Georgia, Illinois, Iowa, Michigan, New Hampshire, New York, Ohio, Tennessee, Texas, Utah, and Virginia.[108] One state, North Carolina, has contradictory

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P.3d 660, 670 (Cal. 2005) (granting parental rights and responsibilities to the biological mother's former lesbian partner); *In re* E.L.M.C., 100 P.3d 546, 562 (Colo. Ct. App. 2004) (granting former same-sex partner joint parenting time and decision-making authority over objection of fit, biological mother); King v. S.B., 837 N.E.2d 965, 967 (Ind. 2005) (entitling former same-sex partner to some rights of visitation to former partner's biological child); C.E.W. v. D.E.W., 2004 ME 43, ¶ 15, 845 A.2d 1146, 1152 (finding that once a court determines nonparent in a same-sex relationship to be a *de facto* parent, the court is free to award parental rights over biological parent's objections); E.N.O. v. L.M.M., 711 N.E.2d 886, 891 (Mass. 1999) (concluding that the best interest analysis applies when determining custody between biological parent or *de facto* parent); Soohoo v. Johnson, 731 N.W.2d 815, 821 (Minn. 2007) (citing *Troxel*, 530 U.S. at 73) (upholding the constitutionality of a third-party visitation statute and granting visitation to a third party who stood *in loco parentis* over parental objection); V.C. v. M.J.B., 748 A.2d 539, 554 (N.J. 2000) (holding that once an individual is found to be a psychological parent, he or she stands in parity with biological parent); A.C. v. C.B., 829 P.2d 660, 663–64 (N.M. Ct. App. 1992) (holding coparenting agreement between a lesbian couple enforceable); Mason v. Dwinnell, 660 S.E.2d 58, 64 (N.C. Ct. App. 2008) (noting that best interest of the child standard shall apply whenever custody is sought regardless of the relationship of the recipient of custody to the child); Rubano v. DiCenzo, 759 A.2d 959, 975 (R.I. 2000) (stating that a *de facto* parent has parental rights in limited circumstances, in spite of *Troxel*); Miller-Jenkins v. Miller-Jenkins, 2006 VT 78, ¶¶ 45–48, 180 Vt. 441, 460–61, 912 A.2d 951, 967 (concluding that the rationale behind granting a former same-sex partner acting *in loco parentis* custody over opposition of biological parent applies equally to visitation); Carvin v. Britain, 122 P.3d 161, 177 (Wash. 2005) (en banc) (holding that a *de facto* parent stands in legal parity with a biological parent); Clifford K. v. Paul S. *ex rel* Z.B.S., 619 S.E.2d 138, 156–58, 160 (W. Va. 2005) (defining psychological parent status and granting custody to partner of deceased mother over biological father); Holtzman v. Knott, 533 N.W.2d 419, 435–36 (Wis. 1995) (adopting a four-prong test to determine *de facto* parenthood).

[108] *See, e.g.*, Kazmierazak v. Query, 736 So. 2d 106, 110 (Fla. Dist. Ct. App. 1999) (denying nonparent in same-sex relationship parental rights because psychological parent lacked parental status equivalent to biological mother); Clark v. Wade, 544 S.E.2d 99, 108 (Ga. 2001) (holding that a biological parent may not lose custody to a nonparent without clear and convincing evidence that the biological parent is unfit or the parental custody would cause harm to the child); *In re* Marriage of Simmons, 825 N.E.2d 303, 307–08, 312–13 (Ill. App. Ct. 2005) (refusing to recognize a *de facto* parent even when child called the nonparent "Daddy" and nonparent co-parented the child since birth); *In re* Visitation with C.B.L., 723 N.E.2d 316, 320–21 (Ill. App. Ct. 1999) (refusing to award visitation to former same-sex partner due to lack of standing); *In re* Ash, 507 N.W.2d 400, 404 (Iowa 1993) (refusing to grant visitation to former boyfriend of biological mother); McGuffin v. Overton, 542 N.W.2d 288, 292 (Mich. Ct. App. 1995) (refusing to allow deceased mother's former same-sex partner to challenge biological father's custody rights or gain visitation rights); *In re* Nelson, 825 A.2d 501, 504 (N.H. 2003) (upholding objection of biological parent over nonparent's claim to parental rights); Alison D. v. Virginia M., 572 N.E.2d 27, 29 (N.Y. 1991) (rejecting former same-sex partner's claim to visitation over objection of biological parent); *In re* Bonfield, 97 Ohio St. 3d 387, 2002-Ohio-6660, 780 N.E.2d 241, at ¶ 34 (rejecting claim that same-sex partner was a parent for purposes of entering shared parenting agreement); White v. Thompson, 11 S.W.3d 913, 919 (Tenn. Ct. App. 1999)

rulings from its intermediate appellate court.[109] Another state, Maryland, has concluded that a person considered a *de facto* parent is not necessarily treated as a parent.[110] Instead, the established relationship with the child is one factor in determining whether exceptional circumstances exist to justify applying the best interest analysis rather than a test that affords more protection to the biological parent's fundamental constitutional rights.[111] Of the twelve states, not one of them *adequately* addresses the constitutional argument in their case law.

A. Understanding the Legal Labels of Parentage

Before exploring the various approaches taken to determine whether a third party is a parent, several common labels used by courts in discussing parentage should be explained. They include "*in loco parentis*," "psychological parenthood," "*de facto* parenthood," and "*parens patriae*." Although courts sometimes interchange and confuse the labels, it is important to understand the differences.

In Loco Parentis. The doctrine of *in loco parentis* is applied when someone who is not a legal parent nevertheless assumes the role of a parent in a child's life. *Black's Law Dictionary* defines it as "[o]f, relating to, or acting as a temporary guardian or caretaker of a child, taking on

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(rejecting biological mothers' former same-sex partners' claims to visitation and concluding that Tennessee law does not provide for award of custody or visitation to nonparent except as provide by its legislature); Coons-Andersen v. Andersen, 104 S.W.3d 630, 635–36 (Tex. App. 2003) (rejecting same-sex partner's claim for visitation because *in loco parentis* is temporary and ends when the child is no longer under the care of the person *in loco parentis*); Jones v. Barlow, 2007 UT 20, ¶ 22, 154 P.3d 808, 813 (holding that "a legal parent may freely terminate *in loco parentis* status by removing her child from the relationship, thereby extinguishing all parent-like rights . . . vested in the former surrogate parent" (italics added)); Stadter v. Siperko, 661 S.E.2d 494, 498, 501 (Va. Ct. App. 2008) (affirming lower court's holding that former cohabitant failed to prove by clear and convincing evidence that denial of visitation would harm child). *But see* Beth R. v. Donna M., 853 N.Y.S.2d 501, 508–09 (N.Y. App. Div. 2008) (refusing to follow New York precedent and concluding that biological parent equitably estopped from cutting off former same-sex partner's custody and visitation rights).

[109] *Compare Mason*, 660 S.E.2d at 70 (affirming the trial court's finding that a biological mother partially relinquished the exclusive right to direct her child's upbringing to her former same-sex partner, requiring the court to apply a best interest analysis to decide the custody dispute), *with* Brewer v. Brewer, 533 S.E.2d 541, 548 (N.C. Ct. App. 2000) (upholding a biological parent's objection to a *de facto* parent's visitation claim where parent voluntarily relinquished custody to other biological parent).

[110] *See* Janice M. v. Margaret K., 948 A.2d 73, 93 (Md. 2008).

[111] *See id.* The Maryland Court of Appeals refused to find that a *de facto* parent "necessarily will overcome the right of the legal parent to custody and control over visitation." *Id.* at 91. The court, however, permitted the *de facto* parent status to be "a strong factor to be considered in assessing whether exceptional circumstances exist" to justify interference with a fit parent's constitutional rights. *Id.* at 93.

all or some of the responsibilities of a parent."[112] "[A person] attains *in loco parentis* status by assuming the 'status and obligations of a parent without formal adoption.'"[113] In essence, the third party is a surrogate parent. "While an individual stands *in loco parentis* to a child, he or she has the 'same rights, duties, and liabilities as a parent.'"[114] While states vary slightly with respect to the definition of *in loco parentis*, there are substantial differences with respect to when, if ever, that status terminates.

In particular, states disagree whether the *in loco parentis* doctrine contemplates perpetuating these parent-like rights and obligations *after* a legal parent has ended the *in loco parentis* relationship and, if it does, what legal standard should apply to custody disputes arising from that relationship. In a recent detailed discussion, the Utah Supreme Court explained that "a legal parent may freely terminate the *in loco parentis* status by removing her child from the relationship . . . [with the] surrogate parent."[115] Thus, once the legal parent terminates her relationship with the third party, the third party ceases to stand *in loco parentis* and, therefore, has no claim to parentage rights. At that point, even if the third party once stood *in loco parentis*, he or she stands as a legal stranger to the child.

The courts in Pennsylvania have reached a contrary result. In *Jones v. Jones*, two women lived together in a same-sex relationship starting in 1988.[116] After they decided to have children by artificial insemination, Ellen Boring Jones ("Boring"), "was impregnated by an anonymous sperm donor, and gave birth to twin boys on December 3, 1996."[117] The two women lived together as a family until January 2001, when Boring left Patricia Jones ("Jones"), taking the children with her.[118] Since neither woman contested that Jones stood *in loco parentis* to the children, the Pennsylvania Superior Court determined (1) what the appropriate test would be to apply when a party standing *in loco parentis* to children not biologically related to her seeks custody of those

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[112] BLACK'S LAW DICTIONARY 803 (8th ed. 2004).

[113] *Jones*, 2007 UT 20, ¶ 13, 154 P.3d at 811 (italics added) (quoting Gribble v. Gribble, 583 P.2d 64, 66 (Utah 1978)).

[114] *Id.* (italics added) (quoting Sparks v. Hinckley, 5 P.2d 570, 571 (Utah 1931)).

[115] *Id.* ¶ 22, 154 P.3d at 813; *see also In re* Agnes P., 800 P.2d 202, 205 (N.M. Ct. App. 1990); McDonald v. Tex. Employers' Ins. Ass'n, 267 S.W. 1074, 1076 (Tex. Civ. App. 1924); Harmon v. Dep't of Soc. & Health Servs., 951 P.2d 770, 775 (Wash. 1998) (en banc) (citing Taylor v. Taylor, 364 P.2d 444, 445–46 (Wash. 1961) (en banc)).

[116] Jones v. Jones, 2005 PA Super. 337, ¶ 1.

[117] *Id.* ¶ 8.

[118] *Id.*

children over the objections of the biological parent, and (2) whether the award of primary custody to Jones was appropriate.[119]

Boring, the biological mother, argued that because there was no finding that she was unfit, the trial court erred in applying a best interest analysis to determine custody.[120] The appellate court affirmed the trial court's determination, explaining that the "trial judge recognized that there was a presumption that primary custody should go to the biological parent rather than one *in loco parentis*."[121] The person standing *in loco parentis,* however, can be awarded custody if she "establish[es] by clear and convincing evidence that it is in the best interests of the child[] to maintain that [parental] relationship."[122] "The burden of proof is not evenly balanced, as the parents have a *prima facie* right to custody, which will be forfeited only if *convincing reasons* appear that the child's best interest will be served by an award to the third party."[123] The most "convincing reason" relied upon by the court in granting primary custody to Jones under its best interest analysis was that Jones had demonstrated an inability on the part of Boring to foster a good relationship between the child and Jones.[124] The Pennsylvania decision to afford the former partner parentage rights after her relationship with the biological mother ended stands in stark contrast to Utah's determination that the former partner loses her parentage status once her relationship ends with the biological parent.

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[119] *Id.* ¶ 1, 9 ("Boring does not seriously contest that Jones is *in loco parentis* . . . ."); *see also* J.A.L. v. E.P.H., 682 A.2d 1314, 1319–21 (Pa. Super. Ct. 1996) (holding that the fact that third party lived with the child and the biological mother in a family setting and developed a relationship with the child as a result of the participation and acquiescence of biological mother must be an important factor in determining whether third party has standing *in loco parentis*); Kellogg v. Kellogg, 646 A.2d 1246, 1249 (Pa. Super. Ct. 1994) (holding that for a third party to be accorded standing he or she must prove by clear and convincing evidence that she has shown a sustained, substantial, and sincere interest in the welfare of the child).

[120] *Jones*, 2005 PA Super. 337, ¶ 9.

[121] *Id.* ¶ 10.

[122] *Id.*

[123] *Id.* ¶ 12 (emphasis added). The appellate court found that

> [w]hile the scale was tipped in favor of Boring, Jones [had] produced clear and convincing reasons to even the scale and then tip it on her side. Jones did not establish that Boring was unfit, and was not required to do so, but Jones did clearly and convincingly establish that the children would be better off with her as the primary custodian and that the children's relationship with *both* parties would be better fostered if custody were awarded to Jones. [The court] noted during the initial round of hearings in this case, wherein primary custody was awarded to Boring, that Boring was inclined "to attempt to exclude Jones" and the court cautioned that Boring "can't totally control the children's lives without any input from the other person that was a parent."

Id. ¶ 14 (citations omitted).

[124] *Id.* ¶¶ 12, 15–16.

Psychological Parenthood. In a 2005 decision that involved a custody dispute between former same-sex partners, the Washington Supreme Court aptly described the term "psychological parent" as:

> [A] term created primarily by social scientists but commonly used in legal opinions and commentaries to describe a parent-like relationship which is "based . . . on [the] day-to-day interaction, companionship, and shared experiences" of the child and adult. As such, it may define a biological parent, stepparent, or other person unrelated to the child. In Washington, psychological parents may have claims and standing above other third parties, but those interests typically yield in the face of the rights and interests of a child's legal parents.[125]

De Facto Parenthood. A *de facto* parent is a person who is not a parent, but is treated as if she were a parent. *Black's Law Dictionary* defines "*de facto*" as "[a]ctual; existing in fact; having effect even though not formally or legally recognized."[126] Courts and legislatures have adopted various tests to determine who is a *de facto* parent.

For example, in Kentucky a *de facto* custodian is statutorily defined as:

> [A] person who has been shown by clear and convincing evidence to have been the *primary caregiver* for, and financial supporter of, a child who has resided with the person for a period of six (6) months or more if the child is under three (3) years of age and for a period of one (1) year or more if the child is three (3) years of age or older . . . .[127]

In *B.F. v. T.D.*, the Kentucky Supreme Court affirmed a trial court's conclusion that the adoptive mother's former domestic partner could not establish by clear and convincing evidence that she was the *primary caregiver*, even though she was involved in caring for the child, because the adoptive parent "took care of almost all of the daily needs of the child."[128] Therefore, the former domestic partner was not a *de facto* parent.

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[125] Carvin v. Britain, 122 P.3d 161, 168 n.7 (Wash. 2005) (en banc) (quoting JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 19 (1973)) (citations omitted). Even though the claims of psychological parents typically yield to the rights of the legal parent, the court held that a *de facto* parent has standing to seek visitation even where the biological mother had married the child's biological father. *Id.* at 164 n.3, 167–68, 178; *see infra* Part II.B. The phrase "psychological parent" is also used in custody disputes between natural parents. In that context, the phrase refers to the psychological bonds formed between the child and parent. *See, e.g.*, Randolph v. Randolph, 2008-51, p. 8 (La. App. 3 Cir. 4/30/08); 982 So. 2d 281, 286 (psychologist recommended that the mother remain the domiciliary parent because she "has been a primary caregiver for this child and . . . the child truly sees her as the 'psychological parent'").

[126] BLACK'S LAW DICTIONARY 448 (8th ed. 2004).

[127] KY. REV. STAT. ANN. § 403.270 (LexisNexis 1999 & Supp. 2007) (emphasis added).

[128] 194 S.W.3d 310, 311 (Ky. 2006). In *B.F.*, T.D. adopted the child during her relationship with B.F., but the two separated when the child was six years old. *Id.* at 310; *see also* Marquez v. Caudill, 656 S.E.2d 737, 742–44 (S.C. 2008) (quoting Middleton v. Johnson, 633 S.E.2d 162, 168 (S.C. Ct. App. 2006)) (affirming family court's determination

In contrast, the Wisconsin Supreme Court adopted a multi-tier test to determine when a third party has standing as a *de facto* parent to petition for visitation.[129] That test considers the caregiving roles of each party, but does not rely exclusively on a determination of who was a primary caregiver. The Wisconsin Supreme Court held that a "court may determine whether visitation [to a third party] is in a child's best interest if the petitioner first proves that he or she has a *parent-like relationship* with the child and that a *significant triggering event* justifies state intervention in the child's relationship with a biological or adoptive parent."[130]

> To [establish] the existence of . . . [a] parent-like relationship with the child, [a] petitioner must prove four elements: (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.
>
> To establish a significant triggering event justifying state intervention in the child's relationship with a biological or adoptive parent, the petitioner must prove that this parent has interfered substantially with the petitioner's parent-like relationship with the child, and that the petitioner sought court ordered visitation within a reasonable time after the parent's interference.[131]

Several courts have adopted a similar approach.[132]

California has adopted a different approach to determine parentage of a child born by artificial insemination to a woman in a same-sex relationship. In *Elisa B. v. Superior Court*, the Supreme Court of California confronted the question of whether a former same-sex partner should be treated as a parent to her former partner's child in order for

that stepfather was a psychological parent by applying four-prong test that included required showing of an assumption of obligations of parenthood).

[129] Holtzman v. Knott, 533 N.W.2d 419, 435–36 (Wis. 1995).

[130] *Id.* at 421 (emphasis added).

[131] *Id.* (footnotes omitted).

[132] *See, e.g.*, Laspina-Williams v. Laspina-Williams, 742 A.2d 840 (Conn. Super. Ct. 1999); C.E.W. v. D.E.W., 2004 ME 43, 845 A.2d 1146; E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999); V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000); Carvin v. Britain, 122 P.3d 161 (Wash. 2005) (en banc). *See generally* Robin Cheryl Miller, Annotation, *Child Custody and Visitation Rights Arising from Same-Sex Relationship*, 80 A.L.R.5th 1 (2000).

the state to impose upon her a child support obligation.[133] Applying the *paternity* presumption, the court concluded that it could.[134]

The court began its analysis with the statutory presumption that "a man is presumed to be the natural father of a child if '[h]e receive[d] the child into his home and openly holds out the child as his natural child.'"[135] Citing prior decisions of the California Court of Appeals, the Supreme Court of California concluded that the *paternity* presumption should apply equally to women even though any determination that a woman is a mother is a *maternity*, not *paternity*, determination.[136] The court ultimately concluded that Elisa, who had "no genetic [or adoptive] connection to the twins," is a presumed parent and that it "is not 'an appropriate action' in which to rebut the presumption of presumed parenthood."[137] Thus, in California, a person who receives a child into her home and holds the child out as her own is a parent to another person's child. In fact, in another case, a California court recently remanded a case to the lower court to determine whether a woman was a parent to her former partner's biological child even though the relationship ended and she had only seen the child twice since the child was three months old.[138]

Parens Patriae. *Black's Law Dictionary* explains that *parens patriae* literally means "parent of his or her country," and refers

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[133] Elisa B. v. Superior Court, 117 P.3d 660, 662 (Cal. 2005); *see also* CAL. FAM. CODE § 7570(a) (West 2004 & Supp. 2008), *declared unconstitutional by* San Diego County Health & Human Servs. Agency v. Jennifer G., 59 Cal. Rptr. 3d 703, 714 (Ct. App. 2007) ("Establishing paternity is the first step toward a child support award.").

[134] *Id.* at 667–70.

[135] *Id.* at 667 (quoting CAL. FAM. CODE § 7611(d) (West 2004 & Supp. 2008), *declared unconstitutional by* San Diego County Health & Human Servs. Agency v. Jennifer G., 59 Cal. Rptr. 3d 703, 714 (Ct. App. 2007)). The Code creates a presumption of paternity (1) if he is the husband of the child's mother, is not impotent or sterile, and was cohabiting with her, CAL. FAM. CODE § 7540 (West 2004), (2) if he signs a voluntary declaration of paternity stating he is the biological father, or (3) if "[h]e receives the child into his home and openly holds out the child as his natural child." CAL. FAM. CODE §§ 7611(c)(1), (d) (West 2004 & Supp. 2008), *declared unconstitutional by* San Diego County Health & Human Servs. Agency v. Jennifer G., 59 Cal. Rptr. 3d 703, 714 (Ct. App. 2007).

[136] *Elisa B.*, 117 P.3d at 664–65, 667–69 (citing Los Angeles County Dep't of Children & Family Servs. v. Leticia C., 124 Cal. Rptr. 2d 677, 681 (Ct. App. 2002)).

[137] *Id.* at 667–68 (explaining that it "is generally a matter within the discretion of the superior court" to determine whether to permit the presumption to be rebutted by proof that the presumed parent is not biologically related to the child). Although the court did not explain what sort of a case would be "an appropriate action" to rebut the presumption, *Elisa B.* was not such a case primarily because there was no one else who claimed to be the child's second parent. *Id.* at 668.

[138] Charisma R. v. Kristina S., 44 Cal. Rptr. 3d. 332, 333, 336–37 (Ct. App. 2006).

traditionally to the role of the state "as a sovereign [and] in its capacity as provider of protection to those unable to care for themselves."[139]

The Supreme Judicial Court of Maine held that "[w]hen exercising its *parens patriae* power, the court puts itself in the position of a 'wise, affectionate, and careful parent' and makes determinations for the child's welfare, focusing on 'what is best for the interest of the child' and not on the needs or desires of the parents."[140] This allows a court to exercise its equitable powers, rather than allowing parents to decide what is best for their children. A decision from the Washington Supreme Court reveals how, in the exercise of their *parens patriae* power to decide what is best for a child, courts have created remedies outside the statutory scheme for custody and parentage.

B. Carvin v. Britain[141]

1. Factual Background

Exercising its equitable power "to adjudicate relationships between children and families," the Washington Supreme Court extended the common law to recognize the doctrine of *de facto* parenthood in the context of a woman's claim that she was a second mother to her former same-sex partner's biological child.[142] After several months of dating in 1989, Page Britain and Sue Ellen Carvin began living together.[143] Five years later, Carvin personally inseminated Britain at home with semen donated by a male friend, John Auseth.[144] On May 10, 1995, Britain gave birth to a baby girl, L.B.[145] Both women took an active role in raising L.B. until she was six years old, making collaborative decisions on

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[139] BLACK'S LAW DICTIONARY 1144 (8th ed. 2004). An earlier edition of *Black's* specified that in "child custody determinations" *parens patriae* refers to "acting on behalf of the state to protect the interests of the child." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

[140] C.E.W. v. D.E.W., 2004 ME 43, ¶ 10, 845 A.2d 1146, 1149 (italics added) (footnote omitted) (quoting Roussel v. State, 274 A.2d 909, 925–26 (Me. 1971)).

[141] 122 P.3d 161 (Wash. 2005) (en banc). The court relied on two decisions that awarded custody to third parties over the biological parents' objections. *Id.* at 168. In one case, the stepmother was awarded custody after divorcing the biological father because his deaf child had shown significant intellectual advances as a result of the stepmother's dedication to the child's training. *Id.* (citing *In re* Marriage of Allen, 626 P.2d 16, 18–20 (Wash. Ct. App. 1981)). In the second case, the Washington Court of Appeals reversed custody for the biological father when the aunt served as the "psychological parent" of the child and provided a "family unit" that could not be ignored. *Id.* at 169 (citing Stell v. Stell, 783 P.2d 615, 621–23 (Wash. Ct. App. 1989)).

[142] *Id.* at 163.

[143] *Id.* at 163–64.

[144] *Id.*

[145] *Id.*

discipline, day care, schooling, and medical care.[146] L.B. called Carvin "mama" and Britain "mommy."[147] When "L.B. was nearly six years old[,] . . . [Britain and Carvin] ended their relationship."[148] "After initially sharing custody and parenting responsibilities, Britain eventually . . . limit[ed] Carvin's contact with L.B. and in the spring of 2002, [Britain] . . . terminated all of Carvin's contact with L.B."[149] On November 15, 2002, Carvin, who has no biological relationship to L.B., petitioned for a determination of coparentage and visitation.[150] Shortly thereafter, Britain married Auseth, who in turn signed a paternity affidavit.[151]

The family court dismissed Carvin's petition and refused to order visitation because Washington's Uniform Parentage Act ("UPA") did not grant standing to psychological parents.[152] Although the trial judge found that a "substantial relationship" existed between Carvin and L.B. and that "terminating visitation between [Carvin] and the child harmed the child," the UPA did not confer standing on Carvin to seek a parentage declaration.[153] In addition, Carvin was not entitled to third-party visitation absent a showing that Britain was unfit.[154]

On appeal, "[t]he Court of Appeals agreed that Carvin lacked standing under the UPA but reversed" on Carvin's claims for third-party visitation and a declaration of parentage under the *de facto* parenthood doctrine.[155] With respect to parentage, the appellate court concluded that "a common law claim of *de facto* or psychological parentage exists in Washington separate and distinct from the parameters of the UPA and that such a claim is not an unconstitutional infringement on the parental rights of fit biological parents."[156] The court explained that the "legislature's omission of . . . language addressing the legal rights of parties to familial relationships such as the one presented here does not imply the complete denial of remedy but rather leaves the matter to be resolved by common law."[157]

> The Court of Appeals held that a [third party] may prove . . . a parent-child relationship by presenting evidence sufficient to prove: "(1) the natural or legal parent consented to and fostered the parent-like

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[146] *Id.*

[147] *Id.* (citing *In re* Parentage of L.B., 89 P.3d 271, 275 (Wash. Ct. App. 2004)).

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.* at 164 n.3.

[152] *Id.* at 164.

[153] *Id.* at 164–65.

[154] *Id.* at 165.

[155] *Id.* (citing *In re* Parentage of L.B., 89 P.3d 271, 278–79 (Wash. Ct. App. 2004)).

[156] *Id.* (citing *L.B.*, 89 P.3d at 284).

[157] *Id.* (citing *L.B.*, 89 P.3d at 279).

> relationship; (2) the petitioner and the child lived together in the same household; (3) the petitioner assumed obligations of parenthood without expectation of financial compensation; and (4) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature."[158]

Finally, in regard to her petition for visitation, the appellate court also held that Carvin could petition for visitation without proving that Britain is unfit; instead, Carvin need only prove that "'it is detrimental to the child to sever the very parent-child relationship that Britain first consented to and fostered.'"[159]

2. The Washington Supreme Court Decision

The question before the Washington Supreme Court was "whether, in the absence of a statutory remedy, the equitable power of our courts in domestic matters permits a remedy *outside* of the statutory scheme, or conversely, whether our state's relevant statutes provide the exclusive means of obtaining parental rights and responsibilities."[160] One Washington statute provides:

> The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the [S]tate of Washington[,] nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state.[161]

"Washington courts have . . . construed this statute to permit the adaptation of the common law to address *gaps* in *existing* statutory enactments . . . ."[162] In the context of Carvin's parentage claim, the court explicitly recognized that the "legislature has been conspicuously silent when it comes to the rights of children like L.B., who are born into nontraditional families."[163]

The court's analysis of legislative intent proceeded as follows:

- "Washington courts have [previously] recognized . . . individuals not biologically nor legally related to . . . children . . . [as] a child's

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[158] *Id.* (quoting *L.B.*, 89 P.3d at 285).

[159] *Id.* (quoting *L.B.*, 89 P.3d at 286). As implied by the Virginia Supreme Court, there are different types of harm a child can suffer if visitation is denied to someone who has been involved in the child's life, not all of which justify judicial interference with parental choices concerning visitation. *See, e.g.*, Williams v. Williams, 501 S.E.2d 417 (Va. 1998). In particular, harm can refer to the sorrow of losing a loved one (which should not justify judicial interference) or actual physical harm to the child (which would justify judicial interference because it approximates a showing of unfitness). *See infra* Part III.

[160] *Carvin*, 122 P.3d at 166.

[161] WASH. REV. CODE ANN. § 4.04.010 (West 2005).

[162] *Carvin*, 122 P.3d at 166 (citing Dep't of Soc. & Health Servs. v. State Pers. Bd., 812 P.2d 500, 504 (Wash. Ct. App. 1991)).

[163] *Id.* at 169.

'psychological parent,'" although noting that prior cases had *not* afforded psychological parents the same fundamental rights as legal parents;[164]

- Washington common law recognizes the status of a *de facto* parent, citing one case where a stepmother was awarded custody over the objection of the biological parent because the deaf child had shown "'remarkable development'" as a result of her care.[165] Additionally, the court relied on another case where an aunt who raised the child was awarded custody over the biological father;[166]
- The UPA reflects the state's policy that parentage questions are to be resolved "without differentiation on the basis of the marital status or [sex] of the . . . parent[s]";[167]
- Although the UPA provides that "'[t]his chapter governs *every* determination of parentage in this state,'" it does not preclude courts from exercising their common law equity jurisdiction to determine parentage for situations not addressed in the statute;[168] and
- In order to address the "paramount considerations" of the child's welfare, "courts . . . [may] exercise their common law equitable powers to award custody of minor children" in situations not addressed in the statute.[169]

Concluding that it had authority to consider parentage doctrines outside those established by the legislature, the court addressed the specific question of whether Washington common law recognizes *de facto* parentage.[170] Citing cases from Colorado, Indiana, Maine, Massachusetts, New Jersey, New Mexico, Ohio, Pennsylvania, Rhode Island, and Wisconsin, the court concluded that "[r]eason and common sense support recognizing the existence of *de facto* parents and according them the rights and responsibilities which attach to parents in this state."[171]

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[164] *Id.* at 167 & n.7.

[165] *Id.* at 168 (citing *In re* Marriage of Allen, 626 P.2d 16, 19 (Wash. Ct. App. 1981)).

[166] *Id.* at 169 (citing Stell v. Stell, 783 P.2d 615, 622 (Wash. Ct. App. 1989)).

[167] *Id.* at 170 (citing WASH. REV. CODE ANN. §§ 26.26.051, .106 (West 2005)). Section 26.26.106 prohibits marital status discrimination in determining the rights of children born out of wedlock. WASH. REV. CODE ANN. § 26.26.106 (West 2005). Section 26.26.051 states that "provisions relating to determination[s] of paternity . . . appl[y] to determination[s] of maternity. WASH. REV. CODE ANN. § 26.26.051 (West 2005).

[168] *Carvin*, 122 P.3d at 170 (emphasis added) (quoting WASH. REV. CODE ANN. § 26.26.021(1) (West 2005)).

[169] *Id.* at 172.

[170] *Id.* at 173.

[171] *Id.* at 173–76 (citing *In re* Interest of E.L.M.C., 100 P.3d 546 (Colo. Ct. App. 2004); King v. S.B., 818 N.E.2d 126 (Ind. Ct. App. 2004); C.E.W. v. D.E.W., 2004 ME 43, 845 A.2d 1146; E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999); V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000); A.C. v. C.B., 829 P.2d 660 (N.M. Ct. App. 1992); *In re* Bonfield, 97 Ohio St. 3d 387, 2002-Ohio-6660, 780 N.E.2d 241; T.B. v. L.R.M., 786 A.2d 913 (Pa. 2001); Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000); Holtzman v. Knott, 533 N.W.2d 419 (Wis. 1995)).

The court relegated to a footnote the decisions from Michigan, New Hampshire, New York, Tennessee, and Vermont that reached contrary results.[172]

In reaching its conclusion, the court made clear that it was recognizing a new parentage right for third parties:

> Our state's current statutory scheme reflects the unsurprising fact that statutes often fail to contemplate all potential scenarios which may arise in the ever changing and evolving notion of familial relations. . . . We cannot read the legislature's pronouncements on this subject[, including the section stating that the statute "governs every determination of parentage in this state,"[173]] to preclude any potential redress to Carvin or L.B. In fact, to do so would be antagonistic to the clear legislative intent that permeates this field of law—to effectuate the best interest of the child in the face of differing notions of family and to provide certain and needed economical and psychological support and nurturing to the children of our state. While the legislature may eventually choose to enact differing standards than those recognized here today, and to do so would be within its province, until that time, it is the duty of this court to "endeavor to administer justice according to the promptings of reason and common sense."[174]

After declaring that Washington's common law recognizes *de facto* parents, the court announced what rights now exist in favor of the *de facto* parent by holding "that henceforth in Washington, a *de facto* parent stands in legal parity with an otherwise legal parent, whether biological, adoptive, or otherwise."[175] "Thus, if, on remand, Carvin can establish standing as a *de facto* parent, Britain and Carvin would *both* have a 'fundamental liberty interest[]' in the 'care, custody, and control' of L.B."[176] L.B. could then have two mothers and a father since Britain had married the child's biological father.

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[172] *Id.* at 175 n.23 (citing McGuffin v. Overton, 542 N.W.2d 288 (Mich. Ct. App. 1995); *In re* Nelson, 825 A.2d 501 (N.H. 2003); Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991); White v. Thompson, 11 S.W.3d 913 (Tenn. Ct. App. 1999); Titchenal v. Dexter, 693 A.2d 682 (Vt. 1997)).

[173] WASH. REV. CODE ANN. § 26.26.021 (West 2005).

[174] *Carvin*, 122 P.3d at 176 (quoting Bernot v. Morrison, 143 P. 104, 106 (Wash. 1914)).

[175] *Id.* at 177. Almost immediately thereafter, the court made the seemingly contradictory statement that "[a] *de facto* parent is not entitled to any parental privileges, as a matter of right, but only as is determined to be in the best interests of the child at the center of any such dispute." *Id.* The court's subsequent discussion in the case of the biological mother's fundamental parental rights makes clear that a *de facto* parent does in fact stand "in parity with biological and adoptive parents" in Washington. *Id.* at 178. The court also created new law when it decided to grant *de facto* parents the same rights as legal parents. In its decision, it explained that prior cases had not afforded psychological parents the same rights as legal parents. *See id.* at 167 n.7.

[176] *Id.* at 178 (quoting Troxel v. Granville, 530 U.S. 57, 65 (2000)).

The court rejected Britain's argument that granting Carvin rights akin to a biological or adoptive parent infringed Britain's fundamental rights in the "care for and control" of her biological child.[177] Recognizing that strict scrutiny was the appropriate analytic framework to review the State's infringement on a parent's fundamental liberty interest in third-party visitation disputes, the court found those cases to be distinguishable.[178] The court's basis for distinguishing those cases, and thus not applying strict scrutiny to analyze Britain's claim, was that the other cases did not involve competing interests of two parents.[179] Rather than address whether it infringed Britain's fundamental rights to treat Carvin as a parent, the court held that once a court declares a third party to be a parent, the newly declared parent's constitutional rights are equivalent to the biological parent's rights.[180] The case was remanded to the trial court with instructions to determine whether Carvin had established that she was a *de facto* parent.[181]

The dissenting opinion raised two primary issues. First, the dissent explained that the outcome unconstitutionally infringed upon a "parent's fundamental right to make child rearing decisions."[182] Second, the dissent criticized the majority for "look[ing] beyond [the] detailed and complete statutory scheme adopted by the . . . legislature . . . [to] create[] by judicial decree a new method for determining parentage."[183]

The dissent pointed out the deficiencies in the majority's treatment of the constitutional question, accusing the majority of "waving a magic wand and creating '*de facto*' parents."[184] The dissent explained that "it is this court's creation of this new class of parents that is the constitutional violation."[185] The dissent implied that the majority should have applied strict scrutiny to determine whether declaring Carvin to be a second

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[177] *Id.* at 177–78.

[178] *Id.* at 178.

[179] *Id.*

[180] *Id.*

[181] *Id.* at 177–79. The responsibility of a court under the best interest of the child standard is to make an order, after considering statutorily defined factors that furthers the child's best interests in the midst of a divorce between the child's parents. *See, e.g.*, LYNN D. WARDLE & LAURENCE C. NOLAN, FUNDAMENTAL PRINCIPLES OF FAMILY LAW 863 (2002). When the custody dispute is between a parent and a third party, *Troxel* mandates that at least some special weight be given to the parent's preferences. *Troxel*, 530 U.S. at 70. As discussed *infra* Part III, a court infringes the biological or adoptive parent's fundamental rights when it grants custody or visitation to a third party over the parent's objections unless the parent is unfit.

[182] *Carvin*, 122 P.3d at 181 (Johnson, J., dissenting).

[183] *Id.*

[184] *Id.*

[185] *Id.*

parent to the child infringed upon the biological mother's rights.[186] Instead, the majority declared Carvin a parent, without any initial constitutional analysis, and then found that because both Carvin and Britain were parents, there was no constitutional issue to resolve.[187] Because the majority elevated a nonparent to *de facto* parent status without any determination that Britain was unfit, it infringed upon Britain's parental rights.[188]

The dissent described the majority's reliance on the common law in its analysis as even "worse" than the faulty constitutional analysis.[189] The dissent viewed the UPA as unambiguously defining "parent" and establishing the *exclusive* means of establishing a mother-child relationship.[190] The dissent admonished the majority for failing to recognize that "separation of powers requires a court to resist the temptation to rewrite an unambiguous statute to suit its notions of public policy and to recognize that 'the drafting of a statute is a legislative, not a judicial, function.'"[191] "The majority improperly concludes that the legislature's failure to speak is somehow an invitation for this court to add further definitions or provisions to a statute that is clear, unambiguous, and all encompassing."[192]

The dissent explained that the majority's view of its common law authority to create additional statutory provisions is particularly inappropriate where four years earlier a court of appeals opinion that refused to treat as a *de facto* parent a former same-sex partner of a woman who conceived a child through artificial insemination alerted the legislature of the need to address the issue: "'If the marriage statute, adoption statute, UPA presumptions or surrogacy statute are inadequate when an unmarried couple, same gender or not, conceive artificially, *it is up to the [l]egislature to make any changes*.'"[193] According to the dissent,

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[186] *Id.*

[187] *Id.* at 178 (majority opinion).

[188] *Id.* at 181 (Johnson, J., dissenting).

[189] *Id.*

[190] *Id.* at 182. Section 26.26.101 sets forth five situations in which the mother-child relationship is established:

> (1) when a woman gives birth to a child[;] (2) through an adjudication of [biological] maternity[;] (3) through adoption[;] (4) by a surrogate parentage contract[;] or (5) by an affidavit and physician's certificate stating . . . [the] intent [of the ovum donor or gestational surrogate] to be bound as a parent of a child born through alternative reproductive medical technology.

Id. (citing WASH. REV. CODE ANN. § 26.26.101. (West 2005)).

[191] *Carvin*, 122 P.3d at 182 (Johnson, J, dissenting) (quoting State v. Jackson, 976 P.2d 1229, 1235 (Wash. 1999) (en banc)).

[192] *Id.*

[193] *Id.* at 183 (quoting State *ex rel.* D.R.M. v. Wood, 34 P.3d 887, 894–95 (Wash. Ct. App. 2001) (emphasis added)).

the legislature's choice *not* to amend the UPA and recognize *de facto* parents was a legislative pronouncement on the issue.[194] As a result, the majority's decision to recognize *de facto* parents is an improper exercise of its common law authority insofar as the new means to establish parentage "goes against the express intent of the legislature."[195] A decision from the Vermont Supreme Court reveals the judiciary's willingness to create parentage law when it believes the legislature has failed to enact laws that respond to modern family dynamics.

C. Miller-Jenkins v. Miller-Jenkins

Lisa Miller met Janet Jenkins in 1997 while both women were living in Virginia.[196] A few months later, Miller moved in with Jenkins.[197] In December 2000, they traveled to Vermont to enter into a civil union, immediately returning to their home in Virginia.[198] After unsuccessfully attempting to adopt a special needs child in Virginia, Miller expressed her desire to have a baby.[199] Miller's first attempt, in mid-2001, at becoming pregnant by assisted reproductive technology was not successful.[200] The second procedure, however, in August 2001, was successful.[201] In April 2002, Miller gave birth to Isabella in Virginia.[202] Around August 2002, Miller and Jenkins moved to Vermont.[203] Approximately one year later, the couple separated.[204]

In November 2003, Miller filed standard court forms in Vermont to dissolve the civil union.[205] She filed them *pro se*, by mail from Virginia,

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[194] *Id.* The dissent also explained that earlier that year, the court had refused to reach the *de facto* parentage issue where the paternal grandmother filed a nonparental custody petition and sought to be declared the *de facto* parent of a child she had raised from ages two to eight. *Id.* (citing Luby v. Da Silva, 105 P.3d 991, 992, 993 n.3 (Wash. 2005) (en banc)).

[195] *Id.* at 184.

[196] The Videotaped Deposition of Lisa Miller-Jenkins at 7–8, Miller-Jenkins v. Miller-Jenkins, No. 454-11-03 Rddm (Rutland Fam. Ct. 2007) [hereinafter Deposition] (on file with the Regent University Law Review); *see also* April Witt, *About Isabella,* WASH. POST, Feb. 4, 2007, (Magazine), at W14, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/01/30/AR2007013001316.html (providing detailed history of the factual and legal issues involved in the case).

[197] Witt, *supra* note 196, at 18.

[198] *Miller-Jenkins*, 2006 VT 78, ¶ 3, 180 Vt. at 445, 912 A.2d at 956.

[199] Deposition, *supra* note 196, at 24–35.

[200] *Id.* at 36.

[201] *Id.* at 36–37.

[202] *Miller-Jenkins*, 2006 VT 78, ¶ 3, 180 Vt. at 445, 912 A.2d at 956.

[203] *Id.*

[204] *Id.*

[205] *Id.* ¶ 4, 180 Vt. at 446, 912 A.2d at 956. At the time, because Virginia did not legally recognize same-sex relationships, Vermont was the only state in which Miller could file to dissolve the civil union. *See* VA. CODE ANN. § 20-45.2 (2008) ("A marriage between

without the advice or representation of counsel.[206] Miller did, however, receive some assistance from a court clerk in Vermont, who instructed Miller to complete the *entire* form, checking a box for each question.[207] Miller checked the boxes to indicate that she should be awarded the physical and legal rights and responsibilities over Isabella and that Jenkins should be awarded supervised parent-child contact (that is, visitation).[208] In addition, when the form asked her to list the "biological or adoptive children" of the civil union, Miller identified Isabella.[209]

In response to the complaint, Jenkins retained counsel and asserted a counterclaim seeking an award of physical and legal custody, with an award of parent-child contact to Miller.[210] The answer and counterclaim did not contain any allegation that Miller was an unfit parent or that Jenkins had adopted the child—because she had not—but simply alleged she was a parent and desired custody.[211]

Prior to the court's first hearing concerning a temporary order for parental rights and responsibilities, Miller's first attorney intended to object to the court's treating Jenkins as a second parent to Isabella.[212] Soon after, Miller retained a new lawyer, Deborah Lashman, who would

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persons of the same sex is prohibited."); *see also* Rosengarten v. Downes, 802 A.2d 170 (Conn. App. Ct. 2002) (affirming trial court's ruling that it lacks subject matter jurisdiction to dissolve Vermont same-sex civil union); Lane v. Albanese, No. FA044002128S, 2005 WL 896129, at *4 (Conn. Super. Ct. Mar. 18, 2005) (finding court lacks subject matter jurisdiction to dissolve Massachusetts same-sex marriage).

206 Witt, *supra* note 196, at 20–21.

207 *Id.* at 21.

208 *Id.* at 21, 28. Miller indicated in a handwritten notation on the form that Jenkins should only be awarded "supervised" parent-child contact. *Id.* at 28. In Vermont, "'[p]arental rights and responsibilities' means the rights and responsibilities related to a child's physical living arrangements, parent[-]child contact, education, medical and dental care, religion, travel and any other matter involving a child's welfare and upbringing." VT. STAT. ANN. tit. 15, § 664(1) (2002). Additionally, "'[p]arent-child contact' means the right of a parent who does not have physical responsibility to have visitation with the child." *Id.* § 664(2). Both phrases refer to rights afforded a *parent* in a custody or visitation dispute. This Article refers to parental rights and responsibilities as "custody," and refers to parent-child contact as "visitation."

209 Deposition, *supra* note 196, at 93. Miller has testified that she listed Isabella in response to that question because Isabella was her biological child. *Id.* She did not understand the question to represent a legal acknowledgment that Jenkins was a parent to Isabella. *See id.*

210 Notice of Appearance, Answer to Civil Union Dissolution Complaint & Counterclaim, Miller-Jenkins v. Miller-Jenkins, No. 454-11-03 Rddm (Rutland Fam. Ct. Jan. 16, 2004) [hereinafter Counterclaim] (on file with the Regent University Law Review); Witt, *supra* note 196, at 28 ("In early 2004, seven weeks after Lisa asked the court to dissolve their union, Janet filed a counterclaim seeking custody of Isabella for herself and visitation for Lisa.").

211 *See* Counterclaim, *supra* note 210; *see also* Witt, *supra* note 196, at 28.

212 Witt, *supra* note 196, at 28. Miller terminated the attorney-client relationship with her first attorney, Linda Reis, before the first day of the temporary hearings. *Id.*

not meet her until the first day of hearings on March 15, 2004.[213] Without consultation with Miller, Lashman purported to waive Miller's right to challenge the court's treatment of Jenkins as a parent.[214] Despite the efforts of Miller's third attorney, Judy Barone, to revoke the waiver at the next day of hearings, the court refused to address the waiver issue.[215]

Without deciding whether Miller had waived her parental rights, on June 17, 2004 the court issued a temporary order (the "Temporary Custody Order") granting Jenkins, over Miller's objections, "parent-child contact" and awarding Miller "legal and physical responsibility" over Isabella.[216] The order directed Miller to give Jenkins unsupervised visitation with then two-year-old Isabella two weekends in June, one weekend in July, and then one week each month of unsupervised visitation in Vermont, beginning in August 2004.[217]

Five months after it granted Jenkins parent-child contact in the Temporary Custody Order, the trial court declared Jenkins a parent to Isabella.[218] In that November 17, 2004 order (the "Parentage Order"), the court addressed Miller's arguments that (1) she be permitted to rebut any presumption of parentage in favor of Jenkins by submitting evidence that Jenkins had no genetic link to Isabella, and (2) Lashman's waiver of Miller's parental rights was without her consent.[219] With respect to the paternity presumption, Miller argued that to the extent a husband or wife is able to rebut a paternity presumption through submission of genetic tests demonstrating that the husband is not the father, Miller

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[213] Witt, *supra* note 196, at 28–29 (explaining that "Lisa worked her way" through the phone book to find a new attorney). Miller met Lashman for the first time at the courthouse, approximately thirty minutes before the hearing began. *Id.*; *see also* Continuation of Request for Temporary Order Hearing at 40–41, Miller-Jenkins v. Miller-Jenkins, No. 454-11-03 Rddm (Rutland Fam. Ct. May 26, 2004) [hereinafter Continuation] (on file with the Regent University Law Review).

[214] Witt, *supra* note 196, at 28–29. Lashman testified that she had a different interpretation than Miller concerning the parental rights of former partners and, without discussing the waiver issue with Miller, purported to waive Miller's parental rights in court. *Id.* During a break in the hearing, Miller asked Lashman to clarify the courtroom discussion concerning the waiver, but Lashman explained that she would not discuss the issue with her at that time. *Id.* at 29. After the hearing, Miller demanded that Lashman take steps to revoke the purported waiver. *Id.* After Miller continued to insist that Jenkins was not Isabella's parent, Lashman withdrew. *Id.* Later in the case, Miller learned that Lashman was an anonymous plaintiff in the landmark Vermont case legalizing second parent adoption for same-sex couples. *Id.* at 28; *see also In re* B.L.V.B., 628 A.2d 1271, 1272 (Vt. 1993); Continuation, *supra* note 213, at 40–41.

[215] Witt, *supra* note 196, at 29–30; *see also* Miller-Jenkins v. Miller-Jenkins, 2006 VT 78, ¶ 62, 180 Vt. 441, 468–69, 912 A.2d 951, 972.

[216] *Miller-Jenkins*, 2006 VT 78, ¶ 4, 180 Vt. at 445–46, 912 A.2d at 956.

[217] *Id.*

[218] *Id.* ¶ 8, 180 Vt. at 446, 912 A.2d at 957.

[219] Parentage Order, *supra* note 12, at 3.

should also be able to rebut any presumption that Jenkins is a parent to Isabella with genetic proof that Jenkins is not biologically related to Isabella.[220] Although the court applied the paternity presumption to the case to find that Jenkins was Isabella's parent, it refused to apply the statutory genetic exception to rebut the presumption.[221]

The court analyzed the parentage question by first explaining that Vermont had not previously "been presented with the question of parental status concerning a child born during a marriage and conceived through artificial insemination."[222] After briefly discussing a case from New York and a case from California,[223] the court "adopt[ed] the reasoning of other courts"[224] and created a new test for Vermont.[225] The test provides that "where a legally connected couple utilizes artificial insemination to have a family, parental rights and obligations are determined by facts showing intent to bring a child into the world and raise the child as one's own as part of a family unit, not by biology."[226] The court then retroactively applied this new test to determine parentage of Isabella.[227] Pursuant to the new test, the court declared Jenkins to be Isabella's second mother because Jenkins and Miller were in a civil union relationship when Miller and Jenkins planned for Miller to have a child.[228] The trial court did not address Miller's constitutional parental rights argument.[229]

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[220] *Id.* at 9–10. VT. STAT. ANN. tit. 15, § 308 (2002) ("A person alleged to be a parent shall be rebuttably presumed to be the natural parent of a child if: (1) the alleged parent fails to submit without good cause to genetic testing as ordered; . . . or (3) the probability that the alleged parent is the biological parent exceeds 98 percent as established by a scientifically reliable genetic test . . . .").

[221] *Miller-Jenkins*, 2006 VT 78, ¶ 54, 180 Vt. at 464, 912 A.2d at 969.

[222] Parentage Order, *supra* note 12, at 10.

[223] *Id.* at 10. Both of those cases, decided in the late 1960s and early 1970s, involved the question of whether the ex-husband, who had consented during the marriage to artificial insemination of his wife with sperm from an anonymous donor, should be treated as the father to the child born during the marriage. People v. Sorensen, 437 P.2d 495, 497 (Cal. 1968); *In re* Adoption of Anonymous, 345 N.Y.S.2d 430, 431 (N.Y. Sur. Ct. 1973).

[224] Parentage Order, *supra* note 12, at 11.

[225] *Id.*

[226] *Id.*

[227] *Id.* at 12. The court stated:

> This court can not [sic] impose a hurdle for a party to a civil union that it would not impose on a married couple. The court sees no reason why a husband choosing to create a family with his wife by utilizing an anonymous sperm donor would be required under Vermont law to initiate an adoption proceeding to protect his rights, and the court can not [sic] impose this obstacle upon a party to a civil union who makes that same choice.

Id.

[228] *See id.* at 11; *see also* Miller-Jenkins v. Miller-Jenkins, 2006 VT 78, ¶ 56, 180 Vt. 441, 465, 912 A.2d 951, 970.

[229] *See* Parentage Order, *supra* note 12.

On appeal, Miller advanced several arguments as to why the order should not be affirmed, including an attack on its constitutionality.[230] First, she explained that prior to the trial court's decision declaring a new parentage rule for Vermont, nothing under existing Vermont law treated Jenkins as a parent to Isabella: Jenkins did not adopt Isabella and, unlike other states, Vermont had not enacted a statute setting forth criteria to determine parentage of a child born by assisted reproductive technology.[231] Jenkins's only claim to parentage was under Vermont's paternity presumption for children born during a marriage, which provided an opportunity to rebut the presumption with genetic proof.[232] The statute provides:

> A person alleged to be a parent shall be rebuttably presumed to be the natural parent of a child if:
>
> (1) the alleged parent fails to submit without good cause to genetic testing as ordered; or
>
> (2) the alleged parents have voluntarily acknowledged parentage under the laws of this state or any other state, by filling out and signing a Voluntary Acknowledgment of Parentage form and filing the completed and witnessed form with the department of health; or
>
> (3) the probability that the alleged parent is the biological parent exceeds 98 percent as established by a scientifically reliable genetic test; or
>
> (4) the child is born while the husband and wife are legally married to each other.[233]

Because the civil union law required courts to treat civil union couples the same as married couples "with respect to a child of whom either becomes the natural parent during the term of the civil union,"[234] Miller argued that she should be allowed to rebut the presumption to the same extent she would be able to do so in the marriage context.[235] Although Jenkins explained that the statutory requirement with respect to parentage of a child born during a civil union "evinces an intention to ensure that children born to couples in civil unions are treated equally to those born to married couples,"[236] she argued that if Miller, the natural parent, were permitted to submit genetic proof to rebut parentage, as provided for under the statute, the civil union law would "be a nullity" with respect to treating her as a parent.[237] Indeed, except in the rare

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[230] *Miller-Jenkins*, 2006 VT 78, ¶¶ 59–60, 62, 180 Vt. at 466–68, 912 A.2d at 971–72.

[231] *Id.* ¶¶ 41–42, 180 Vt. at 459, 912 A.2d at 965–66.

[232] VT. STAT. ANN. tit. 15, § 308 (2002).

[233] *Id.*

[234] VT. STAT. ANN. tit. 15, § 1204(f) (2002).

[235] *Miller-Jenkins*, 2006 VT 78, ¶¶ 41–42, 180 Vt. at 459, 912 A.2d at 966.

[236] Brief of the Appellee at 18, Miller-Jenkins v. Miller-Jenkins, 2006 VT 78, 180 Vt. 441, 912 A.2d 951 (No. 454-11-03 Rddm).

[237] *Id.* at 18–19.

situation where one partner's ovum is implanted into the womb of the other partner, there is usually no dispute that only one woman in the same-sex civil union relationship is a biological parent to the child.[238]

On appeal, Jenkins urged the court to affirm the new law created by the trial court concerning parentage of children born by assisted reproductive technology.[239] She explained that given the increasing number of children born to heterosexual and homosexual couples by use of assisted reproductive technology, the parentage presumption must be interpreted to "refuse[] to permit either parent to challenge the parentage of the consenting spouse" when "both spouses jointly agree to use [assisted reproductive technology] to create a family."[240] She explained:

> This Court should not wait for the Vermont Legislature to enact a specific statute about [assisted reproductive technology], as Lisa argues. The reality in Vermont today is that many children are born through [assisted reproductive technology]. When faced with the reality of these children, the courts cannot simply defer adjudicating their parentage until the legislature enacts a specific statute. Rather, as this Court has acknowledged, "it is the courts that are required to define, declare[,] and protect the rights of children raised in these [assisted reproductive technology] families. . . ."[241]

Miller offered three arguments in response.[242] First, Miller explained that refusing to treat Jenkins as a parent does not render the parentage presumption a nullity.[243] Rather, if the court were to permit Miller to rebut parentage with genetic proof, it would be consistent with the statutory obligation "to treat civil union partners the *same* as married partners . . . . In a marriage, a spouse can rebut the presumption of 'natural' parentage by demonstrating that the child is not biologically related to the 'parent.' The same must apply to partners in a civil union."[244] To deny Miller the opportunity to rebut parentage because she was in a same-sex civil union, rather than a marriage, would afford civil union partners unequal rights as compared to married couples.[245] Miller also explained that the trial court had "drafted new legislation" when it declared Jenkins a parent because there was no possible way to "construe" or apply the parentage presumption "to declare [Jenkins] to be a 'natural parent,' particularly where she admits

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[238] *See, e.g.*, Johnson v. Calvert, 851 P.2d 776, 778 (Cal. 1993).

[239] Brief of the Appellee, *supra* note 236, at 17–18.

[240] *Id.* at 22.

[241] *Id.* at 23–24 (quoting *In re* B.L.V.B., 628 A.2d 1271, 1276 (Vt. 1993)).

[242] *See* Reply Brief, Miller-Jenkins v. Miller-Jenkins, 2006 VT 78, 180 Vt. 441, 912 A.2d 951 (No. 454-11-03 Rddm).

[243] *Id.* at 13.

[244] *Id.*

[245] *Id.*

she is not a 'natural' parent."[246] Finally, Miller argued that it would deprive her of her fundamental parental rights to treat Jenkins as a parent by denying Miller the ability to rebut the parentage presumption.[247]

The Vermont Supreme Court ultimately rejected both parties' arguments concerning the scope and application of the parentage presumption: "[w]e have examined the legislative history of the statute and can find no indication that it was intended to govern the rights of parentage of children born through artificial insemination or to same-sex partners, or to do anything other than provide a speedy recovery of child support."[248] Instead, the court relied on its 1985 decision that articulated the circumstances under which a stepparent could obtain custody or visitation over his stepchild.[249] Quoting its 1985 decision, the court held,

> where the stepparent has assumed the role of a parent with respect to the child—that is, had acted "in loco parentis"—the lower court can give custody to the stepparent, over the opposition of the biological parent, if it finds that it is in the best interest of the child to do so and "the natural parent is unfit or . . . extraordinary circumstances exist to warrant such a custodial order."[250]

As applied to Jenkins, the court held:

> Assuming extraordinary circumstances are even required for a visitation order, we conclude that extraordinary circumstances are present in this case. The court's findings demonstrate that [Jenkins] acted *in loco parentis* with respect to [Isabella] as long as [Jenkins] and [Miller] were together. Thus, our short answer to [Miller's] argument is that the visitation order is supported by *Paquette* even if [Jenkins] is not considered [Isabella's] parent under [the paternity presumption].[251]

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[246] *Id.* at 14; *see also Miller-Jenkins*, 2006 VT 78, ¶¶ 41–42, 180 Vt. at 459–60, 912 A.2d at 966. The statute seeks to declare "natural" parentage, the plain language of which suggests a genetic connection between the child and alleged parent. *Id.*

[247] Reply Brief, *supra* note 242, at 14; *see also Miller-Jenkins*, 2006 VT 78, ¶ 59, 180 Vt. at 466–67, 912 A.2d at 971.

[248] *Miller-Jenkins*, 2006 VT 78, ¶ 44, 180 Vt. at 460, 912 A.2d at 966.

[249] *See* Paquette v. Paquette, 499 A.2d 23, 30 (Vt. 1985).

[250] *Miller-Jenkins*, 2006 VT 78, ¶ 45, 180 Vt. at 460, 912 A.2d at 966–67 (quoting *Paquette*, 499 A.2d at 30).

[251] *Miller-Jenkins*, 2006 VT 78, ¶ 47, 180 Vt. at 461, 912 A.2d at 967 (italics added). Although it is unlikely to have changed the court's analysis, the court mischaracterized Jenkins' interest as one for only visitation. Jenkins was awarded parent-child contact; she was not awarded third-party visitation. The significance of the difference is that because Jenkins is treated as a parent, she has the ability to request a modification of the parent-child contact order, asking the court to award her primary legal and physical responsibility of the child. If she had been awarded third-party visitation rights, she would not have the ability to make any such request. *See supra* note 210 and accompanying text (explaining that in her counterclaim, Jenkins sought primary custody in her favor).

Although the court acknowledged that the legislature had not addressed parentage of children born by assisted reproductive technologies,[252] it concluded that "in the absence of [legislative] action, we must protect the best interests of the child."[253] Clearly, "[m]any factors are present here that support a conclusion that [Jenkins] is a parent, including, first and foremost, that [Jenkins] and [Miller] were in a valid legal union at the time of the child's birth."[254] The other relevant factors relied on by the court included the trial court's findings that: (1) Miller and Jenkins both intended Jenkins to be Isabella's parent; (2) Jenkins participated in Miller's decision to be artificially inseminated; (3) Jenkins participated in the prenatal care and birth; (4) Miller and Jenkins both treated Jenkins as Isabella's parent during the time they resided together; and (5) Miller identified Jenkins as a parent in the dissolution petition.[255] The court concluded the parentage discussion by stating, "This is not a close case under the precedents from other states. . . . We do note that, in accordance with the common law, the couple's legal union at the time of the child's birth is extremely persuasive evidence of joint parentage."[256]

The court also briefly addressed Miller's fundamental parental rights argument: "[Jenkins] was awarded visitation because she is a parent of [Isabella]. [Miller's] parental rights are not exclusive."[257] In other words, like the Washington Supreme Court in *Carvin v. Britain*,[258] the court did not inquire whether elevating Jenkins to the status of a parent infringed Miller's fundamental constitutional rights as Isabella's sole biological parent.[259] Instead, the court declared Jenkins a parent

[252] *Id.* ¶ 52, 180 Vt. at 463, 912 A.2d at 968.

[253] *Id.* ¶ 52, 180 Vt. at 463, 912 A.2d at 968–69 ("We express, as many other courts have, a preference for legislative action . . . .").

[254] *Id.* ¶ 56, 180 Vt. at 465, 912 A.2d at 970.

[255] *Id; see also supra* note 209 and accompanying text (discussing Miller's decision to list Isabella on the civil dissolution proceeding papers as a child of the union).

[256] *Miller-Jenkins*, 2006 VT 78, ¶ 58, 180 Vt. at 466, 912 A.2d at 971.

[257] *Id.* ¶ 59, 180 Vt. at 467, 912 A.2d at 971.

[258] 122 P.3d 161 (Wash. 2005) (en banc).

[259] *See Miller-Jenkins*, 2006 VT 78, 180 Vt. 441, 912 A.2d 951. The court also readily dispensed with Miller's argument that Lashman's purported waiver of Miller's constitutional rights should be revoked, stating:

> We believe the family court acted within its broad discretion in awarding temporary visitation as it did, even if it could not make a final determination of parentage . . . . In any event, the timing of the court's action was harmless in this case. The family court eventually ruled that [Jenkins] had parental status with respect to [Isabella], a ruling we have affirmed.

Id. ¶¶ 62–63, 180 Vt. at 469, 912 A.2d at 972–73. The issue, however, raises substantial constitutional questions. Under what circumstances, if any, can a biological parent waive her exclusive rights to parent her child? What facts must be proven to establish that it was

and then held that because two parents are involved in the custody dispute, Miller's "parental rights are not exclusive."[260] In August 2006, the Vermont Supreme Court affirmed the family court's order declaring Jenkins a parent to Isabella.[261]

When confronted with a similar, third-party parentage question, the Utah Supreme Court addressed the constitutional implications of declaring a legal stranger to be a parent over parental objection, an issue that both the Washington and Vermont Supreme Courts failed to seriously consider. In light of the weighty policy decisions that accompany changes in parentage law, the Utah Supreme Court properly deferred to the legislature a decision to make appropriate amendments to the law.

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a knowing and voluntary waiver? Must the waiver be in writing? See *infra* notes 341–359 and accompanying text (discussing the waiver question).

[260] *Miller-Jenkins*, 2006 VT 78, ¶ 59, 180 Vt. at 467, 912 A.2d at 971. The court's decision in *Miller-Jenkins* was a departure from cases in which the Vermont Supreme Court had refused to treat a former same-sex partner as a parent to the biological parent's child. *See* Titchenal v. Dexter, 693 A.2d 682, 683–85 (Vt. 1997). In fact, in February 2007, the Utah Supreme Court relied on *Titchenal* to support its decision not to adopt the *de facto* parent doctrine:

> We agree with the Supreme Court of Vermont that "jurisdiction should not rest upon a test that in effect would examine the merits of visitation or custody petitions on a case-by-case basis. In reality, such a fact-based test would not be a threshold jurisdictional test, but rather would require a full-blown evidentiary hearing in most cases. Thus, any such test would not prevent parents from having to defend themselves against the merits of petitions brought by a potentially wide range of third parties claiming a parent-like relationship with their child."

Jones v. Barlow, 2007 UT 20, ¶ 31, 154 P.3d 808, 816 (quoting *Titchenal*, 693 A.2d at 687–88).

[261] *See Miller-Jenkins*, 2006 VT 78, ¶ 72, 180 Vt. at 471, 912 A.2d at 974. The Vermont Supreme Court denied a petition for reargument in November 2006. *Id.* 180 Vt. at 441, 912 A.2d at 951. In June 2007, the Vermont family court issued a final order regarding the civil union dissolution and allocation of parental rights and responsibilities. *See* Findings of Fact, Conclusions of Law, & Order, Miller-Jenkins v. Miller-Jenkins, No. 454-11-03 Rddm (Rutland Fam. Ct. June 15, 2007) [hereinafter June 15 Order] (on file with the Regent University Law Review). That order awarded Miller "sole physical and legal custody" of Isabella and gave Jenkins liberal, unsupervised visitation. June 15 Order, *supra*, at 14–15. Pursuant to that order, Jenkins was awarded visitation as follows: June 30 and July 7 in Virginia for eight hours each day; July 13–15 and July 27–29 in Virginia from Friday 5:00 p.m. until Sunday 9:00 a.m.; August 19–25 in Vermont; two weekends each month thereafter, with one visitation taking place in Virginia and one in Vermont. *Id.* By order dated December 31, 2007, the court modified the visitation schedule to avoid Isabella's traveling from Virginia to Vermont for two-day weekends while school was in session. *See* Order on Modification of Visitation Schedule, Miller-Jenkins v. Miller-Jenkins, No. 454-11-03 Rddm (Rutland Fam. Ct. Dec. 31, 2007) (on file with the Regent University Law Review). In March 2008, the Vermont Supreme Court affirmed the final order. Miller-Jenkins v. Miller-Jenkins, No. 2007-271, 2008 WL 2811218, at *2 (Vt. Mar. 2008). The United States Supreme Court denied review on October 6, 2008.

D. Jones v. Barlow

Cheryl Barlow and Kerri Jones were involved in a same-sex relationship when, in November 2000, they decided to have a child together.[262] They planned that Barlow would be the first of the two to have a child by artificial insemination.[263]

> [They] selected a sperm donor who shared both of their characteristics . . . . Barlow conceived in February 2001. During the pregnancy, Jones participated in prenatal care with Barlow and her physician.
>
> On October 4, 2001, Barlow gave birth to a baby girl . . . . The birth certificate listed the child's surname as "Jones Barlow." For the first two years of the child's life, both Barlow and Jones cared for the child . . . . [I]n May 2002, the parties obtained [a court] order . . . designnating Jones and Barlow as co-guardians of the child.[264]

"Jones and Barlow ended their relationship around October 2003," when the child was two years old.[265] Barlow and her child moved out of the shared residence, with Barlow eventually ending "all contact between Jones and the child."[266] At that time, Barlow petitioned the court for an order removing Jones as the child's co-guardian.[267]

In December 2003, Jones filed suit, "seeking a [d]ecree of custody and visitation, claiming that she had standing under the common law doctrine of *in loco parentis*."[268] The district court bifurcated the proceedings, and for the first phase, the parties participated "in an evidentiary hearing to assess whether Jones stood *in loco parentis* to the child," and therefore had standing to petition for custody or visitation.[269] The court concluded that she had standing because she stood *in loco parentis*.[270] For the second phase, the court limited the issues to visitation and child support, concluding that Utah's adoption statutes precluded a consideration of custody in favor of Jones.[271] The court found that "continued contact with Jones would be in the child's best interest and ordered visitation."[272] Barlow appealed.[273] The Utah Court of

262 *Jones*, 2007 UT 20, ¶¶ 3–4, 154 P.3d at 810.

263 *Id.* ¶ 4, 154 P.3d at 810.

264 *Id.* ¶¶ 4–5, 154 P.3d at 810.

265 *Id.* ¶ 6, 154 P.3d at 810.

266 *Id.*

267 *Id.*

268 *Id.* ¶ 7, 154 P.3d at 810 (italics added) (internal quotation marks omitted).

269 *Id.* (italics added).

270 *Id.* ¶ 8, 154 P.3d at 810.

271 *Id.*

272 *Id.*

273 *Id.* ¶ 9, 154 P.3d at 810.

Appeals certified the case for direct appeal to the Utah Supreme Court.[274]

On appeal, Barlow argued that "the trial court lack[ed] jurisdiction because the *in loco parentis* doctrine does not grant Jones standing to seek visitation."[275] The court began its analysis by explaining the *in loco parentis* doctrine, noting it "is applied when someone who is not a legal parent nevertheless assumes the role of a parent in a child's life . . . by assuming the 'status and obligations of a parent without formal adoption.'"[276] A person has the "'same rights, duties, and liabilities as a parent'" as long as she stands *in loco parentis*.[277]

The specific legal question addressed by the court was "whether a legal parent may terminate the *in loco parentis* status by removing the child from the relationship with the surrogate parent or whether the *in loco parentis* doctrine allows the surrogate parent to extend the relationship against the legal parent's will."[278] The court held that Jones lacked standing to seek visitation because "at common law all rights and obligations end with the termination of the *in loco parentis* relationship," which either party has the "right to terminate."[279] To recognize "a legally protectable right under the rubric of *in loco parentis* would be 'an unwarranted expansion of an otherwise well-established common law doctrine.'"[280]

Alternatively, Jones asked the court to "recognize a new judicial doctrine in Utah that creates in a third party the right to seek visitation with a child in contexts outside those recognized by this state's domestic relation laws."[281] Whether labeled "'psychological parent'" or "'*de facto* parent,'" the court explained that recognition of such a doctrine would "create permanent and abiding rights similar to those of an actual parent."[282] The court "decline[d] to craft such a doctrine" for two reasons.[283]

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[274] *Id.* ¶ 9 n.2, 154 P.3d at 810 n.2.

[275] *Id.* ¶ 9, 154 P.3d at 810–11 (italics added). She also argued "the trial court's application of the *in loco parentis* doctrine violat[ed] Barlow's constitutional rights[,] . . . the visitation order violat[ed] Barlow's right to privacy," and Jones never stood *in loco parentis* to the child. *Id.* ¶ 9, 154 P.3d at 811.

[276] *Id.* ¶ 13, 154 P.3d at 811 (quoting Gribble v. Gribble, 583 P.2d 64, 66 (Utah 1978), *abrogated by Jones*, 2007 UT 20, 154 P.3d 810).

[277] *Id.* (quoting Sparks v. Hinckley, 5 P.2d 570, 571 (Utah 1931)).

[278] *Id.* ¶ 16, 154 P.3d at 812 (italics added).

[279] *Id.* ¶ 14, 154 P.3d at 812 (italics added).

[280] *Id.* ¶ 29, 154 P.3d at 815 (italics added) (quoting Coons-Andersen v. Andersen, 104 S.W.3d 630, 636 (Tex. App. 2003)).

[281] *Id.* ¶ 30, 154 P.3d at 815.

[282] *Id.* ¶ 30, 154 P.3d at 816 (italics added).

[283] *Id.* ¶ 31, 154 P.3d at 816.

> First . . . [the] *de facto* parent doctrine fails to provide an identifiable jurisdictional test that may be easily and uniformly applied in all cases [to determine standing]. A *de facto* parent rule for standing, which rests upon ambiguous and fact-intensive inquiries into the surrogate parent's relationship with a child and the natural parent's intent in allowing or fostering such a relationship, does not fulfill the traditional gate-keeping function of rules of standing.[284]

Second, and more importantly, the court properly recognized that "adopting a *de facto* parent doctrine would exceed the proper bounds of the judiciary."[285] Although the court acknowledged that "mutual bonds of affection can be formed between a child and an adult who does not fit within the traditional definition of a parent," the adoption of the *de facto* parent doctrine is "ultimately based upon policy preferences, rather than established common law."[286] Because the legislature had defined the manner in which a parent-child relationship is established, which did not include *de facto* parentage, the court refused to adopt a common law doctrine that would contradict the statutory scheme.[287]

> Quoting the Michigan Supreme Court, the Utah Supreme Court explained that [a]s a general rule, making social policy is a job for the [l]egislature, not the courts. This is especially true when the determination or resolution requires placing a premium on one societal interest at the expense of another[.] The responsibility for drawing lines in a society as complex as ours—of identifying priorities, weighing the relevant considerations and choosing between competing alternatives—is the [l]egislature's, not the judiciary's.[288]

The rationale for leaving the decision to the legislature reflects the unique role played by that governmental branch. As illustrated in *Jones*:

> Jones asks this court to exercise the wisdom of Solomon by adopting a *de facto* parent doctrine based upon our weighing of the competing policies at play. Although this court is routinely called upon to make difficult decisions as to what the law is, or even to fill the interstices of jurisprudence, in this case we are asked to create law from whole cloth where it currently does not exist. . . . Courts are unable to fully investigate the ramifications of social policies and cannot gauge or

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[284] *Id.* (italics added).

[285] *Id.* ¶ 32, 154 P.3d at 816 (italics added).

[286] *Id.* ¶¶ 33–34, 154 P.3d at 816–17.

[287] *Id.* ¶¶ 40–41, 154 P.3d at 818–19.

[288] *Id.* ¶ 34, 154 P.3d at 817 (quoting Van v. Zahorik, 597 N.W.2d 15, 18 (Mich. 1999)). There are unique dangers presented to our constitutional liberties and inalienable rights when the powers of two branches of government are combined into one. As Alexander Hamilton explained in the Federalist Papers, "'there is no liberty, if the power of judging be not separated from the legislative and executive powers.'" THE FEDERALIST NO. 78, at 473 (Alexander Hamilton) (Bantam Classic ed. 1982) [hereinafter FEDERALIST NO. 78] (citing 1 MONTESQUIEU, THE SPIRIT OF LAWS bk. XI, ch. 6, para. 5, at 174 (Thomas Nugent trans., 1873)). "[L]iberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments." *Id.*

> build the public consensus necessary to effectively implement them. Unlike the legislature, which may craft a comprehensive scheme for resolving future cases and then may repeal or amend it at any time should it prove unworkable, courts are not agile in developing social policy. If we miscalculate in legislating social policy, the harm may not be corrected until an appropriate case wends its way through the system and arrives before us once again . . . .[289]

In his dissent, Chief Justice Durham disagreed with the majority's conclusion that the legislature's silence in the statutory scheme precluded the court's creation of the *de facto* parenthood doctrine.[290] Citing the Washington Supreme Court's decision in *Carvin v. Britain* and the Wisconsin Supreme Court's decision in *Holtzman v. Knott*, the Chief Justice would have "recognize[d] common law standing for *de facto* parents."[291] He then articulated a new test to determine who qualifies as a *de facto* parent. He would require that the third party show by clear and convincing evidence that "(1) the legal parent intended to create a permanent parent-child relationship between the third party and the child, and (2) an actual parent-child relationship was formed."[292] The dissent explained that for purposes of *visitation*, but not necessarily custody, the test passed constitutional muster because the biological parent waived her constitutional rights by fostering a relationship between her biological child and the third party.[293]

III. PROTECTING FUNDAMENTAL PARENTAL RIGHTS IN THE FACE OF THIRD-PARTY CUSTODY OR VISITATION CLAIMS

A. Strict Scrutiny Should Be Applied

Utilizing any test other than strict scrutiny to resolve third-party parentage claims fails to protect a biological or adoptive parent's fundamental constitutional rights.[294] Although some states presently distinguish between visitation and custody cases for purposes of the

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[289] *Jones*, 2007 UT 20, ¶¶ 35–36, 154 P.3d at 817 (italics added).

[290] *Id.* ¶ 66, 154 P.3d at 826 (Durham, C.J., dissenting).

[291] *Id.* ¶¶ 63–66, 154 P.3d at 825–26 (italics added).

[292] *Id.* ¶ 68, 154 P.3d at 826.

[293] *Id.* ¶¶ 93, 95, 154 P.3d at 833–34. *But see infra* Part III (explaining why an implicit waiver does not pass constitutional muster).

[294] *See* C.E.W. v. D.E.W., 2004 ME 43, ¶ 14, 845 A.2d 1146, 1152 ("The question of by what standard a person is determined to be a *de facto* parent implicates . . . the fundamental liberty interests of natural and adoptive parents . . . ." (italics added)); *Jones*, 2007 UT 20, ¶ 33, 154 P.3d at 816 ("[I]n carving out a permanent role in the child's life for a surrogate parent, this court would necessarily subtract from the legal parent's right to direct the upbringing of her child and expose the child to inevitable conflict between the surrogate and the natural parents.").

parental rights analysis,[295] neither should be ordered over parental objections absent proof that the order serves a compelling governmental interest and the order is narrowly tailored to achieve that interest.[296] Unless a parent is *unfit*, however, there is no compelling governmental interest to undermine the parent's decision concerning visitation and custody.

Unfortunately, courts have failed to apply strict scrutiny. Some courts, in the context of third-party *visitation* claims, have adopted a harm standard that recognizes the fundamental liberty interest at stake, but falls short of strict scrutiny.[297] The Virginia Supreme Court, for

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[295] *See, e.g.*, Riepe v. Riepe, 91 P.3d 312, 317 n.3 (Ariz. Ct. App. 2004) (stating that standard for awarding custody is more onerous than for visitation); Robinson v. Ford-Robinson, 208 S.W.3d 140, 143 (Ark. 2005) (explaining that a more lenient standard applies when a stepparent seeks visitation rather than custody (citing Stamps v. Rawlins, 761 S.W.2d 933, 935 (Ark. 1988))); Middleton v. Johnson, 633 S.E.2d 162, 172–73 (S.C. Ct. App. 2006) (stating that in a dispute between a legal parent and a psychological parent, the "'presumptive rule'" is to give custody to the legal parent with visitation to the third party (citing V.C. v. M.J.B., 748 A.2d 539, 554 (N.J. 2000))).

[296] *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 80 (2000) (Thomas, J., concurring) (opining that the government "lack[ed] even a legitimate . . . interest . . . in second-guessing a fit parent's decision regarding visitation with third parties"); Clark v. Wade, 544 S.E.2d 99, 109 (Ga. 2001) (Sears, J., concurring) (stating that only the parental fitness test can be constitutionally applied when a third party seeks to remove a child from the care of his or her parents); Soohoo v. Johnson, 731 N.W.2d 815, 821 (Minn. 2007) (stating that strict scrutiny is proper standard to apply in third-party visitation cases, but then failing to properly apply the standard (citing *Troxel*, 530 U.S. at 65; Wisconsin v. Yoder, 406 U.S. 205, 220–21 (1972))); *In re* R.A., 891 A.2d 564, 576, 579 (N.H. 2005) (stating that strict scrutiny analysis applied to grandmother's petition for joint custody with child's parents but adopting a rule that required only that there be "clear and convincing evidence that the stepparent or grandparent should obtain custody of the child"); Charles v. Stehlik, 744 A.2d 1255, 1260 (Pa. 2000) (Nigro, J., dissenting) ("I believe that natural parents have a constitutionally protected paramount right to custody, care and control of their child whenever there is no evidence that the parents were unfit or neglected the child's welfare."); Carvin v. Britain, 122 P.3d 161, 180–81 (Wash. 2005) (en banc) (Johnson, J., dissenting) (assuming that it is in the child's best interests to continue a relationship with a nonparent over the objection of a parent violates the constitutional presumption that a parent acts in their child's best interest); Holtzman v. Knott, 533 N.W.2d 419, 443 (Wis. 1995) (Steinmetz, J., concurring in part & dissenting in part) ("[A]bsent narrowly defined, compelling circumstances, the legal parent of a child is constitutionally entitled to decide whether visitation by a nonparent is in the best interest of the child.").

[297] *See, e.g.*, Roth v. Weston, 789 A.2d 431, 450 (Conn. 2002) ("The petition must also contain specific, good faith allegations that denial of the visitation will cause real and significant harm to the child."); Beagle v. Beagle, 678 So. 2d 1271, 1276–77 (Fla. 1996) (holding that the state may not intrude upon a parent's fundamental right to raise their children without a finding that the child is threatened with harm); *Clark*, 544 S.E.2d at 100 ("[W]e construe the custody statute as requiring the third party to show by clear and convincing evidence that parental custody would harm the child in order to rebut the statutory presumption in favor of the parent."); *In re R.A.*, 891 A.2d at 580 ("Accordingly, to grant custody to a stepparent or a grandparent as a means to protect the child, it is necessary that there be a substantial psychological parent-child relationship between the child and the stepparent or grandparent, such that denial of custody to that person would

example, has held that a third party cannot constitutionally be awarded *visitation* over the objection of the biological parent absent proof by clear and convincing evidence that "'actual harm to the child's health or welfare'" will occur without the visitation.[298] Two subsequent Virginia Court of Appeals decisions highlight the difficult hurdle third parties must overcome to be declared a parent under Virginia's harm standard.

In *Griffin v. Griffin*, a woman gave birth to a boy on June 25, 1998.[299] At that time, her husband believed that the child was his.[300] Fifteen months later, the wife moved out of the home, taking her son with her.[301] The wife allowed weekly visitation for more than two months, when a court-ordered paternity test established that another man was the father.[302] Afterwards, the wife discontinued the weekly visits and her husband petitioned the court for visitation rights.[303] Applying the best interest standard, the domestic relations court awarded visitation to the husband.[304] It found that denying visitation would be "detrimental" to the child.[305] Applying the actual harm standard, the Court of Appeals reversed, explaining:

> Absent a showing of *actual harm* to the child, the constitutional liberty interests of fit parents "take precedence over the 'best interests' of the child." As a result, "a court may not impose its subjective notions of 'best interests of the child'" in derogation of parental rights protected by the Constitution. A "vague generalization about the positive influence" of non-parent visitation cannot satisfy the actual harm requirement. To be sure, in this context, *forced visitation "cannot be ordered absent compelling circumstances which suggest something near unfitness of custodial parents."*[306]

The court explained that while the evidence supported an inference that the "child would grieve the loss of the emotional attachment he has for his mother's estranged husband and 'could be' emotionally hurt if

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be 'emotionally harmful to the child.'" (quoting *In re* Diana P., 424 A.2d 178, 181 (N.H. 1980))); Hawk v. Hawk, 855 S.W.2d 573, 582 (Tenn. 1993) ("Absent some harm to the child, we find that the state lacks a sufficiently compelling justification for interfering with [a parent's] fundamental right.").

[298] Williams v. Williams, 501 S.E.2d 417, 418 (Va. 1998) (quoting Williams v. Williams, 485 S.E.2d 651, 654 (Va. Ct. App. 1997)).

[299] 581 S.E.2d 899, 900 (Va. Ct. App. 2003).

[300] *Id.*

[301] *Id.*

[302] *Id.*

[303] *Id.*

[304] *Id.* (court applied the best interest standard as codified in VA. CODE ANN. § 20–124.3 (2008)).

[305] *Id.* at 901.

[306] *Id.* at 903 (emphasis added) (citations omitted).

visitation with him ended . . . [that evidence] falls far short of satisfying [the] clear and convincing [standard] the actual-harm test [requires]."[307]

In *Surles v. Mayer*, the Virginia Court of Appeals held it could not award Surles visitation over the objections of the biological parents in the absence of actual harm, despite the fact that Surles acted as a surrogate father to the child for almost four years and had standing to petition for visitation.[308] In that case, Mayer, the biological mother of James, began dating Surles in November of 1998.[309] At that time, James was ten months old.[310] During the first few months of dating, Surles saw James two or three times a month, but by the summer of 1999, Surles began to have almost daily contact with James.[311] James's biological father, however, had almost no contact with him.[312] In February 2000, Mayer and Surles moved in together, separated soon afterward, and reunited in the middle of July.[313] One month later, Mayer learned that she was pregnant with Surles's child and in May 2001, she gave birth to Kayla.[314] Although they never married, Surles and Mayer continued their relationship until December 2002.[315]

After they separated, Mayer filed a petition for custody of Kayla.[316] On May 5, 2003, the domestic relations court entered a custody order granting the parties joint legal custody of Kayla.[317] The order awarded primary physical custody to Mayer and granted Surles the right to "reasonable and seasonable visitation" with Kayla.[318] Surles's last visit with James took place in November of 2003, when James was almost six years old.[319] When Mayer sought to move to Florida in late 2003, Surles not only filed a motion to modify the May 2003 custody order, but also petitioned for visitation with James.[320] In an expedited hearing, the juvenile and domestic relations district court denied his motion to modify

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[307] *Id.*

[308] 628 S.E.2d 563, 570–71, 574 (Va. Ct. App. 2006). With regard to standing, Surles qualified as "a person with legitimate interest." *Id.* at 570. A "person with legitimate interest" is broadly defined to include, but is not limited to "grandparents, stepparents, former stepparents, blood relatives and family members." VA. CODE. ANN. § 20-124.1 (2008).

[309] *Surles*, 628 S.E.2d at 567.

[310] *Id.* at 567–68.

[311] *Id.* at 568.

[312] *Id.*

[313] *Id.*

[314] *Id.*

[315] *Id.*

[316] *Id.*

[317] *Id.*

[318] *Id.*

[319] *Id.* at 567–68.

[320] *Id.* at 568.

the custody order.[321] After Mayer moved to Florida, the district court dismissed Surles's petition for visitation with James.[322] Surles appealed this decision to the circuit court, which subsequently granted Mayer's motion to strike Surles's petition, finding that Surles did not have standing.[323]

The Virginia Court of Appeals affirmed on other grounds. Contrary to the trial court's finding, the court of appeals held that "Surles—who acted as a surrogate father to James for almost four years"—had standing to petition for visitation.[324] Even though he had standing, the court held he was not entitled to that visitation because he "failed to present any evidence indicating that the absence of visitation would result in 'actual harm' to James."[325] The court explained the interplay between the required showing of harm and the best interest analysis:

> [W]hen fit parents object to non-parental visitation, a trial court should apply the best interests standard in determining visitation *only after it finds harm if visitation is not ordered* . . . . However, this Court has made clear that "[a] vague generalization about the positive influence of nonparent visitation cannot satisfy the actual-harm requirement.". . .
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> . . . .
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> Surles, as the party requesting visitation with James, bore the burden of producing clear and convincing evidence that James would suffer "actual harm" to his "health or welfare" in the absence of visitation. Because Surles failed to produce any evidence—much less clear and convincing evidence—that would support a finding of "actual harm" to James'[s] "health or welfare," we hold that the trial court did not err in denying the petition for visitation.[326]

The Virginia Supreme Court has explained why it is necessary to adhere to a strict harm analysis in order to protect the fundamental parental rights of biological parents:

> No doubt losing such a relationship would cause some measure of sadness and a sense of loss which, in theory, "could be" emotionally harmful. But that is not what we meant by "actual harm to the child's health or welfare." If it were, any nonparent who has developed an emotionally enduring relationship with another's child would satisfy

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[321] *Id.*

[322] *Id.* at 568–69.

[323] *Id.* at 569–70.

[324] *Id.* at 571, 573.

[325] *Id.* at 573.

[326] *Id.* (internal quotation marks and citations omitted) (quoting Griffin v. Griffin, 581 S.E.2d 899, 902–03 (Va. Ct. App. 2003)).

the actual-harm requirement. The constitutional rights of parents cannot be so easily undermined.[327]

Even Virginia's harm analysis, however, falls short of adequately protecting a parent's constitutional rights because it does not require a showing of unfitness. Unless the parent's conduct or choices harm the child, the state lacks the requisite compelling interest to interfere with the parent's choice concerning visitation or custody vis-à-vis third parties.[328]

The "exceptional circumstances" standard adopted by some courts reflects circular reasoning that ignores the high hurdle that must be overcome to show a compelling governmental interest. In a same-sex custody dispute, the New Jersey Supreme Court, in *V.C. v. M.J.B.*, explained the role of the exceptional circumstances test in third-party petitions for custody or visitation.[329] In that case, the biological parent argued that the court could not interfere with her constitutional rights absent a showing that she was unfit.[330] The court stated, however, that the "'exceptional circumstances' category . . . has been recognized as an alternative basis for a third party to seek custody and visitation of another person's child."[331] "Subsumed within that category is the subset known as the psychological parent cases in which a third party has stepped in to assume the role of the legal parent who has been unable or unwilling to undertake the obligations of parenthood."[332] The court then extended the category to include cases, such as the one before it, where the legal parent has *not* been unwilling or unable to undertake parenting obligations but has actively been parenting the child.[333] The court then adopted the *Holtzman v. Knott* test for *de facto* parenthood to establish when compelling circumstances exist. Thus, a person who is a *de facto* parent under the four-prong test falls within the exceptional circumstances category without any constitutional analysis of the legal

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[327] *Griffin*, 581 S.E.2d at 903 (citations omitted). The court in *Surles* relied on this passage. *Surles*, 628 S.E.2d at 573. In June 2008, the Virginia Court of Appeals applied the logic of *Williams*, *Griffin*, and *Surles* to a visitation dispute between a biological mother and her former same-sex partner. See Stadter v. Siperko, 661 S.E.2d 494, 496, 498 (Va. Ct. App. 2008), where the court affirmed the trial court's refusal to judicially create the *de facto* parent doctrine for Virginia in a case where two women in a lesbian relationship separated when the child was approximately eighteen months old. The court reaffirmed its requirement that harm be shown by clear and convincing evidence. *Id.* at 498.

[328] *See, e.g.*, Clark v. Wade, 544 S.E.2d 99, 109 (Ga. 2001) (Sears, J., concurring) ("[O]nly the traditional parental fitness test can be constitutionally applied" when a third party seeks custody).

[329] 748 A.2d 539 (N.J. 2000).

[330] *Id.* at 549.

[331] *Id.* (citing Watkins v. Nelson, 748 A.2d 558, 564–65 (N.J. 2000)).

[332] *Id.* (citing Sorentino v. Family & Children's Soc'y, 367 A.2d 1168 (N.J. 1976)).

[333] *Id.* at 550.

parent's rights or any showing of actual harm to the child or parental unfitness.[334]

To require a showing of unfitness before a court can interfere with the parent's choice is also consistent with a state's *parens patriae* authority. *Parens patriae* is a common law doctrine in which the state has the duty to protect society's weakest members from those who would do them harm.[335] The *parens patriae* power is only properly invoked when there is a threat of serious danger to the health or safety of a child.[336] That threat of serious harm to the child would satisfy the compelling governmental interest necessary to interfere with the parent's constitutional rights. Many courts, however, have invoked the state's *parens patriae* authority to substitute the court's views concerning third-party visitation or custody where the parents are undeniably fit.[337] In those cases, the *parens patrie* power is used to substitute the court's view of what is best for the child in place of the parent's determination.

In contrast to those courts that have adopted a harm standard, several courts have sidestepped the difficult constitutional question altogether. For example, rather than evaluating whether a third party's petition for parentage rights (including visitation) infringed the biological parent's rights (through application of a harm, strict scrutiny, or fitness standard), the courts simply declare the third party to be a parent. Those courts either ignore the constitutional inquiry altogether,[338] or, like the Washington and Vermont Supreme Courts,

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[334] *Id.* at 551 (citing Holtzman v. Knott, 533 N.W.2d 419, 421 (Wis. 1995)).

[335] *See supra* notes 139–140 and accompanying text (discussing *parens patriae* power).

[336] *Cf.* Wisconsin v. Yoder, 406 U.S. 205, 233–34 (1972) (explaining that *Prince v. Massachusetts* was limited to situations where "it appears that parental decisions will jeopardize the health or safety of the child"). *See generally supra* notes 24–33 and accompanying text (discussing *Prince*).

[337] *See Holtzman*, 533 N.W.2d at 441–42 (Day, J., concurring & dissenting) ("[T]he majority creates its law under the rubric of the court's longstanding equitable power to protect the best interest of a child. . . . Anything goes that a court may claim is in the best interest of the child!" (quotations omitted)); *see also* C.E.W. v. D.E.W., 2004 ME 43, ¶ 10, 845 A.2d 1146, 1149–50 (italics added) (quotations omitted) ("[N]ow familiar best interest of the child standard . . . stands as the cornerstone of *parens patriae* doctrine."); Carvin v. Britain, 122 P.3d 161, 171 (Wash. 2005) (en banc) ("Washington courts have historically exercised broad equitable powers in considering cases regarding the welfare of children."); Clifford K. v. Paul S. *ex rel* Z.B.S., 619 S.E.2d 138, 147 (W. Va. 2005) ("[T]he best interest of children is the court's primary concern." (quoting W. VA. CODE ANN. § 48-9-101(b) (LexisNexis 2004))).

[338] *See, e.g.*, Riepe v. Riepe, 91 P.3d 312, 317 n.3 (Ariz. Ct. App. 2004) (stating that a biological parent's rights are not necessarily violated by awarding custody or visitation rights to a person standing *in loco parentis*); S.F. v. M.D., 751 A.2d 9, 14 (Md. Ct. Spec. App. 2000) ("The issue before us is thus largely governed by family law, not constitutional law."); A.C. v. C.B., 829 P.2d 660, 664, 666 (N.M. Ct. App. 1992) (holding that a nonparent

take the additional step of summarily concluding that the constitutional rights of the biological parent and the third party are coextensive.[339] The error is manifest. If a parent's fundamental rights dictate that courts perform a constitutional inquiry before a third party can be awarded visitation, the constitutional analysis is even more vital to protect the biological parent's rights when a court considers treating a third party as a parent.[340]

Other courts have sidestepped the constitutional analysis by concluding that the biological parent implicitly waived her constitutional rights.[341] For example, one court explained that "[t]hrough consent, a

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may have rights over a parent's objection if the terms of a settlement agreement so dictate and it's in the best interests of the child); T.B. v. L.R.M., 874 A.2d 34, 38 (Pa. Super. Ct. 2005) ("'[C]ustody and visitation matters are to be decided on the basis of the judicially determined 'best interests of the child' standard, on a case-by-case basis, considering *all* factors which legitimately have an effect upon the child's physical, intellectual, moral, and spiritual well-being.'" (quoting Hicks v. Hicks, 868 A.2d 1245, 1247–48 (Pa. Super. Ct. 2005))).

[339] *See* Rubano v. DiCenzo, 759 A.2d 959, 973 (R.I. 2000) ("[R]ights of a child's biological parent do not always outweigh those of other parties asserting parental rights, let alone do they trump the child's best interests."); Miller-Jenkins v. Miller-Jenkins, 2006 VT 78, ¶ 58, 180 Vt. 441,466, 912 A.2d 951, 971 ("[Jenkins] was awarded visitation because she is a parent of [Isabella]. [Miller's] parental rights are not exclusive."); *Carvin*, 122 P.3d at 179 (contrasting the potential constitutional infringement of a third-party visitation with that in the case involving a visitation request by a *de facto* parent, which did not implicate the same constitutional interests).

[340] *See generally* Troxel v. Granville, 530 U.S. 57, 70 (2000) (deciding what weight to afford parental preferences with respect to third-party visitation in light of the underlying fundamental parental right to rear children). Some have argued that the United States Supreme Court decision in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), supports a state's right to determine parentage irrespective of biology. In that case, the Court considered the rights of the biological father of a child who was born during the mother's marriage to another man as a result of the biological father's adulterous affair with the woman. *Id.* at 113. The biological father had established a relationship with the child and had not been shown to be unfit. *Id.* at 121. The Supreme Court affirmed the constitutionality of California's parentage presumption, which, at the time, presumed the husband, not the biological father, to be the child's father. *Id.* at 129. That presumption could only be rebutted by the husband or wife, and then only in limited circumstances. *Id.* at 124. Applying that statute to the biological father, the United States Supreme Court affirmed California's decision that he lacked standing to challenge the presumption, specifically rejecting the father's parental rights argument. *Id.* at 125. That case, however, did not establish that the husband had an individual right to be treated as a *de facto* parent. Rather, the decision concerned the state's legitimate interest in protecting existing marriages against claims by a putative father who had engaged in an extramarital affair with the mother of the child. The decision reflects a choice to "preserve the integrity of the traditional family unit." *Id.* at 130. *See generally* Lynne Marie Kohm, *Marriage and the Intact Family: The Significance of* Michael H. v. Gerald D., 22 WHITTIER L. REV. 327 (2000) (discussing the emphasis the Court placed on protecting the intact family to reach its decision).

[341] *See, e.g.*, LaChapelle v. Mitten, 607 N.W.2d 151, 161 (Minn. Ct. App. 2000) ("By agreeing to share legal custody . . . [she] functionally 'abandoned her right to [sole legal] custody.'" (quoting Wallin v. Wallin, 187 N.W.2d 627, 629 (Minn. 1971))); V.C. v. M.J.B.,

biological or adoptive parent exercises his or her constitutional right of parental autonomy to allow another adult to develop a parent-like relationship with the child."[342] While consent is a relatively straightforward question when a parent expressly waives her parental rights, the difficult proof issues inherent in a determination of an implicit waiver should prevent any such determination.

The Utah Supreme Court explained the inherent deficiencies in a factual determination of implicit waiver:

> [A]dopting a *de facto* parent doctrine fails to provide an identifiable jurisdictional test that may be easily and uniformly applied in all cases. A *de facto* parent rule for standing, which rests upon ambiguous and fact-intensive inquiries into the surrogate parent's relationship with a child and the natural parent's intent in allowing or fostering such a relationship, does not fulfill the traditional gate-keeping function of rules of standing. Under such a doctrine, a party could try the merits of her case under the guise of an inquiry into standing, unduly burdening legal parents with litigation.[343]

Prior to *Miller-Jenkins v. Miller-Jenkins*, the Vermont Supreme Court echoed the same sentiments.[344]

Not only are there proof problems inherent in an implicit waiver standard, but it is inconsistent with United States Supreme Court

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748 A.2d 539, 552 (N.J. 2000) (explaining that if the biological parent wishes to maintain "a zone of autonomous privacy for herself and her child . . . she cannot invite a third party to function as a parent to her child and cannot cede over to that third party parental authority"); Mason v. Dwinnell, 660 S.E.2d 58, 69 (N.C. Ct. App. 2008) ("'[W]hen a legal parent invites a third party into a child's life, and that invitation alters a child's life by essentially providing him with another parent, the legal parent's rights to unilaterally sever that relationship are necessarily reduced.'" (alteration in original) (emphasis omitted) (quoting Middleton v. Johnson, 633 S.E.2d 162, 169 (S.C. Ct. App. 2006))); *cf.* Jones v. Barlow, 2007 UT 20, ¶ 73, 154 P.3d 808, 828 (Durham, C.J., dissenting) ("If the legal parent wishes to maintain that zone of privacy, he or she need only choose not to delegate parental authority or encourage the formation of a permanent, parent-like relationship between his or her child and another party."). *But see* Stadter v. Siperko, 661 S.E.2d 494, 500 (Va. Ct. App. 2008) (rejecting third parties' argument that the biological parent had partially relinquished her parental rights to her former same-sex partner).

[342] *Holtzman*, 533 N.W.2d at 436 n.40.

[343] *Jones*, 2007 UT 20, ¶ 31, 154 P.3d at 816 (italics added).

[344] *See* Titchenal v. Dexter, 693 A.2d 682, 687–88 (Vt. 1997) ("[J]urisdiction should not rest upon a test that in effect would examine the merits of visitation or custody petitions on a case-by-case basis. In reality, such a fact-based test would not be a threshold jurisdictional test, but rather would require a full-blown evidentiary hearing in most cases."). Ironically, while the vast majority of states have abolished common law marriage, the trend is to adopt a doctrine akin to common law parentage. One reason that states abolished common law marriage "was to secure reliable evidence by which the marriage could be proved to prevent fraud and litigation." John E. Wallace, *The Afterlife of the Meretricious Relationship Doctrine: Applying the Doctrine Post Mortem*, 29 SEATTLE U. L. REV. 243, 247 (2005) (citing *In re* McLauglin's Estate, 30 P. 651, 655 (Wash. 1892)). That same concern, as explained by the Utah Supreme Court in *Jones*, should keep courts from adopting *de facto* parenthood. *See Jones*, 2007 UT 20, ¶ 31, 154 P.3d at 816.

precedent concerning waiver of fundamental rights. "'[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights"[345] and "'do not presume acquiescence in the loss of fundamental rights.'"[346] Additionally, "[a] waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."[347] In the context of waiving the right to assistance of counsel, the Supreme Court has explained:

> The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution.[348]

As a result, an accused retains the right to counsel unless he knowingly waives that right. Embodied within the "knowingly" requirement is not just that he knows that he executed a waiver but that he appreciates the legal consequence of that waiver. As courts have stated, "'[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.'"[349] As the Virginia Supreme Court stated, the "[e]ssential elements of [waiver] are both knowledge of the facts basic to the exercise of the right and intent to relinquish that right."[350] In addition, since the constitutional right belongs to the individual, the right can only be waived by the individual—not by her attorney.[351] A similar standard is used concerning the right to confront an adverse witness,[352] the Sixth Amendment right to a jury trial,[353] the Miranda warnings,[354] and, as stated above, the Sixth Amendment right to counsel.[355]

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[345] Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (quoting Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937); Hodges v. Easton, 106 U.S. 408, 412 (1882)).

[346] *Id.* (quoting Ohio Bell Tel. Co. v. Pub. Utils. Comm'n, 301 U.S. 292, 307 (1937)).

[347] *Id.*

[348] *Id.* at 465.

[349] Travis v. Finley, 548 S.E.2d 906, 911 (Va. Ct. App. 2001) (quoting Brady v. United States, 397 U.S. 742, 748 (1970)); *see also* State v. Merrill, 584 A.2d 1129, 1131 (Vt. 1990) (explaining that in order to find a knowing waiver of right to counsel, the "defendant may need to be advised of the available options to protect his rights to counsel, the full nature of the charges against him, the range of allowable punishment, and the consequences of proceeding without the aid of an attorney" (citing State v. Quintin, 460 A.2d 458, 460–61 (Vt. 1983); State v. Ahearn, 403 A.2d 696, 702 (Vt. 1979))).

[350] Weidman v. Babcock, 400 S.E.2d 164, 167 (Va. 1991) (citing Fox v. Deese, 362 S.E.2d 699, 707 (Va. 1987)).

[351] *See Travis*, 548 S.E.2d at 911 (concluding that a letter from counsel indicating that discovery answers would be forthcoming cannot constitute a waiver of the client's privilege against self-incrimination).

[352] Brookhart v. Janis, 384 U.S. 1, 7–8 (1966).

[353] McCarthy v. United States, 394 U.S. 459, 466 (1969).

Waiving one's constitutional parental rights to have exclusive authority to make decisions concerning who visits with or has custody over one's child is, at a minimum, of similar weight to these other rights so as to require a similar waiver standard. Nevertheless, some courts have concluded that the biological mother implicitly waived her parental rights by consenting to the development of a relationship between her biological child and a third party.[356]

For example, the *de facto* parenthood test adopted by many courts asks whether the biological parent consented to and fostered a relationship between the third party and the child.[357] If so, then the third party can be declared a parent over the objections of the parent. Whether the parent consented to the third party's establishing a relationship with the child, however, is *not* the relevant constitutional inquiry. While that question focuses on whether the biological parent permitted a third party to become involved in the life of the parent's child, it does not provide any insight into the relevant legal inquiry of whether the biological parent was fully aware of her fundamental parental rights and knowingly intended to relinquish those rights to a third party.[358] Stated differently, although the parent consented to her child forming a relationship with a third party a court cannot necessarily infer that she knowingly, and irrevocably, waived her constitutional right to (1) be

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[354] Moran v. Burbine, 475 U.S. 412, 421 (1986).

[355] Patterson v. Illinois, 487 U.S. 285, 292 (1988).

[356] *See supra* note 341 (citing cases that have found implicit waiver).

[357] *See, e.g.*, Holtzman v. Knott, 533 N.W.2d 419, 421 (Wis. 1995); *see also supra* note 132 (identifying decisions that have adopted the *de facto* parent doctrine).

[358] The American Law Institute's PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.03 suffers from the same deficiency. It defines a *de facto* parent as:

> [A]n individual other than a legal parent or a parent by estoppel who, for a significant period of time not less than two years,
> (i) lived with the child and,
> (ii) for reasons primarily other than financial compensation, and *with the agreement of a legal parent to form a parent-child relationship*, or as a result of a complete failure or inability of any legal parent to perform caretaking functions,
> (A) regularly performed a majority of the caretaking functions for the child, or
> (B) regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived.

FAMILY DISSOLUTION, *supra* note 102 (emphasis added). *Cf.* A.H. v. M.P., 857 N.E.2d 1061, 1074 (Mass. 2006) ("An express or implied agreement to have or raise a child may be relevant to the parties' intentions . . . [b]ut evidence of an agreement is not and cannot be dispositive on the issue whether the plaintiff is the child's legal parent.").

treated as the child's sole parent, or (2) make exclusive determinations concerning custody and visitation concerning her child.[359]

Nor is the constitutional infringement somehow lessened when a court grants only visitation, rather than custody. In either situation, the court infringes upon the legal parent's constitutional right to decide with whom her child associates. The only difference between a custody and visitation award is the degree of the constitutional infringement. The Utah Supreme Court explained that treating someone as a parent for visitation purposes necessarily impacts the parental rights of the biological parent: "[I]n carving out a permanent role in the child's life for a surrogate parent, this court would necessarily subtract from the legal parent's right to direct the upbringing of her child and expose the child to inevitable conflict between the surrogate and the natural parents."[360]

That is particularly true where the court grants visitation because the third party is treated as a parent rather than pursuant to a third-party visitation statute. As in any custody dispute, the "parent" awarded visitation can seek modification of the order at a later time, requesting a change in primary custody.

Nor does the fact that the biological parent is a single parent justify deprivation of the biological mother's constitutional rights.[361] Both the California and Vermont Supreme Courts, in declaring a third party to be a parent, have cited the fact that unless the court treats the third party as a parent the child will be left with only one parent, suggesting that single parents have less constitutional rights to parent their children.[362] One Wisconsin Supreme Court judge highlighted the specious nature of that argument:

> Contrary to the majority opinion, the child here does not need the "protection of the courts." His mother is the one who should have had

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[359] *See, e.g.*, Stadter v. Siperko, 661 S.E.2d 494, 500 (Va. Ct. App. 2008) (rejecting argument that the biological mother partially relinquished her parental rights to permit the court to grant third-party visitation over parental objection).

[360] Jones v. Barlow, 2007 UT 20, ¶ 33, 154 P.3d. 808, 816. That conflict is magnified in these cases when the biological parent has left the homosexual lifestyle and is seeking to raise her child consistent with the Biblical understanding that the parent's former same-sex relationship was a sin. *Cf.* Witt, *supra* note 196 (providing detailed history of the factual and legal issues involved in *Miller-Jenkins v. Miller-Jenkins*).

[361] *See generally* Troxel v. Granville, 530 U.S. 57, 65–67 (2000) (discussing fundamental parental rights in the context of "a parent's decision" to deny third-party visitation).

[362] Elisa B. v. Superior Court, 117 P.3d 660, 669 (Cal. 2005) ("The twins in the present case have no father because they were conceived by means of artificial insemination using an anonymous semen donor. Rebutting the presumption that Elisa is the twin's parent would leave them with only one parent and would deprive them of the support of their second parent."); Miller-Jenkins v. Miller-Jenkins, 2006 VT 78, ¶ 56, 180 Vt. 441,465, 912 A.2d 951, 970 ("[T]here is no other claimant to the status of parent, and, as a result, a negative decision would leave [Isabella] with only one parent.").

> the courts protecting her right to raise her own child and to determine what is in her child's best interests . . . . But, this child is in no "societal drift," Dickensian or otherwise. This child is no "Oliver Twist"—he is not an orphan, he has a mother. Thousands and thousands of single parents, widows and widowers from time immemorial have raised children and made the choices parents have always had to make that are part of raising, supporting and nurturing their children, including deciding with whom their child shall associate. And, they have done so without government interference. This mother has a constitutional right to do the same.[363]

A state's preference that a child be raised in a two-parent home is not sufficiently strong to deprive a parent of her constitutional rights.

B. Courts Should Respect the Separation of Powers

In performing strict scrutiny, courts must also resist the temptation to take matters into their own hands. Courts must remember that they are called to decide what the law is, not to make law. Several courts have expressly commented on the proper role of the judiciary in the context of parentage determinations.[364] For example, New York appellate courts have repeatedly had the opportunity to expand the legal definition of parent but have, each time, refused to do so, recognizing the unique role of the legislature to make such a public policy determination. For example, in *Alison D. v. Virginia M.*, the New York Court of Appeals, the highest court in New York, addressed "whether petitioner, a biological stranger to a child who is properly in the custody of his biological mother, has standing to seek visitation with the child."[365] Petitioner and

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[363] Holtzman v. Knott, 533 N.W.2d 419, 441 (Wis. 1995) (Day, J., concurring and dissenting); *see also Troxel*, 530 U.S. at 100–01 (Kennedy, J., dissenting).

[364] Although it raises an issue that is more appropriately the subject of another law review article, many courts and scholars maintain, in error, that the judiciary has the authority to create new law. *See, e.g.*, King v. S.B., 837 N.E.2d 965, 967 (Ind. 2005) (holding that because courts have authority to determine whether to place a child with a third party, it "necessarily includes the authority to determine whether such a person has the rights and obligations of a parent"); Janis C. v. Christine T., 742 N.Y.S.2d 381, 383 (N.Y. App. Div. 2002) ("Any extension of visitation rights to a same sex domestic partner who claims to be a 'parent by estoppel,' '*de facto parent*,' or 'psychological parent' must come from the New York State Legislature or the Court of Appeals." (italics added)). *But see* A.B. v. H.L., 723 N.E.2d 316, 321 (Ill. App. Ct. 1999) ("Who shall have standing to petition for visitation with a minor is an issue of complex social significance. Such an issue demands a comprehensive legislative solution."); D.G. v. D.M.K., 1996 SD 144, ¶ 41, 557 N.W.2d 235, 243 ("It is up to the legislature to decide whether the definition of parent should be modified."); Wash. State Bar Ass'n. v. Washington, 890 P.2d 1047, 1050 (Wash. 1995) (en banc) ("'American courts are constantly wary not to trench upon the prerogatives of other departments of government or to arrogate to themselves any undue powers, lest they disturb the balance of power; and this principle has contributed greatly to the success of the American system of government and to the strength of the judiciary itself.'" (quoting Wash. State Motorcycle Dealers Ass'n v. Washington, 763 P.2d 442, 446 (Wash. 1988))).

[365] 572 N.E.2d 27, 28 (N.Y. 1991) (per curiam).

Respondent, two women, were in a relationship until the child was two years and four months old.[366] For three years, the women agreed to a visitation schedule that permitted the former same-sex partner to visit with the child a few times a week.[367] The biological mother ended all contact between the former partner and the child after the former partner moved to Ireland.[368] At that time, the child was approximately six years old.[369] The former partner claimed that she was a *de facto* parent or, alternatively, that she should be treated as a parent by estoppel.[370] The court held:

> We decline petitioner's invitation to read the term parent in [S]ection 70 to include categories of nonparents who have developed a relationship with a child or who have had prior relationships with a child's parents and who wish to continue visitation with the child. While one may dispute in an individual case whether it would be beneficial to a child to have continued contact with a nonparent, the [l]egislature did not in [S]ection 70 give such nonparent the opportunity to compel a fit parent to allow them to do so.[371]

More recently, the Utah Supreme Court explained the limited authority of courts to make public policy determinations concerning parentage and visitation: "While the distinction between applying the law to unique situations and engaging in legislation is not always clear, by asking us to recognize a new class of parents, . . . this court [is invited] to overstep its bounds and invade the purview of the legislature."[372]

Two justices of the Wisconsin Supreme Court, dissenting in the seminal case that established a four-part test to determine when a third party is a *de facto* parent, echoed the sentiments of the New York Court of Appeals:

> There is no justification for a court to seek to impose in the name of the law, common or equitable, its own ideas of social policy and a new found theory of family law which creates new "rights" for those who have no legally binding relationship to the child (for instance, no duty of support). This is especially true when doing so requires overruling its own cases interpreting controlling statutory authority. Changes in

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[366] *Id.*

[367] *Id.*

[368] *Id.*

[369] *See id.*

[370] *Id.* at 29.

[371] *Id.* (citation omitted).

[372] Jones v. Barlow, 2007 UT 20 ¶¶ 35, 154 P.3d 808, 817; *see also* Clifford K. v. Paul S. *ex rel* Z.B.S., 619 S.E.2d 138, 161 (W. Va. 2005) (Maynard, J., dissenting) ("Although this Court has previously acknowledged that it 'does not sit as a superlegislature' . . . the majority does so in this case under the guise of doing what is in the best interests of Z.B.S. . . . It is improper for this Court to make new law in this area." (quoting Boyd v. Merritt, 354 S.E.2d 106, 108 (W. Va. 1986))).

> family law as drastic as those created here should only be done by the legislature following full hearings and debate by ninety-nine Representatives, thirty-three Senators and the Governor. The majority opinion is a bad example of legislation by judicial fiat.[373]

Another justice of that court also explained that

> [a] state court functions at its lowest ebb of legitimacy when it not only ignores constitutional mandates, but also legislates from the bench, usurping power from the appropriate legislative body and forcing the moral views of a small, relatively unaccountable group of judges upon all those living in the state. Sadly, the majority opinion in this case provides an illustration of a court at its lowest ebb of legitimacy.[374]

CONCLUSION

Under the guise of changing the law to reflect evolving social mores, some courts have adopted a view of parental rights that protects a biological mother's liberty interest in private property more than her interest in her children.[375] Whereas one can acquire an ownership interest in real property by prescriptive easement or adverse possession only after he has had open, continuous use of the property for a prescribed number of years, one can acquire fundamental parental rights in another's child without any requirement that the third party live with and raise the child for any set period of time.[376] While some courts grant a third party parental status only after she has been in a parental role for a length of time "sufficient to have established with the child a bonded, dependent relationship, parental in nature,"[377] that standard

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[373] Holtzman v. Knott, 533 N.W.2d 419, 442 (Day, J., concurring & dissenting) (concurring with the part of the opinion that dismissed the former partner's custody petition but dissenting from the part of the opinion allowing her to seek visitation).

[374] *Id.* (Steinmetz, J., concurring in part & dissenting in part); *see also* FEDERALIST NO. 78, *supra* note 288.

[375] *See* Laspina-Williams v. Laspina-Williams, 742 A.2d 840, 843 (Conn. Super. Ct. 1999) ("[F]or purposes of third party custody and visitation determinations, [t]raditional models of the nuclear family have come, in recent years, to be replaced by various configurations . . . and we should not assume that the welfare of children is best served by a narrow definition of those whom we permit to continue to manifest their deep concern for a child's growth and development." (quoting Doe v. Doe, 710 A.2d 1297, 1317 (Conn. 1998))); Chambers v. Chambers, No. CN00-09493, 2002 WL 1940145, at *4 (Del. Fam. Ct. Feb. 5, 2002) ("[T]he societal definition of 'family' and 'parent' has dramatically changed . . . . As such, to the extent the passage of time has created a latent ambiguity in the definition of 'parent' in the support statute, the court must resolve the ambiguity."). *See generally* Lynn D. Wardle, *Parenthood and the Limits of Adult Autonomy*, 24 ST. LOUIS U. PUB. L. REV. 169 (2005) (discussing implications of adopting alternative family structures).

[376] While not a perfect analogy, insofar as title acquired by adverse possession requires hostile possession of the property (that is, without owner's consent), whereas these custody disputes involve some aspect of initial consent, the analogy hopefully makes the point that courts, for the most part, fail to give proper attention to the deprivation of parental rights necessarily involved in granting a legal stranger parental rights.

[377] Carvin v. Britain, 122 P.3d 161, 176 (Wash. 2005) (en banc).

still permits a third party to gain constitutional interests in parenting another person's child in much shorter time than that person could have gained a protected interest in another's real property. Worse still, other courts, including Vermont, have adopted a standard that does not require the third party to live with the child for any period of time whatsoever.[378] Even college roommates, who share furniture, music collections, and appliances during their time together know that upon graduation, the items belong to the original owner despite the four year period of continuous use of another's property. Yet, the concept seems lost on some members of the judiciary and the third parties seeking to become a parent to another's child.

The intent to share parenting responsibilities for a child and time spent acting as a parent, coupled with the third party's desire to be a parent and time spent acting as a parent, does not make the third party a parent to another's child. Regardless of the wisdom of the biological parent's decision to involve a third party in the child's life, parents do not abdicate their constitutional rights to raise their children to the exclusion of third parties. The government lacks any authority, even under the guise of what is best for the child and society, to take all, or a part, of a parent's interest in her child and give it to a legal stranger pursuant to some form of eminent domain.

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[378] The family court's test would confer parentage rights on a third party "where a legally connected couple utilizes artificial insemination to have a family[] [because] parental rights and obligations are determined by facts showing intent to bring a child into the world and raise the child as one's own as part of a family unit, not by biology." Parentage Order, *supra* note 12, at 11.

THE FIFTH AMENDMENT DISCLOSURE OBLIGATIONS OF GOVERNMENT EMPLOYERS WHEN INTERROGATING PUBLIC EMPLOYEES

*Lindsay Niehaus**

INTRODUCTION

Imagine you are a police officer working for your local police department. One night, while you are on patrol with your partner, you stop at the local doughnut shop. There, you witness your partner not only engage in conversation with a well-known drug dealer in the area named Smokey, but also accept an unmarked envelope from him. When your partner returns, he hands you the envelope and asks if you can keep it in your locker for a few days. Despite the suspicious circumstances, you agree and store the envelope.

A few days later, you begin to hear rumors that a few of your fellow officers have been taking bribes from local drug dealers in return for allowing those dealers to pass freely through the city. In response to these allegations, your department opens an investigation and interrogates officers one at a time. When it is your turn to be interrogated, you fear that you will be disciplined because you are still holding the envelope for your partner. Upon entering the interrogation room, the only statement your employer makes is that you must talk or be fired. Unaware that this situation grants you automatic immunity from any self-incriminating statements, you fear criminal prosecution and instinctively tell your employer that you are going to exercise your right to remain silent. You are fired on the spot.

Although the Supreme Court has held that public employees must be granted immunity from self-incriminating statements when presented with a choice between answering the employer's questions or facing disciplinary action,[1] the Court has failed to clarify whether the employer must also give the employees notice of their Fifth Amendment rights and immunities before asking them potentially incriminating questions. On this issue, the federal circuit courts are split. The United States Court of Appeals for the Fifth,[2] Eighth,[3] and Eleventh[4] Circuits have adopted the

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[1] Garrity v. New Jersey, 385 U.S. 493, 500 (1967).

[2] Gulden v. McCorkle, 680 F.2d 1070 (5th Cir. 1982).

[3] Hill v. Johnson, 160 F.3d 469 (8th Cir. 1998).

[4] Hester v. Milledgeville, 777 F.2d 1492 (11th Cir. 1985).

"no affirmative tender" approach, holding that the government is under no affirmative duty to disclose to employees their rights and immunities prior to questioning. Conversely, the Second,[5] Seventh,[6] and Federal[7] Circuits have adopted the "duty to advise" approach, holding that a government employer is under a duty to advise its employees of their rights and immunities under the Fifth Amendment prior to asking them potentially incriminating questions.

This Article argues that courts should adopt the "duty to advise" approach to a government employer's disclosure obligations. Part I describes the evolution of the Supreme Court's decisions regarding the rights and immunities of public employees under the Fifth Amendment. Part II presents the circuit split on the issue of whether the government must give employees notice of their rights and immunities under the Fifth Amendment before asking them potentially incriminating questions. Part III analyzes the arguments on both sides of the issue and argues that the "duty to advise" approach is preferable for four reasons. First, it eliminates the potential for public employees to unknowingly subject themselves to discipline while exercising their constitutional privilege against self-incrimination. Second, it eliminates the potential that the government will use its position of power to manipulate or exploit public employees. Third, the duty imposed on the government in comparison to the protection afforded to the employees would be inherently low. Fourth, this approach facilitates the government's fact-finding process by giving the employees an incentive for honesty.

I. BACKGROUND: PUBLIC EMPLOYEE RIGHTS AND IMMUNITIES

A. The Fifth Amendment Privilege Against Self-Incrimination

The Fifth Amendment of the United States Constitution states in pertinent part that "[n]o person . . . shall be compelled . . . to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."[8] The broad scope of the Fifth Amendment affords a United States citizen two important rights.[9] First, it "protects the individual against being involuntarily called as a witness against himself in a criminal prosecution."[10] Second, it privileges the individual "not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate

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[5] Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation of New York, 426 F.2d 619 (2d Cir. 1970).

[6] Atwell v. Lisle Park Dist., 286 F.3d 987 (7th Cir. 2002).

[7] Modrowski v. Dep't of Veterans Affairs, 252 F.3d 1344 (Fed. Cir. 2001).

[8] U.S. CONST. amend. V.

[9] Lefkowitz v. Turley, 414 U.S. 70, 77 (1973).

[10] *Id.*

him in future criminal proceedings."[11] Basically, the Fifth Amendment affords a United States citizen protection from being compelled to make self-incriminating statements unless first granted immunity from further prosecution.[12] Thus, any potentially self-incriminating statement may be used against a citizen only if it is made voluntarily, or without the improper pressures of coercion.

In the 1966 case *Miranda v. Arizona*, the Supreme Court reinforced this concept and held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[13] More specifically, any persons subject to custodial interrogation must first be given a *Miranda* warning, which includes being advised that they have a right to remain silent, that their statements can be used as evidence against them, and that they have a right to an attorney.[14] The Court further held that these rights may be waived only if the waiver is made "voluntarily, knowingly and intelligently."[15] Prior to custodial interrogation, law enforcement officers must first give a *Miranda* warning to ensure that citizens are informed of their rights and immunities under the Fifth Amendment.

B. The Basic Privilege Against Self-Incrimination in the Public Employment Context Under Garrity v. New Jersey *and* Spavek v. Klein

Although the Supreme Court clarified the scope of the Fifth Amendment in the typical criminal law context in *Miranda*, the extent of the Fifth Amendment rights and immunities of public employees when asked potentially incriminating questions remained unclear. In 1967, however, the Supreme Court passed down two opinions on the issue of whether the government may use the threat of discharge to secure incriminatory evidence against an employee.

The Supreme Court first addressed this issue in *Garrity v. New Jersey*.[16] In *Garrity*, the police department coerced officers into answering self-incriminating questions by threatening to fire them for refusal to answer.[17] Consequently, the officers answered the questions, and some of the answers were used in subsequent prosecutions against

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[11] *Id.*

[12] *See* Kastigar v. United States, 406 U.S. 441 (1972).

[13] 384 U.S. 436, 444 (1966).

[14] *Id.*

[15] *Id.*

[16] 385 U.S. 493 (1967).

[17] *Id.* at 494.

them.[18] As such, the officers were presented with the choice between self-incrimination and termination from employment.

The Court stated that the choice presented to the employees amounted to coercion because "[t]he option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent."[19] Like the circumstances in *Miranda*, the practice of offering the option of either losing one's job or making self-incriminating statements is "'likely to exert such pressure upon an individual as to disable him from making a free and rational choice.'"[20] Thus, the *Garrity* decision protects public employees from self-incrimination by prohibiting, in subsequent criminal proceedings, the use of statements obtained under threat of removal from employment.[21]

On the same day the Supreme Court decided *Garrity*, it also decided *Spevack v. Klein*, in which Justice Fortas's concurring opinion noted that the Court has never adhered to the proposition that public employees were immune from being discharged for refusal to testify on conduct relative to their employment.[22] Instead, he stated that the decision in *Garrity* only rendered the dismissal of a public employee for refusal to testify improper when the government sought to use the testimony in subsequent criminal proceedings.[23] Thus, where public employees are forced to answer potentially incriminating questions under the threat of being fired, such statements cannot lawfully be used against them in subsequent criminal proceedings.

C. Gardner v. Broderick: *The Ban on Requiring Waiver of Immunity*

Just over a year later in 1968, the Supreme Court decided *Gardner v. Broderick*, which confronted whether public employees could be fired for refusing to waive their Fifth Amendment privilege against self-incrimination.[24] The Court reviewed the *Garrity* and *Spevack* decisions and held that if public employees refuse to answer questions "specifically, directly, and narrowly relating to the performance of [their] official duties, without being required to waive [their] immunity" in subsequent criminal proceedings, then the privilege against self-incrimination would not bar dismissal from employment.[25] Alternatively, where public employees are discharged from office not for failure to

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[18] *Id.* at 495.

[19] *Id.* at 497.

[20] *Id.* (quoting Miranda v, Arizona, 384 U.S. 436, 464–65 (1966)).

[21] *Id.* at 500.

[22] 385 U.S. 511, 519–20 (1967) (Fortas, J., concurring).

[23] *Id.*

[24] 392 U.S. 273 (1968).

[25] *Id.* at 278 (footnote omitted).

answer relevant questions about their duties as employees, but for refusing to waive a constitutional right, such discharge is improper because it violates the rights and immunities afforded to citizens under the Fifth Amendment.[26] Therefore, forcing public employees to choose between job loss and self-incrimination is unconstitutional, regardless of its effectiveness.[27]

D. Lefkowitz v. Turley *and* Lefkowitz v. Cunningham: *The Limited Expansion of Public Employee Rights and Immunities*

Finally, the two most recent Supreme Court cases relating to public employee Fifth Amendment rights and immunities were decided in the 1970s. The first case, *Lefkowitz v. Turley*, addressed the issue of whether a public contractor is afforded the same rights and immunities as a public employee when presented with the choice between either waiving Fifth Amendment rights against self-incrimination or losing contracts with the government.[28] The Court held that such a choice is indeed unconstitutional and reasoned that there was no difference between the threat of job loss to a public employee and the threat of lost contracts to a contractor engaged in business with the government.[29] Essentially, the Court found that such a threat amounted to coercion because the choice presented to the contractors threatened their livelihood.[30] As a result, any incriminating statements elicited as a result of that coercion could not be used against the contractors in any subsequent criminal proceeding, regardless of any governmental need for such statements.[31]

The Supreme Court further expanded the concept of public employee immunity in *Lefkowitz v. Cunningham* when it addressed the issue of whether government employers may sanction or discipline public employees for refusing to waive their constitutional privilege against self-incrimination as long as the sanctions do not have economic ramifications.[32] The Court specifically addressed whether a political party officer could be sanctioned and prevented from holding further office for refusing to waive the Fifth Amendment protection against self-incrimination.[33] The Court reiterated that its precedent settled that when public employees are sanctioned or disciplined for refusing to waive their privilege against compelled self-incrimination without being

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[26] *Id.* at 278–79.

[27] *Id.*

[28] 414 U.S. 70 (1973).

[29] *Id.* at 83.

[30] *Id.*

[31] *Id.* at 85.

[32] 431 U.S. 801 (1977).

[33] *Id.* at 802.

tendered immunity from those statements, such practices amount to coercion and violate the Fifth Amendment.[34] Therefore, unless public employees are immunized from subsequent criminal prosecution, any statements procured through threats of discipline, sanction, or loss of employment for failure to waive the right of self-incrimination, amount to coercion and are unconstitutional.

II. THE NOTICE PROBLEM

Although the Supreme Court made it clear that public employees cannot be constitutionally coerced to waive their privilege against self-incrimination without being granted immunity from subsequent criminal prosecution, the Court has been less clear as to whether a government employer has a duty to provide employees with notice of their rights and immunities. To date, six federal circuit courts have addressed the issue of whether a government employer must give public employees notice of their rights and immunities prior to asking potentially incriminating questions. The United States Court of Appeals for the Fifth,[35] Eighth,[36] and Eleventh[37] Circuits have adopted the "no affirmative tender" approach and held that there is no notice requirement because the right to immunity attaches automatically when public employees are compelled to waive their right to silence.[38] This approach emphasizes that it is the threat of discipline or job loss that creates the constitutional protection of immunity and bars the answers from being used in subsequent proceedings, not the affirmative notice of immunity.[39]

Conversely, the United States Court of Appeals for the Second,[40] Seventh,[41] and Federal[42] Circuits have adopted the "duty to advise" approach and held that before asking potentially incriminating questions, government employers must advise public employees that they may not refuse to answer the questions under the guise that the questions may be incriminating because they are entitled to immunity from subsequent prosecution.[43] This approach emphasizes that the disclosure obligation is essential because it protects public employees

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34 *Id.* at 806.

35 Gulden v. McCorkle, 680 F.2d 1070 (5th Cir. 1982).

36 Hill v. Johnson, 160 F.3d 469 (8th Cir. 1998).

37 Hester v. Milledgeville, 777 F.2d 1492 (11th Cir. 1985).

38 *See, e.g.*, *id.* at 1496.

39 *Gulden*, 680 F.2d at 1075.

40 Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation of New York, 426 F.2d 619 (2d Cir. 1970).

41 Atwell v. Lisle Park Dist., 286 F.3d 987 (7th Cir. 2002).

42 Modrowski v. Dep't of Veterans Affairs, 252 F.3d 1344 (Fed. Cir. 2001).

43 *See, e.g.*, *Atwell*, 286 F.3d at 990.

who may not be well versed with the complex exceptions to the *Garrity* decision.[44]

A. The "No Affirmative Tender" Approach

As stated above, the Fifth, Eighth, and Eleventh Circuits adopt the "no affirmative tender" approach, which rejects a requirement for an affirmative tender of immunity to public employees prior to requiring them to answer potentially incriminating questions. In the Fifth Circuit case *Gulden v. McCorkle*, the Dallas Public Works Department ordered its employees, including Charles Gulden and Richard Sage, to take polygraph examinations in connection with an investigation about a bomb threat.[45] In the process of conducting the mandatory polygraph tests, the Department required employees to sign two waivers, one of which stated that the employees were not being promised immunity in an effort to induce them to consent to the examination.[46] When brought in for the examination, however, Gulden and Sage refused to either sign the waiver or submit to the polygraph; as a result they were fired.[47]

Gulden and Sage sued in the District Court for the Northern District of Texas.[48] After a bench trial, the district court found for the Department and held that Gulden and Sage's Fifth Amendment rights against self-incrimination were not violated because the "polygraph exam[inations] were purely job-related" and the waiver sought only to obtain consent to take the polygraph.[49] The court explained that the Fifth Amendment does not require an affirmative tender of immunity, but only requires that employees be advised that evidence obtained as a result of the polygraph may be used against them, and that they may not be dismissed for refusing to waive their right against self-incrimination.[50]

The Court of Appeals for the Fifth Circuit affirmed the district court's decision and held that government employers violate the Fifth Amendment rights of public employees only when the employees are coerced to answer potentially incriminating questions and required to waive their right to immunity.[51] As such, a government employer's actions are unconstitutional if an employee's discharge is predicated on his or her refusal to waive immunity.[52] According to the Fifth Circuit,

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[44] *Id.*

[45] 680 F.2d 1070, 1071 (5th Cir. 1982).

[46] *Id.* at 1072 n.4.

[47] *Id.*

[48] *Id.* at 1071–72.

[49] *Id.* at 1073.

[50] *Id.*

[51] *Id.* at 1074.

[52] *Id.*

there is no constitutional violation where an employee's discharge is based on his refusal to answer where there is no demand by the employer to relinquish the constitutional right to immunity.[53] The court further held that there was no requirement for an affirmative tender of immunity because an explicit coercive demand by the employer that employees waive immunity or lose their jobs is what creates the constitutional problem, not the fact that the employees were never warned.[54] Thus, the Fifth Circuit rejected the notion that government employers should be required to give an affirmative tender of immunity to public employees when asking potentially incriminating questions because immunity attaches automatically as a result of the compulsion, not because the employees were notified of their rights.[55]

Like the Fifth Circuit, the Eighth Circuit has also adopted the "no affirmative tender" approach, which supports automatic attachment of immunity to the public employee. The plaintiff in *Hill v. Johnson*, J.D. Hill, was a supervising officer at the Pulaski County Sheriff's office.[56] After discovering that a photograph of a beaten detainee was missing, the sheriff tried to question Hill about the incident and subject him to a polygraph examination.[57] Hill refused to answer the questions and failed to appear for the polygraph examination.[58] Subsequently, the sheriff terminated Hill's employment, which prompted Hill to file suit in the District Court for the Eastern District of Arkansas against the sheriff and other office members for violating his Fifth Amendment rights.[59] Ultimately, the district court denied the sheriff's motion for summary judgment, which had alleged that no constitutional or statutory right was violated.[60]

On appeal, the Eighth Circuit reversed the district court's denial of summary judgment, holding that Hill failed to allege a "violation of clearly established Fifth Amendment rights of which a reasonable person would have known."[61] The court reasoned that because there is a substantial "'public interest in securing from public employees an accounting of their public trust,'" a government employer does not violate a public employee's constitutional rights as long as the employer does not demand that the employee relinquish his constitutional

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[53] *Id.*

[54] *Id.* at 1075.

[55] *Id.*

[56] 160 F.3d 469, 470 (8th Cir. 1998).

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.* at 471.

immunity from prosecution.[62] Thus, so long as the employer does not require the employee to waive immunity, it can compel the employee to either testify about the performance of official duties or forfeit employment.[63]

The Eighth Circuit specifically rejected an employer's affirmative duty to offer immunity. Citing *Gulden*, the court found that even if employees are not specifically informed that their answers cannot be used against them in subsequent criminal prosecution, "the mere failure affirmatively to offer immunity is not an impermissible attempt to compel a waiver of immunity."[64] According to the Eighth Circuit, regardless of whether public employees are given notice of their rights and immunities, a government employer's actions are constitutional as long as the employees are not expressly asked to waive immunity rights on penalty of job loss and any statements procured are not used in subsequent prosecution.

Like the Fifth and Eighth Circuits, the Eleventh Circuit has also adopted the "no affirmative tender" approach. In *Hester v. Milledgeville*, Freddie Hester brought an action in the United States District Court for the Middle District of Georgia against the City of Milledgeville, challenging the constitutionality of the City's practice of requiring firefighters to submit to polygraph examinations.[65] When the polygraph testing was implemented, the firefighters were required to sign one of four forms prior to taking the examination.[66] In the first form, the employee consented to the use of the result in a subsequent judicial proceeding or administrative hearing.[67] In the second form, the employee waived all state and federal constitutional rights in connection with the polygraph examination.[68] In the third form, the employee retained all constitutional rights and granted the employee permission to object to incriminating questions.[69] In the fourth form, the employee refused to submit to the polygraph examination.[70] Although Hester was never tested because the City agreed to postpone testing until the legality of the procedure was determined in court, he filed suit challenging the constitutionality of the requirement.[71] The district court ruled in Hester's favor and issued a permanent injunction against the polygraph

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[62] *Id.* (quoting Lefkowitz v. Cunningham, 431 U.S. 801, 806 (1977)).

[63] *Id.*

[64] *Id.* (citation omitted).

[65] 777 F.2d 1492, 1493 (11th Cir. 1985).

[66] *Id.* at 1494.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

testing on the premise that the waiver system had the potential to violate the privilege against self-incrimination, as well as due process and privacy rights.[72]

On appeal, the Eleventh Circuit affirmed the decision of the district court and upheld the injunction against the polygraph testing.[73] The court reasoned that because the City had no authority to require at least two of the waiver options, Hester and the other public employees would be in an inherently coercive situation.[74] The court noted that if it is unconstitutional for a government employer to compel a public employee to answer self-incriminating questions without immunity, then the resulting statements could not be used in a subsequent criminal proceeding.[75] According to the court, a guarantee of immunity "would serve no useful purpose."[76] Thus, no affirmative tender of immunity is necessary because the right to immunity automatically attaches to the compelled testimony.[77]

Therefore, the Fifth, Eighth, and Eleventh Circuits have all developed a "no affirmative tender" approach, which refuses to require government employers to provide public employees with notice of their rights and immunities prior to being asked potentially incriminating questions. The Fifth Circuit reasoned that no notice is required because it is the coercive nature of the choice between compelled testimony or job forfeiture that automatically attaches the right to immunity under the Fifth Amendment.[78] The Eighth Circuit reasoned that no affirmative tender of immunity is required because there is no constitutional violation unless the public employees are expressly asked to waive their immunity rights or the information is actually used against them in subsequent prosecution.[79] Finally, the Eleventh Circuit reasoned that there is no notice requirement because it is implied in *Garrity* that if it is unconstitutional to compel self-incrimination by a public employee without an explicit grant of immunity, any self-incriminating statements that are procured from compelled testimony could not be used in a subsequent criminal proceeding.[80] Thus, the decisions from the Fifth, Eighth, and Eleventh Circuits stand for the proposition that the government has no duty to provide public employees with notice of their rights and immunities under the Fifth Amendment because immunity

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72 *Id.*

73 *Id.* at 1496.

74 *Id.* at 1495–96.

75 *Id.* at 1496.

76 *Id.*

77 *Id.*

78 Gulden v. McCorkle, 680 F.2d 1070, 1075 (5th Cir. 1982).

79 Hill v. Johnson, 160 F.3d 469, 471 (8th Cir. 1998).

80 *Hester*, 777 F.2d at 1496.

automatically attaches in coercive situations, causing the notice requirement to serve no legitimate purpose.

B. The "Duty to Advise" Approach

Alternatively, the Second,[81] Seventh,[82] and Federal[83] Circuits have adopted the "duty to advise" approach. Under this approach, a government employer has an affirmative duty to advise public employees about their Fifth Amendment rights and immunities prior to asking potentially incriminating questions. In the Second Circuit case *Uniformed Sanitation Men Association v. Commissioner of Sanitation of New York*, employees of the City Department of Sanitation (the "Employees") sued the Commissioner of Sanitation of New York City (the "Commissioner") in the United States District Court for the Southern District of New York seeking reinstatement after being fired for refusing to answer potentially incriminating questions.[84] The City of New York required private waste carriers to purchase tickets for the privilege of using the City's waste disposal facilities.[85] Employees of the Department of Sanitation were responsible for selling those tickets.[86] At one point, officials suspected that some employees were selling the tickets for cash and pocketing the profit.[87] An investigation was conducted that included observation by detectives and wiretapping of telephones.[88]

The Deputy Administrator of the Environmental Protection Administration, which included the Department of Sanitation, called the Employees in for questioning.[89] At the meeting, the Employees were represented by counsel and advised by the Deputy Administrator of their "rights and privileges" under the laws of New York and the United States Constitution.[90] When the Employees refused to answer any incriminating questions, they were suspended.[91] Eventually, the Commissioner gave the Employees a second opportunity to answer, but when the Employees refused, they were fired.[92] The Employees then filed suit and demanded reinstatement on the ground that their Fifth Amendment

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[81] Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation of New York, 426 F.2d 619 (2d Cir. 1970).

[82] Atwell v. Lisle Park Dist., 286 F.3d 987 (7th Cir. 2002).

[83] Modrowski v. Dep't of Veterans Affairs, 252 F.3d 1344 (Fed. Cir. 2001).

[84] *Uniformed Sanitation Men Ass'n*, 426 F.2d at 621–22.

[85] *Id.* at 621.

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.* at 622.

rights and immunities had been violated.[93] Both parties filed motions for summary judgment, and the district court granted the motion for the Employees.[94]

On appeal, the Second Circuit reversed the district court's decision and explained that compelled testimony is constitutional so long as the questions posed by the government employer to public employees are about performance of their official duties and the employees are duly advised of their rights and immunities prior to questioning.[95] The court reaffirmed the rule that if public employees are asked potentially incriminating questions and are not required to waive immunity, the privilege against self-incrimination is not a bar to their dismissal for refusing to answer.[96] More notably, the court determined that proceedings wherein an employer asks pertinent questions about the performance of duties are proper when government employers advise public employees of their rights and immunities, as well as the consequences of their decisions, before asking potentially incriminating questions.[97] Thus, the Second Circuit's decision in *Uniformed Sanitation Men Association* stands for three propositions. First, before asking potentially incriminating questions, government employers must advise public employees of their rights and immunities under the Fifth Amendment.[98] Second, if employees who have been duly advised of their rights and immunities refuse to answer the government employer's questions, the employer may constitutionally fire the employees.[99] Third, if employees are duly advised of their rights and immunities and consent to answer the questions, rather than face disciplinary action, those answers cannot be used against them in subsequent criminal proceedings.[100]

Like the Second Circuit, the Seventh Circuit also adopts the "duty to advise" approach. In *Atwell v. Lisle Park District*, Sarah Atwell brought an action in the United States District Court for the Northern District of Illinois against the Lisle Park District ("Park District") alleging that her Fifth Amendment rights were violated because the Park District terminated her for failure to cooperate with an investigation.[101] Due to a series of financial improprieties, the Park

93 *Id.*
94 *Id.*
95 *Id.* at 627.
96 *Id.* at 626–27.
97 *Id.* at 627.
98 *Id.*
99 *Id.* at 626.
100 *Id.* at 627.
101 286 F.3d 987, 989 (7th Cir. 2002).

District initiated an investigation and suspended Atwell.[102] In response, Atwell obtained counsel.[103] Before questioning and during the course of an informal meeting, the investigator for the Park District told Atwell that her attorney would probably advise her to exercise her right to remain silent.[104] As predicted, Atwell's attorney advised her to refuse to consent to an interview and Atwell complied. After being fired by the Park District, Atwell sued, but the district court dismissed her case.[105]

On appeal, the Seventh Circuit cited the rule as stated in *Lefkowitz v. Cunningham* and *Gardner v. Broderick*—that a government employer may compel a public employee to answer potentially incriminating questions upon penalty of job loss or disciplinary action only if that employee is not required to waive immunity.[106] The court affirmed the district court's decision to dismiss on the ground that the duty to advise never arose because Atwell never attended the interview.[107] On the issue of notice, however, the court found that a government employer who seeks to ask employees potentially incriminating questions must first warn the employees that because of the immunity guaranteed to them, they may not refuse to answer the questions on the basis that the answers may be incriminating.[108] The court reasoned that employees who are asked potentially incriminating questions "may instinctively 'take the Fifth' and . . . unknowingly set themselves up to be fired without recourse."[109] Ultimately, the Seventh Circuit maintained an express notice requirement, but emphasized that the rule was limited by the fact that "there can be no duty to warn until the employee is asked specific questions," and that given this limitation, the employee may not skip the interview altogether in an effort to avoid answering incriminating questions.[110]

Like the Second and Seventh Circuits, the Federal Circuit also follows the rule that a government employer must warn its employees of their rights and immunities before asking potentially incriminating questions. In *Modrowski v. Department of Veterans Affairs*, the circumstances were somewhat different than the typical Fifth Amendment employment case.[111] In *Modrowski*, the Department of Veterans Affairs (the "DVA") employed Leon Modrowski as a Senior

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[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.* at 989–90.

[106] *Id.* at 990.

[107] *Id.* at 991.

[108] *Id.* at 990.

[109] *Id.*

[110] *Id.* at 991 (citations omitted).

[111] 252 F.3d 1344 (Fed. Cir. 2001).

Realty Specialist in Chicago, Illinois.[112] During his employment, the DVA began an internal investigation into various criminal acts committed against the DVA and its property.[113] In the course of this investigation, the DVA questioned Modrowski and discovered that he had participated in two unauthorized sales of property to his son-in-law, which violated DVA regulations.[114] Consequently, the DVA conducted a series of follow-up investigations on Modrowski, and ultimately sent him a letter that purported to grant him immunity, advise him of his Fifth Amendment rights, and compel him to respond to questioning.[115] Modrowski, however, did not understand the scope of the purported immunity and continually refused to answer any questions during subsequent interrogations.[116] Thereafter, Modrowski obtained counsel and continued to refuse to waive his right to silence.[117] Ultimately, the DVA discharged Modrowski from federal service on the grounds that he violated conflict of interest rules, and more specifically, failed to cooperate with the investigation.[118] Accordingly, the Board affirmed the DVA's decision to discharge Modrowski.[119] Modrowski appealed to the Federal Circuit.[120]

On appeal, the Federal Circuit reversed the Board's decision regarding Modrowski's refusal to submit to interrogation by the DVA.[121] Citing *Garrity v. New Jersey*, the court explained that the threat of discharge from public employment constitutes coercion, making any statements obtained as a result of such threat inadmissible against that employee in subsequent criminal proceedings.[122] Moreover, the court explained that a government employer may only properly invoke the right to compel answers to pertinent questions about the performance of the employee's duties when the employee has been duly advised of the option to either answer when actually granted immunity or remain silent and face discharge.[123] The court further discussed that where the immunity granted by the government employer is not as comprehensive as the protection of the Fifth Amendment privilege, that employee is justified in refusing to answer potentially incriminating questions.[124]

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[112] *Id.* at 1346.
[113] *Id.* at 1347.
[114] *Id.*
[115] *Id.*
[116] *Id.* at 1351.
[117] *Id.* at 1348.
[118] *Id.* at 1348 & n.1.
[119] *Id.* at 1346.
[120] *Id.*
[121] *Id.*
[122] *Id.* at 1350.
[123] *Id.* at 1351.
[124] *Id.*

Thus, the court held that Modrowski was justified in refusing to answer the DVA's questions because the scope of the purported grant of immunity was ambiguous, leaving open the possibility that any answers elicited during that questioning could be used against him in subsequent proceedings.[125]

Therefore, the Second, Seventh, and Federal Circuits have all developed a "duty to advise" approach, which requires government employers to inform employees of their Fifth Amendment rights and immunities, as well as the consequences of their decisions, before being asked potentially incriminating questions.[126] The Second Circuit held that public employees may only be discharged for failure to cooperate while under the cloak of immunity if they are duly advised of their rights and immunities before being asked specific pertinent questions about their duties of employment.[127] In adopting this approach, the Seventh Circuit reasoned that because average employees are likely to exercise their Fifth Amendment right to remain silent, they may unknowingly subject themselves to discharge without recourse if they are not first advised of their rights and immunities under the Fifth Amendment.[128] The Federal Circuit reinforced this concept and held that notice will not be constitutionally sufficient where the government employer does not clearly advise employees of their rights and immunities in such a manner that the scope of immunity is broad enough to match the protection afforded by the Fifth Amendment.[129]

III. ANALYSIS

As stated above, the Supreme Court decisions in *Garrity v. New Jersey* and its progeny stand for the proposition that under the Fifth Amendment, public employees must be granted immunity from subsequent criminal prosecution if they are coerced into answering potentially incriminating questions. Nevertheless, the federal courts have split on the issue of whether a government employer must give employees notice of their rights and immunities under the Fifth Amendment prior to asking potentially incriminating questions. The "no affirmative tender" approach of the Fifth, Eighth, and Eleventh Circuits attempts to lessen the government's burden and support the employer's interest in reliable evidence by automatically attaching the right of immunity when an employee is compelled to answer incriminating

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[125] *Id.* at 1352.

[126] *See, e.g.*, Atwell v. Lisle Park Dist., 286 F.3d 987, 990 (7th Cir. 2002).

[127] Uniformed Sanitation Men Ass'n, Inc. v. Comm'r of Sanitation of New York, 426 F.2d 619, 627 (2d Cir. 1970).

[128] *Atwell*, 286 F.3d at 990.

[129] *Modrowski*, 252 F.3d at 1352.

questions. These courts reason that a notice requirement would be duplicative because the right to immunity attaches regardless of whether notice is given. Under this approach, if public employees are coerced into answering incriminating questions by threat of discipline or job loss, those answers cannot be used against them in subsequent proceedings. If public employees refuse to answer the questions without expressly being asked to waive their right to immunity, then the employer may discharge them for failure to cooperate.

The "no affirmative tender" approach has two major problems. First, by rejecting a notice requirement, the rule creates ambiguity with respect to employee actions. For example, although the approach expressly permits employees to be fired for refusing to answer questions if they have not been asked to waive their immunity, it does not address the issue of whether discharge or discipline is appropriate where employees remain silent based on an "objectively reasonable fear" that their answers could be used against them in subsequent criminal proceedings.[130] As such, it is entirely possible that public employees could be discharged or disciplined solely because they are unaware of their rights and the consequences of their decision to remain silent.[131] In essence, without a notice requirement, public employees could unknowingly subject themselves to sanctions by exercising their Fifth Amendment privilege against self-incrimination.

Second, this approach provides the government with an opportunity to take advantage of public employees. Because the rule permits the government to fire employees for exercising their right to silence when they are not required to waive immunity, it could potentially abuse its position as the more knowledgeable and powerful party.[132] In essence, by not disclosing what the public employees' rights and immunities are under *Garrity* and the Fifth Amendment, the government leaves its employees in a state of ambiguity that can easily be exploited. If it is not clear to public employees what their constitutional rights are, how their statements could be used against them, or how they should respond to an employer's often vague request to submit to questioning or polygraph interrogations, the government could reasonably manipulate the situation so that its employees are fired or prosecuted, regardless of whether they answer the incriminating questions. This imbalance in power should not be constitutionally permitted.

In contrast, the "duty to advise" approach of the Second, Seventh, and Federal Circuits seeks to eliminate ambiguity and further the

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[130] Sher v. U.S. Dep't of Veterans Affairs, 488 F.3d 489, 510 n.23 (1st Cir. 2007) (Stahl, J., dissenting).

[131] *Id.* at 511.

[132] *Id.*

protections afforded in *Garrity* by requiring government employers to fully disclose to public employees their rights and immunities prior to subjecting them to potentially incriminating questioning. This approach, which emphasizes the protective nature of *Garrity*, has four crucial advantages.

First, by requiring government employers to warn employees that they may be fired for refusing to answer potentially incriminating questions when they have been granted immunity, the "duty to advise" approach eliminates the confusion created by the "no affirmative tender" approach. The interplay between the Fifth Amendment and *Garrity* are such that average public employees may not fully understand their rights. Even though it may be true that public employees are aware of their Fifth Amendment rights, it is more likely to be true that the same employees may not understand the various complex exceptions under *Garrity*, which is less widely known than the Fifth Amendment.[133] For example, because this approach expressly provides employees with the knowledge of all of their rights and immunities in this context, there is no longer a risk that the employees will exercise their right to silence and unknowingly lose their jobs as a consequence of their decision. Thus, the notice requirement permits employees to make informed decisions instead of encouraging them to make blind decisions.

Second, this approach eliminates the potential for government employers to exploit an employee's lack of familiarity with the Fifth Amendment's rights and immunities. By requiring the employer to fully disclose the employee's relevant rights and immunities, as well as the consequences to the attendant decisions, the "duty to advise" approach ensures that the employee is informed and less susceptible to any misrepresentation or deception by the government. Such a requirement makes it more difficult for the government, in a position of power, to manipulate the situation into one where an employee can be fired or prosecuted irrespective of whether he or she submits to questioning. In so doing, the disclosure requirement furthers the protective nature of *Garrity* by ensuring that the Fifth Amendment rights and immunities cannot be circumvented by government employers.[134]

Third, the "duty to advise" approach is favorable because the burden imposed on the government employer would be minimal.[135] In fact, the duty does not even arise until the interrogation takes place. Essentially, the government's duty to disclose never arises if the public employee fails to attend the questioning. Furthermore, there is no indication that the notice requirement must be fact specific. In fact, the Federal Circuit

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[133] *Id.*

[134] *See id.*

[135] *Id.* at 511 n.25.

held that notice is sufficient even if the government uses a standardized form, as long as it is clear and fully conveys the public employee's rights.[136] Therefore, in comparison to the interest of fairness and clarity, the burden of giving notice to public employees prior to questioning is minimal.

Fourth, the "duty to advise" approach is most favorable because it facilitates the government's interest in obtaining reliable information from public employees in these scenarios. Uninformed employees may be more likely to be untruthful or bend the facts in an attempt to avoid prosecution, whereas employees who know from the beginning that they are immune from their statements in subsequent prosecution may be more likely to give honest answers. Although it is true that the statements may still be used against employees in regard to discipline or discharge by the employer, it is still much more likely that the employees will be honest if they know that those statements cannot be used against them in a subsequent criminal proceeding. Therefore, the "duty to advise" approach is preferable because it reinforces the government's interest in obtaining truthful information from its employees.

CONCLUSION

Government employers are often faced with the task of questioning public employees about potentially incriminating issues. As a general rule, if the government employer seeks to compel employees to answer the questions by penalty of discipline or job loss, employees must also be provided with immunity from the use of those statements against them in subsequent proceedings. As such, a government employer cannot constitutionally fire employees for failure to waive their right to immunity. Although this rule is clear, it fails to specify whether the employer is under a duty to give public employees notice of these rights and immunities prior to interrogation.

The federal circuits are split as to whether there should be a notice requirement. The first group of circuits has adopted the "no affirmative tender" approach, rejecting a notice requirement and automatically attaching immunity when public employees are compelled to waive their right to immunity and answer potentially incriminating questions on penalty of disciplinary action or job loss. The second group of circuits has adopted the "duty to advise" approach, requiring government employers to give employees notice of their rights and immunities under the Fifth Amendment, as well as the consequences to any decisions they may make.

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[136] *Id.* (citing Hanna v. Dep't of Labor, 18 F. App'x 787, 789–90 (Fed. Cir. 2001)).

The "duty to advise" approach is the most favorable for four reasons. First, it eliminates the potential for public employees to unknowingly subject themselves to discipline while exercising their constitutional privilege against self-incrimination. Second, it eliminates the potential that the government will use its position of power to manipulate or exploit public employees. Third, the duty imposed on the government in comparison to the protection afforded to the employees would be inherently low. Fourth, it facilitates the government's fact-finding process by giving the employees an incentive for honesty. Therefore, the "duty to advise" approach should be adopted by all circuits.

TOWARD A MORMON JURISPRUDENCE

*John W. Welch**

Many lawyers and law students are interested in the intersection of their religious faith and values with their responsibilities and duties in the legal profession. The mere fact that many people intuitively sense a connection between law and religion is prima facie evidence that these domains are at least relevant to each other, if not fundamentally linked.

In this Article, I hope to make a pioneering contribution to the intellectual progress of my own religious tradition, Mormonism. Recent political events have amplified the fact that to many Americans, Mormonism is still seen today as a bizarre religion, or worse, a "cult with a heretical understanding of Scripture and doctrine."[1] This Article does not seek to answer such criticisms[2] or to explain Mormon tenets,[3] as is readily available elsewhere. Instead, this Article explores a broad jurisprudential perspective of the relatively young religion that is very rich in potential and now emerging more often on national and

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[1] Nancy Gibbs, *The Religion Test: Is It Sheer Bigotry to Say You Won't Vote for Someone Because He's a Jew? A Muslim? What About a Mormon?*, TIME, May 21, 2007, at 41. For additional discussion, see also the Conference at Princeton University Center for the Study of Religion: Mormonism and American Politics (Nov. 9–10, 2007), http://www.princeton.edu/~csrelig/mormonism&politics.

[2] *See generally* CRAIG L. BLOMBERG & STEPHEN E. ROBINSON, HOW WIDE THE DIVIDE? A MORMON & AN EVANGELICAL IN CONVERSATION (1997); ROBERT L. MILLET, A DIFFERENT JESUS? THE CHRIST OF THE LATTER-DAY SAINTS (2005); ROBERT L. MILLET & GERALD R. MCDERMOTT, CLAIMING CHRIST: A MORMON-EVANGELICAL DEBATE (2007); MORMONISM IN DIALOGUE WITH CONTEMPORARY CHRISTIAN THEOLOGIES (David L. Paulsen & Donald W. Musser eds., 2007) (offering models of interfaith conversation, through a collection of eleven extended theological exchanges between leading Protestant and Latter-day Saint scholars, including a foreword by Martin E. Marty); THE NEW MORMON CHALLENGE (Francis J. Beckwith et al. eds., 2002); Stephen E. Robinson, *LDS Doctrine Compared with Other Christian Doctrines*, *in* 1 ENCYCLOPEDIA OF MORMONISM 399 (Daniel H. Ludlow ed., 1992); Jan Shipps, *"Is Mormonism Christian?" Reflections on a Complicated Question*, 33 BYU STUDIES, No.3, at 438 (1993).

[3] *See generally* RICHARD LYMAN BUSHMAN, MORMONISM: A VERY SHORT INTRODUCTION (2008); DOUGLAS J. DAVIES, AN INTRODUCTION TO MORMONISM (2003); ENCYCLOPEDIA OF MORMONISM, *supra* note 2 (containing clear, nonpolemical definitions and explanations of hundreds of Latter-day Saint doctrines, practices, and beliefs); THE WORLDS OF JOSEPH SMITH: A BICENTENNIAL CONFERENCE AT THE LIBRARY OF CONGRESS (John W. Welch ed., 2006) (a compilation of essays related to the life and teachings of Joseph Smith).

international scenes. This Article raises the following questions: what would a Mormon jurisprudence look like? How would one recognize a Mormon jurisprudence? What would distinguish it from other jurisprudential approaches? My comments will necessarily be brief and introductory. I will strive to say something, without saying too little or too much. Much remains to be said and done along this line of inquiry, though a start has been made.[4]

In outlining the basics of a Mormon jurisprudence, I am entering into a broader conversation that has been ongoing for some time. Catholics and Protestants are respected for wrestling to understand jurisprudence in terms of the premises and beliefs of their respective faiths; serious Jewish, Buddhist, and Islamic contributions are also welcomed.[5] Rigorous Mormon efforts should be no less regarded and may have much to offer in today's world.

I. WHAT A MORMON JURISPRUDENCE IS NOT

Consider first what a Mormon jurisprudence is not. For one thing, it would need to be more than a jurisprudence that just happens to be composed by a Mormon. Just because a song is written by a Mormon, a Baptist, or a Jew, does not necessarily make it a Mormon, Baptist, or Jewish song. And while Mormons may well have the greater interest in and access to Mormon ideas than do others, a Mormon jurisprudence could be developed or articulated by a member of another faith. I have benefited from my long-standing membership in the Jewish Law Association and from my associations with biblical scholars of many faiths in the Society of Biblical Literature as I attempt to explain elements of Jewish jurisprudence or Biblical law to my law students at Brigham Young University. I would hope that scholars of other faiths might find Mormon thought worthy of study in a similar outsider fashion. The works of non-Mormon scholars such as Jan Shipps,[6]

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[4] In 2001, a first-ever conference was held at Brigham Young University entitled "Latter-day Saint Perspectives on Law." 3 BYU L. REV. 829 (2003). The papers presented at that conference stimulated reflection on the basic question: "[w]hat is a Latter-day Saint perspective on the law?" Many answers to that question are possible. In offering exploratory thoughts on this subject, the views expressed there and here are personal and should not necessarily be attributed to The Church of Jesus Christ of Latter-day Saints, any other Mormon group, Brigham Young University, or anyone else. *See also* Nathan B. Oman, *Jurisprudence and the Problem of Church Doctrine*, ELEMENT: J. SOC'Y FOR MORMON PHIL. & THEOLOGY, Fall 2006, at 1, 16–17 (describing the basis of the emerging discussion of a Mormon jurisprudence).

[5] For example, the *Journal of Law and Religion* has published numerous articles on Christian, Islamic, Jewish, Buddhist, and even Bahá'i religious perspectives on the law. *See* J. L. & RELIGION Subject Index Vol. 1–20, *available at* http://law.hamline.edu/files/Subject%20Index%20Vol.1-20.pdf.

[6] *See* JAN SHIPPS, MORMONISM: THE STORY OF A NEW RELIGIOUS TRADITION (1985) (explaining the chronology and development of the Mormon tradition).

Douglas Davies,[7] and a number of others[8] show this is possible. It might even help to articulate a better Mormon jurisprudence if it were coauthored by Mary Ann Glendon or some other sympathetic collaborator.[9]

At the same time, it is doubtful that any Mormon jurisprudence will ever receive an official stamp of approval from the leadership of the Church of Jesus Christ of Latter-day Saints or any other church in the Mormon tradition. Whether one sees jurisprudence as a branch of philosophy and ethics, social science, psychology, or anthropology, an official Latter-day Saint jurisprudence would no sooner exist than any officially sanctioned approach to philosophy, economics, or any other academic discipline. Latter-day Saint scripture, doctrine, ideas, and assumptions, of course, will and should influence any Mormon thinker who engages the mind with the perennially perplexing problems of jurisprudence, but one should not expect any Latter-day Saint leader to speak *ex cathedra*[10] or to issue a *nihil obstat*[11] regarding approaches and solutions to jurisprudential issues and topics.

Thus, using the word "Mormon" (instead of "Latter-day Saint") is preferable in this situation. The term "Mormon" is best used in reference to cultural phenomena, such as the Mormon Tabernacle Choir, the Mormon Trail, Mormon history, or Mormon weddings.[12] The term "Latter-day Saint" is better reserved for official doctrines, policies, or programs of the Church of Jesus Christ of Latter-day Saints.[13]

When one goes looking for a Mormon jurisprudence, one is looking for more than a description of Mormon historical experiences with the law (Joseph Smith's numerous appearances in court,[14] antipolygamy

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[7] *See* DOUGLAS J. DAVIES, THE MORMON CULTURE OF SALVATION (2000) (presenting a new interpretation of the origins of Mormonism and offering insight into how Mormons work towards their own salvation).

[8] *See, e.g.*, MORMONISM IN DIALOGUE WITH CONTEMPORARY CHRISTIAN THEOLOGIES, *supra* note 2.

[9] *See, e.g.*, Mary Ann Glendon, *Catholic Thought and Dilemmas of Human Rights*, *in* HIGHER LEARNING & CATHOLIC TRADITIONS 113, 113–14 (Robert E. Sullivan ed., 2001) (elaborating on her previous writing about rights concepts).

[10] A CATHOLIC DICTIONARY 181 (Donald Attwater ed., 3d ed. 1961) (an official pastoral utterance of the most solemn kind).

[11] *Id.* at 343 (nothing hinders it from being printed, certifying a work is not contrary to faith or good morals).

[12] *See* Donald K. Jarvis, *Mormonism, Mormons*, *in* ENCYCLOPEDIA OF MORMONISM, *supra* note 2, at 941–42. This is how the term "Mormon" is used in editing the *Encyclopedia of Mormonism*, although that editorial policy was never made explicit. *Id.*

[13] *See id.* This is how the term "Latter-day Saint" is used in editing the *Encyclopedia of Mormonism*, although that editorial policy was never made explicit. *Id.*

[14] For various reasons, between 1819 and 1844, Joseph Smith had numerous court appearances in New York, Ohio, Missouri, and Illinois, either as a witness, a defendant, a party to a business transaction, or a judge. *See, e.g.*, RICHARD LYMAN BUSHMAN, JOSEPH

legislation,[15] J. Reuben Clark's service in the State Department,[16] comments on the Equal Rights Amendment,[17] abortion, same-sex marriage,[18] or the United Nations Doha Declaration on the Family[19]); and more than an articulation of what Joseph Smith meant when he said that the Constitution of the United States was an inspired document.[20] Although these legal topics are typical discussion topics,[21]

SMITH: ROUGH STONE ROLLING *passim* (2005) (describing the life of Joseph Smith from birth to death, detailing his numerous encounters with the law); David W. Grua, *Joseph Smith and the 1834 D.P. Hurlbut Case*, 44 BYU STUDIES, No. 1, at 33, 33–34 (2005) (describing Joseph Smith's first legal experience in Ohio); Gordon A. Madsen, *Joseph Smith and the Missouri Court of Inquiry*, 43 BYU STUDIES, No. 4, at 93, 95–96 (2004) (detailing the events surrounding Joseph Smith's legal trouble in Missouri); Gordon A. Madsen, *Joseph Smith's 1826 Trial: The Legal Setting*, 30 BYU STUDIES, No. 2, at 91, 91 (Spring 1990) (describing the charges against Joseph Smith in South Bainbridge, New York); Dallin H. Oaks, *The Suppression of the Nauvoo Expositor*, 9 UTAH L. REV. 862, 862 (1965) (examining the legal basis for the charges brought against Joseph Smith and others in Nauvoo, Illinois); Nathaniel Hinckley Wadsworth, *Copyright Laws and the 1830 Book of Mormon*, 45 BYU STUDIES, No. 3, at 77, 91 (2006) (describing the legal dispute over the copyright to the *Book of Mormon*); Jeffrey N. Walker, *Mormon Land Rights in Caldwell and Daviess Counties and the Mormon Conflict of 1838: New Findings and New Understandings*, 47 BYU STUDIES, No. 1, at 4, 46–47 (2008) (explaining the events surrounding Joseph Smith's settlement in Missouri). *See generally* EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, ZION IN THE COURTS (1988) (describing Joseph Smith's legal encounters throughout his lifetime); Joseph I. Bentley, *Legal Trials of Joseph Smith*, *in* ENCYCLOPEDIA OF MORMONISM, *supra* note 2, at 1346–48 (providing a summary of Joseph Smith's interactions with the courts).

[15] *See, e.g.*, Ray Jay Davis, *AntiPolygamy Legislation*, *in* ENCYCLOPEDIA OF MORMONISM, *supra* note 2, at 52; Ray Jay Davis, *The Polygamous Prelude*, 6 AM. J. LEGAL HIST. 1 (1962); Richard D. Poll, *The Legislative Antipolygamy Campaign*, 26 BYU STUDIES, No. 4, at 107 (Fall 1986).

[16] *See generally* FRANK W. FOX, J. REUBEN CLARK: THE PUBLIC YEARS (1980).

[17] *See generally* REX E. LEE, A LAWYER LOOKS AT THE EQUAL RIGHTS AMENDMENT (1980).

[18] *See generally* Lynn D. Wardle, *"Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL'Y 771 (2001) (discussing and advocating a global interest in the protection of traditional marriage).

[19] *See, e.g.*, Richard G. Wilkins, *The Principles of the Proclamation*, 44 BYU STUDIES, No. 3, at 5, 8, 16–19 (2005); *cf.* Richard G. Wilkins, *Protecting the Family and Marriage in a Global Society*, 6 ENCOUNTERS: J. INTER-CULTURAL PERSPECTIVES 223, 224–26 (2000) (discussing the effect of the 1996 United Nations proposals and policy initiatives that impacted the international definition of the family, women's rights, and child welfare).

[20] THE DOCTRINE AND COVENANTS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 98:7, 101:77, 101:80 (Salt Lake City, The Church of Latter-day Saints 1981) (1891) [hereinafter DOCTRINE AND COVENANTS]; TEACHINGS OF THE PROPHET JOSEPH SMITH 147 (Joseph Fielding Smith ed., 1976) (1938) [hereinafter TEACHINGS]; Rex E. Lee, President of Brigham Young Univ., The Constitution and the Restoration (Jan. 15, 1991), *in* BRIGHAM YOUNG UNIVERSITY SPEECHES, 1990–91, 1, at 17–8. *See generally* Panel Discussion, *What Is the Proper Role of the Latter-day Saint with Respect to the Constitution?*, 4 BYU STUDIES, No. 2, at 151 (Winter 1962) [hereinafter Panel Discussion] (a compilation of discussions on Mormonism and the United States Constitution).

jurisprudence goes beyond the historical and political domain, probing into questions of theory and meaning.

In the Western tradition, jurisprudence typically asks: what is truth? What is law? How does law differ from custom or manners? What is justice? What are rights? It produces books like Ronald Dworkin's *Taking Rights Seriously.*[22] Western tradition asks: what constitutes an actionable offense? What is causation? What is intention? What is legitimate? Why do bad things happen to good people? When and why do we punish? What do we mean by equality?

A Mormon jurisprudence would, of course, offer its answers to such questions. But at the same time, a Mormon jurisprudence would not just begin or end with the questions that Western jurisprudence has preferred to ask. We should not expect every tradition to ask the same questions. In addition to the questions typically posed by Western tradition, a Mormon jurisprudence would be more inclined to ask: what is goodness? What is love? How does law differ from covenants or principles? What is mercy? What are duties? It might produce a book titled *Taking Duties Seriously.* What constitutes repentance and restitution? What is responsibility? What is free agency? What is authority? It questions why bad things happen at all.[23] When and how do we offer assistance? What do we mean by equanimity and harmony? In sum, Mormon jurisprudence asks overlooked questions, advancing these often underrepresented topics.

In exploring and answering such questions, a Mormon jurisprudence would not be an American jurisprudence or a British jurisprudence. Mormonism is both a worldwide and an eternally oriented movement. Thus, Mormons must begin thinking in terms of "Mormon jurisprudences"—members of the Latter-day Saint Church, as jurists in various countries and cultures, must work to understand and utilize principles of the gospel within the context of their own legal system. The number of Latter-day Saints in South and Central America now rivals those in North America, and those Latin countries follow a jurisprudence much more closely tied to the civil law tradition, which, as Harvard Law Professor Mary Ann Glendon ("Professor Glendon") has noted, places emphasis on "equality and fraternity (or, as we would say today,

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[21] *See, e.g.*, James B. Allen, *J. Reuben Clark, Jr., on American Sovereignty and International Organization*, 13 BYU STUDIES, No. 3, at 347 (Spring 1973); Christopher L. Blakesley, *Terrorism and the Constitution*, 27 BYU STUDIES, No. 3, at 197 (Summer 1987); Panel Discussion, *supra* note 20. Additional Mormon legal scholarship can be found in the *BYU Studies* online archives, located at http://byustudies.byu.edu.

[22] *See generally* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

[23] *See, e.g.*, David L. Paulsen, *Joseph Smith and the Problem of Evil*, 39 BYU STUDIES, No. 1, at 53 (2000); John Sutton Welch, *Why Bad Things Happen at All: A Search for Clarity Among the Problems of Evil*, 42 BYU STUDIES, No. 2, at 75 (2003).

solidarity)"; whereas Anglo-American thinkers place "greater emphasis on individual liberty and property."[24] Dallin H. Oaks, now a high-ranking Latter-day Saint church official and previously a law professor, university president, and member of the Utah Supreme Court, was surprised to learn that the concept of a fiduciary is quite foreign to Mormons coming out of civil law backgrounds; this situation means that different presumptions might apply when explaining to these people doctrinal concepts such as stewardship, to say nothing of the practical assumptions involved in training them to handle funds as fiduciaries. Local differences aside, a Mormon jurisprudence must also begin thinking in terms that transcend and unify Mormon jurisprudential thought across all cultures. Will that be in a universal, catholic (little "c") sense, or in a worldwide, umbrella or tabernacle sense? One would suspect the latter.

Various approaches to law are taken in different cultures, reflecting to a large extent the received views of those cultures on the ultimate characteristics and values of the human condition and civilization.[25] Accordingly, a Mormon jurisprudence would not be independent of Latter-day Saint ideals and values. The insights of comparative anthropology may be helpful. In ancient Greece, individualism, rationality, debate, the city-state, public opinion, creativity, choice, and adventure predominated. These values have heavily influenced Western jurisprudence,[26] although not always beneficially. Professor Glendon rightly said, the extreme form of "hyper-individualism" sends the message that rights are absolute "without responsibilities, . . . in radical isolation from other individuals, freedom from the past, and recklessness toward the future."[27] In ancient Israel, a different set of legal norms and concepts arose in the Jewish tradition because such values as collective responsibility, law (*torah*, "teaching," or "instruction"), holiness, purification, belonging to God, brotherhood, redemption, remembrance, and wisdom were of the essence.[28] In China, however, concepts of decorum, self-control, relationships, interdependence, ceremony, mediation, persuasion, conciliation, conscience, and harmony with nature's

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[24] Mary Ann Glendon, *The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea*, 16 HARV. HUM. RTS. J. 27, 32 (2003).

[25] SURYA PRAKASH SINHA, JURISPRUDENCE: LEGAL PHILOSOPHY IN A NUTSHELL 7–8 (1993).

[26] *Id.* at 21–22; HUNTINGTON CAIRNS, LEGAL PHILOSOPHY FROM PLATO TO HEGEL 24–30, 50–51 (2d prtg. 1949).

[27] Mary Ann Glendon, *What's Wrong with 'Rights'?*, BYU TODAY, July 1990, at 23, 54 (defining "hyper-individualism" as envisioning "the possessor of rights as a person alone against the world").

[28] *See* ZE'EV W. FALK, HEBREW LAW IN BIBLICAL TIMES 1–16 (2d ed. 2001). *See generally* JOEL S. KAMINSKY, CORPORATE RESPONSIBILITY IN THE HEBREW BIBLE (1995).

events have traditionally prevailed.[29] In India, concepts of caste, purity, cosmic order, dharma, conformity, allotment, and the performance of inherent duties have shaped thinking about social order.[30] In Japan, honor, rules of behavior, prestige, courage, endurance, and loyalty are preeminent.[31] In all cultures, whether in Africa or in Islam, other arrays of values shape and give distinctive textures to jurisprudence and law in each of these societies. Thus, it is fair to begin asking what factors will emerge at the crux or bedrock of a Mormon jurisprudence. By studying comparative jurisprudence, we may well learn how to recognize those still implicit contours of a Mormon jurisprudence.

Finally, it is worth clarifying that a jurisprudence is not the same thing as an ideology, but it is not easy to sustain the distinction between the two. Jurisprudence asks how we think, not what we think. In this regard, this Article turns attention to three fundamental features that would significantly shape any Mormon jurisprudence. First, such a jurisprudence would be rooted in Mormon scripture. Second, such a jurisprudence would be inclusive, though not eclectic. And third, such a jurisprudence would be fundamentally pluralistic, though not poly-centric.

II. ROOTED IN MORMON SCRIPTURE

Whatever else one may say, a Mormon jurisprudence must be based solidly in scripture; and, indeed, Latter-day Saint scriptures are filled with seminal statements about the nature and operation of law, both divine and human, spiritual and temporal. Studying scripture will be the closest ally of Mormon jurisprudence, and not just a casual level of scripture study, or a selective proof-text approach of pulling out one's favorite passage as an aphoristic touchstone. Flimsy readings will not bear the needed weight in order to function as part of a jurisprudence.

A primary issue then becomes, "And what is scripture?"[32] The premises of a Mormon jurisprudence must be based in the first instance in all Latter-day Saint canonical works, namely the Old and New Testaments, the Book of Mormon, The Doctrine and Covenants, and the Pearl of Great Price.[33] Elaborations may be found in intentional, relevant

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29 SINHA, *supra* note 25, at 24, 31, 33–36.

30 *Id.* at 37, 46–49.

31 *Id.* at 49–51, 53.

32 *See* W. D. Davies & Truman G. Madsen, *Scriptures*, *in* ENCYCLOPEDIA OF MORMONISM, *supra* note 2, at 1277.

33 Clyde J. Williams, *Standard Works*, *in* ENCYCLOPEDIA OF MORMONISM, *supra* note 2, at 1415–16. Mormon belief holds that the *Book of Mormon* is a translation of an ancient document written as a witness of the divinity and the atonement of Jesus Christ by former prophets and Christian disciples living on the American continent between 600 B.C. and A.D. 421. *Introduction* to THE BOOK OF MORMON: ANOTHER TESTAMENT OF JESUS

statements by high-ranking Latter-day Saints church leaders, but these may be less universally applicable than the canonical revelations. As is done in Jewish law, which recognizes levels of authority between Torah, Mishnah, Gemara, midrash, responsa, and so on,[34] a Mormon jurisprudence will eventually need to articulate its own "rules of recognition" among its various kinds of scriptural statements. And indeed, inconveniently, Mormons do not believe in a monolithic concept of scripture.[35]

No scripture is for personal interpretation[36] and yet neither is it self-interpreting. A Mormon jurisprudence will need to extract from the body of scripture "correct principles" that will appropriately govern human life.[37] Unique rules of Mormon interpretation may in time be developed. Rules of statutory construction exist in the American legal tradition,[38] and the Jewish tradition has rules for analyzing and resolving halachic disputes.[39] How will Mormons go about the task of finding, revealing, distilling, articulating, understanding, or applying correct principles? How should that process differ from the procedures followed in other jurisprudences? These questions remain open because the sources of jurisprudential wisdom in each and all of the scriptures are copious and variegated. But what is clear is that Mormon scripture will play a preeminent role in that process. If an idea cannot be located and substantiated within the purview of scripture, the idea may still be true, but it probably should not be counted as particularly or bindingly Mormon.

CHRIST (Joseph Smith, trans., The Church of Latter-day Saints 1989) (1830). The *Doctrine and Covenants* is a compilation of 138 separate revelations received by Mormonism's founder, Joseph Smith, and, in a few cases, by other Mormon leaders. *Introduction* to DOCTRINE AND COVENANTS, *supra* note 20. The *Pearl of Great Price* is comprised of other texts translated or written by Joseph Smith. *Introduction* to THE PEARL OF GREAT PRICE (Joseph Smith, trans., 1981).

[34] *See* GEORGE HOROWITZ, THE SPIRIT OF JEWISH LAW 15–17, 31 (1953). *See generally* JACOB NEUSNER, INVITATION TO THE TALMUD (rev. ed. 1984).

[35] *See* Cheryl B. Preston, *The Canon, Lawmakers and the Right to Interpret in the Church of Jesus Christ of Latter-day Saints*, 6 DAIMON: ANNUARIO DI DIRITTO COMPARATO DELLE RELIGIONI, Dec. 2006, at 115, 121–22; John W. Welch & David J. Whittaker, Mormonism's Open Canon: Some Historical Perspectives on Its Religious Limits and Potentials, Preliminary Report for the Foundation for Ancient Research and Mormon Studies 4–6 (1987) (presented at the annual meeting of the American Academy of Religion and the Society of Biblical Literature in Atlanta, Georgia in November 1986).

[36] 2 *Peter* 1:20 (King James, The Church of Latter-day Saints).

[37] John Taylor, *The Organization of the Church*, MILLENNIAL STAR, Nov. 15, 1851, at 337, 339 (quoting Joseph Smith).

[38] *See* RUGGERO J. ALDISERT, THE JUDICIAL PROCESS 193, 205–08 (2d ed. 1996); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 9, 14–18 (1921), *as reprinted in* PHILIP SHUCHMAN, COHEN AND COHEN'S READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 245, 246–47 (1979).

[39] HOROWITZ, *supra* note 34, at 8–17, 745–46.

In this process, the scriptures must be carefully and broadly studied. A passage's original intent is important, but so is its reception, history, and its use as canon within Mormon communities. In his article on viewing criminal sanctions through Latter-day Saint thought, Martin Gardner, a Latter-day Saint law professor at the University of Nebraska College of Law, leans heavily on *The Doctrine and Covenants* Section 42, which tells Mormon leaders that if one of their members commits a crime "he or she shall be delivered up unto the law of the land."[40] But this still leaves us wondering, what does that scripture tell us about what kinds of punishment the state should impose?

Marguerite Driessen, another Latter-day Saint legal educator, responding to Professor Gardner, invoked the Pauline mantra, "by the law no flesh is justified."[41] But the words and meanings of the Greek word *nomos*, like the English word *law*, are legion and often misleading, so I and most New Testament scholars are still puzzling over what Paul meant.[42]

Likewise, one must wonder: what was the Book of Mormon prophet Nephi's intent when he said that "all are alike unto God"?[43] His pronouncement sounds like the beginnings of a jurisprudence of critical race theory,[44] but how revolutionary and transformational is Mormonism?[45] Indeed, Joseph Smith said that Mormonism will revolutionize the world, but by making all men friends.[46]

Does Lehi, another Book of Mormon prophet, agree with Plato's *Philebus* that pleasure is the purpose of life and basis of a jurisprudence

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[40] Martin R. Gardner, *Viewing the Criminal Sanction Through Latter-day Saint Thought*, 2003 BYU L. REV. 861, 872 (2003) (quoting DOCTRINE AND COVENANTS, *supra* note 20, at 42:79).

[41] Marguerite A. Driessen, Response, *Not for the Sake of Punishment Alone: Comments on* Viewing the Criminal Sanction Through Latter-day Saint Thought, 2003 BYU L. REV. 941, 954 (2003) (quoting 2 *Nephi* 2:5 (The Book of Mormon)).

[42] *See, e.g.*, A. ANDREW DAS, PAUL, THE LAW, AND THE COVENANT (2001); HANS HÜBNER, LAW IN PAUL'S THOUGHT (John Riches ed., James C. G. Greig trans., T & T Clark Ltd. 1984) (1978); VERONICA KOPERSKI, WHAT ARE THEY SAYING ABOUT PAUL AND THE LAW? (2001); FRANK THIELMAN, A CONTEXTUAL APPROACH: PAUL & THE LAW (1994).

[43] 2 *Nephi* 26:33 (The Book of Mormon).

[44] *See* SINHA, *supra* note 25, at 341 ("[Critical race theory] analyzes the relationship of law and racial subordination in the United States.").

[45] *See generally* Dwight N. Hopkins & Eugene England, *A Dialogue on Black Theology*, *in* MORMONISM IN DIALOGUE WITH CONTEMPORARY CHRISTIAN THEOLOGIES, *supra* note 2, at 341; Dwight N. Hopkins et al., *A Dialogue on Womanist Theology*, *in* MORMONISM IN DIALOGUE WITH CONTEMPORARY CHRISTIAN THEOLOGIES, *supra* note 2, at 303; Rosemary Radford Reuther & Camille Williams, *A Dialogue on Feminist Theology*, *in* MORMONISM IN DIALOGUE WITH CONTEMPORARY CHRISTIAN THEOLOGIES, *supra* note 2, at 251.

[46] TEACHINGS, *supra* note 20, at 316, 366.

when he says, "[M]en are, that they might have joy"?[47] Not likely. But what did Lehi mean?

What is the scriptural content of the doctrine of agency? Latter-day Saint Michael Young, former dean and professor of comparative law and jurisprudence at George Washington University Law School, rightly detects the centrality of free will as a philosophical principle in a Mormon jurisprudence.[48] But one must still ask, how free are we really, given the inevitability of most consequences?[49]

Perhaps most directly pertinent to the law, legal cases in the scriptures need to be carefully analyzed: what rules of law and holdings emerge from the scriptural account of the trial and execution of Naboth;[50] of the action of Boaz on behalf of Ruth;[51] from the trial of Jeremiah at the temple;[52] or in the Book of Mormon, the case of Sherem against Jacob;[53] or the trials of Abinadi, Nehor, or Korihor?[54] The same could be asked of the trials of Jesus, Paul, and others.[55] Why are there so many legal cases in the scriptures, and what would a Mormon jurisprudence draw from them?

Equally difficult to understand—historically, linguistically, literarily, comparatively, collectively, and practically—are the various and often conflicting or changing bodies of rules or legal codes in the scriptures. What is one to make today of Jehovah's rules of judicial ethics found at the end of the Code of Covenant in Exodus 23,[56] or the

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[47] 2 *Nephi* 2:25 (The Book of Mormon).

[48] Michael K. Young, *Legal Scholarship and Membership in the Church of Jesus Christ of Latter-day Saints: Have They Buried Both an Honest Man and a Law Professor in the Same Grave?*, 2003 BYU L. REV. 1069, 1093–94 (2003).

[49] *See* C. Terry Warner, *Agency*, *in* ENCYCLOPEDIA OF MORMONISM, *supra* note 2, at 26–27.

[50] 1 *Kings* 21:1–14 (King James, The Church of Latter-day Saints).

[51] *Ruth* 4:1–13 (King James, The Church of Latter-day Saints).

[52] *Jeremiah* 26:8–24 (King James, The Church of Latter-day Saints). This is discussed in John W. Welch, *The Trial of Jeremiah: A Legal Legacy from Lehi's Jerusalem*, *in* GLIMPSES OF LEHI'S JERUSALEM 337 (John D. Welch et al. eds., 2004).

[53] *Jacob* 7:1–20 (The Book of Mormon).

[54] *Mosiah* 12–17; *Alma* 1:10–15, 30:20–56 (The Book of Mormon). *See generally* JOHN W. WELCH, THE LEGAL CASES IN THE BOOK OF MORMON (2008) (providing detailed discussions of each of the legal cases in the Old Testament and *Book of Mormon*).

[55] *See generally* John W. Welch, *Latter-day Saint Reflections on the Trial and Death of Jesus*, CLARK MEMORANDUM, Fall 2000, at 2; John W. Welch, *Miracles,* Maleficium, *and* Maiestas *in the Trial of Jesus*, *in* JESUS AND ARCHAEOLOGY 349 (James H. Charlesworth ed., 2006).

[56] *Exodus* 23 (King James, The Church of Latter-day Saints); *see also* John W. Welch, *Jehovah's Code of Civil Justice*, CLARK MEMORANDUM, Spring 2005, at 12. For a more detailed discussion, see *The Legal Cases in the Book of Mormon*, *supra* note 54, at 57–76.

concept of social justice found in the laws of Deuteronomy,[57] or the legal elements concerning divorce and perjury in the Sermon on the Mount,[58] or the statement published as *The Doctrine and Covenants* Section 134 on government?[59] One must look carefully at these issues, not only to determine what the word "kill" or "false witness" actually meant in Hebrew in the Ten Commandments, but also what the implications of those meanings are. Does one cheer (can one cheer, should one cheer) when it becomes clear that Section 134 of the *The Doctrine and Covenants* reflects Madisonian constructions of revolution, natural law, and freedom of conscience?[60]

The scriptures are filled with laws, teachings, statutes, ordinances, commandments, and testimonies, in all their varieties. Legal topics in the scriptures often appear or are assumed in prophetic texts, revelations, ethical admonitions, speeches, sermons, proverbs, parables, psalms, histories, and narratives.[61] In many ways, the Mormon scriptural package is endless. Exactly what do these texts say? And not say? Is there a scriptural position on tolerance? On struggle and resistance? On analogical reasoning? On legal analysis? On collective intention? On social choice? On human dignity? On the boundaries of democratic pluralism? Unpacking it all remains a daunting task. But herein lies an important recognition of the next main observation concerning the open-endedness of a Mormon jurisprudence.

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[57] *See generally* LÉON EPSZTEIN, SOCIAL JUSTICE IN THE ANCIENT NEAR EAST AND THE PEOPLE OF THE BIBLE (John Bowden trans., 1986); MOSHE WEINFELD, SOCIAL JUSTICE IN ANCIENT ISRAEL AND IN THE ANCIENT NEAR EAST 154, 154–55 (1995).

[58] *See* BERNARD S. JACKSON, *"Holier than Thou"? Marriage and Divorce in the Scrolls, the New Testament and Early Rabbinic Sources, in* ESSAYS ON *HALAKHAH* IN THE NEW TESTAMENT 167, 169–70 (Jewish and Christian Perspectives Series, No. 16, 2008); JOHN W. WELCH, ILLUMINATING THE SERMON AT THE TEMPLE AND SERMON ON THE MOUNT 67, 69–70 (1999).

[59] Rodney K. Smith, *James Madison, John Witherspoon, and Oliver Cowdery: The First Amendment and the 134th Section of The Doctrine and Covenants*, 2003 BYU L. REV. 891, 929–33 (2003).

[60] Frederick Mark Gedicks, *The "Embarrassing" Section 134*, 2003 BYU L. REV. 959, 959–60 (2003).

[61] *See generally* JAMES K. BRUCKNER, IMPLIED LAW IN THE ABRAHAM NARRATIVE: A LITERARY AND THEOLOGICAL ANALYSIS (2001); DAVID DAUBE, STUDIES IN BIBLICAL LAW (The Lawbook Exchange, Ltd. ed., 2004) (1947); FALK, *supra* note 28; DALE PATRICK, OLD TESTAMENT LAW (1985); Raymond Westbrook, *Biblical Law, in* AN INTRODUCTION TO THE HISTORY AND SOURCES OF JEWISH LAW 1 (N.S. Hecht et al. eds., 1996). For several thousand references to books and articles about legal topics in the Bible, see JOHN W. WELCH, BIBLICAL LAW CUMULATIVE BIBLIOGRAPHY (Bringham Young Univ. Press & Eisenbrauns CD-ROM, 2005).

III. NOT RANDOM OR ECLECTIC, BUT INCLUSIVE

In 1931, the German mathematician Gödel proved an important hypothesis known as the incompleteness theorem.[62] He demonstrated that any system can be either complete or consistent, but not both.[63] Applying his theorem to systems of thought, it has been noted that systematic theologies and strictly rational philosophies may well achieve a satisfying sense of internal consistency, but they do so at the expense of completeness. The standard objections to Aquinas' naturalism, Kant's idealism, or Hart's positivism is that they exclude too much of the picture of life,[64] saying more and more about less and less, until they say virtually everything about nothing. Abstractions may be clean and clear, but they are also just that, extractions of selected parts from an unmanageable and perhaps naturally inconsistent whole. And the answer is not, with critical legal studies,[65] or perhaps legal polycentrism,[66] to say less and less about more and more, until one is left to say nothing about everything.

Mormon thought, in contrast, privileges fullness, abundance, completeness, and all that the Father has, even if that means that Mormon thought, like Mormon life, appears to be overloaded, inconsistent, in many ways rationally unprovable and torn by competing values and obligations that pull, stretch, and expand in many ways. This may produce episodes of cognitive dissonance, ethical quandaries, confusion, mystery, and unknowability, but Mormonism boldly recognizes that there must be an opposition in all things,[67] including rationality and irrationality, as paradoxical as that may seem.[68]

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62 ERNEST NAGEL & JAMES R. NEWMAN, GÖDEL'S PROOF 94–95 (5th impression, N.Y. Univ. Press 1964) (1958).

63 *Id.* Gödel's work as a young mathematician at the University of Vienna successfully proved the "axiomatic" approach to mathematical thought as unsound. *Id.* at 3–5. The original proofs of Gödel attacked the ancient Greek approach to mathematics, which accepts as true certain unproven axioms and then derives from those axioms all other propositions as theorems. *Id.* at 4–5. This approach was successfully used in geometry and, in Gödel's time, was being applied to other forms of mathematics. *Id.* Gödel's proof showed this approach unsound and his theories have since been extended beyond mathematics to other disciplines, including philosophy and systematic theology. *Id.* at 6–7.

64 *See, e.g.*, SINHA, *supra* note 25, at 202–04.

65 *Id.* at 297, 307–14 (defining the major tenants of Critical Legal Studies); Lewis A. Kornhauser, *The Great Image of Authority*, 36 STAN. L. REV 349, 364–71 (1984).

66 SINHA, *supra* note 25, at 347–49. *See generally* PLURALISM AND LAW (Arend Soeteman ed., 2001) (containing a series of articles addressing the problems and issues posed to the law in a global community); WARWICK TIE, LEGAL PLURALISM: TOWARD A MULTICULTURAL CONCEPTION OF LAW (1999).

67 2 *Nephi* 2:11 (The Book of Mormon).

68 *See* David L. Paulsen, *Harmonization of Paradox*, *in* ENCYCLOPEDIA OF MORMONISM, *supra* note 2, at 402–03. *See generally* TERRYL L. GIVENS, PEOPLE OF PARADOX: A HISTORY OF MORMON CULTURE (2007).

Faced with a choice, a Mormon jurisprudence will always prefer fullness over mere coherence, choosing to circumscribe all truth into one great whole. For this very reason, Joseph Smith objected to the limiting effects of denominational creeds, rational and consistent though they may be: "I want to come up into the presence of God, and learn all things; but the creeds set up stakes, and say, 'Hitherto shalt thou come, and no further' . . . ."[69]

A logical result of this inclusivism can be found in one of the basic impulses of Mormonism—gathering.[70] Joseph Smith and Brigham Young, the first two Presidents of the Latter-day Saints Church, gathered people from various places to Kirtland and Nauvoo, to Utah and Zion. But the principle of gathering embraces not only gathering groups of people but also bodies of truth. Brigham Young once said:

> It is our duty and calling, as ministers of the same salvation and Gospel, to gather every item of truth and reject every error. Whether a truth be found with professed infidels, or with the Universalists, or the Church of Rome, or the Methodists, the Church of England, the Presbyterians, the Baptists, the Quakers, the Shakers, or any other of the various and numerous different sects and parties, all of whom have more or less truth, it is the business of the Elders of this Church (Jesus, their Elder Brother, being at their head) to gather up all the truths in the world pertaining to life and salvation, to the Gospel we preach, to mechanism of every kind, to the sciences, and to philosophy, wherever it may be found in every nation, kindred, tongue, and people and bring it to Zion.[71]

Some people will say that a Mormon jurisprudence is eclectic. But there is a difference between being eclectic and being open or willing to be inclusive. A Mormon "rule of inclusion" may need to be developed. It will fall back, at a minimum, onto the Mormon concept of scripture, which is both open and canonical, transcendent and immanent.

As a Mormon jurisprudence reads various theories of law, it will find useful elements in each that are true and can be supported by scripture:

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[69] TEACHINGS, *supra* note 20, at 327. For a developmental analysis of the Christian creeds from a Latter-day Saints' perspective, see John W. Welch, *"All Their Creeds Were an Abomination": A Brief Look at Creeds as Part of the Apostasy*, *in* PRELUDE TO THE RESTORATION: FROM APOSTASY TO THE RESTORED CHURCH 228 (Sperry Symposium Series No. 33, 2004).

[70] Ronald D. Dennis, *Gathering*, *in* ENCYCLOPEDIA OF MORMONISM, *supra* note 2, at 536.

[71] BRIGHAM YOUNG, DISCOURSES OF BRIGHAM YOUNG 382 (John A. Widtsoe comp., 1925) [hereinafter DISCOURSES OF BRIGHAM YOUNG]. For a balanced, scholarly discussion of the history and meanings of the idea that Jesus Christ is a brother to all mankind, who all with him have God as their Father as stated in *Matthew* 6:9 and 7:21 (King James, The Church of Latter-day Saints), see Corbin Volluz, *Jesus Christ as Elder Brother*, 45 BYU STUDIES, No. 2, at 141 (2006).

Divine Law Theory. Divine law theory will certainly be a primary part of this mix.[72] God is a lawgiver in the Bible. Furthermore, the *Doctrine and Covenants* Section 88:42 expansively affirms, "[God] hath given a law unto all things,"[73] and Section 130:20 fundamentally speaks of a law "irrevocably decreed in heaven before the foundations of this world."[74] Moreover, Joseph Smith clearly asserted, God "was the first Author of law."[75]

Natural Law Theory. Natural law theory will have its solid truths to offer and is therefore an essential part of a Mormon jurisprudence.[76] Law naturally exists to some extent independent even of God, for in Alma's *reductio ad absurdum*, if God somehow were to be unjust, "God would cease to be God."[77] God is also bound when people do what he says.[78] Law is necessary, Lehi argued: "if . . . there is no law . . . . there is no God."[79] And in some sense, law or its effects are immutable or fixed: "[a]nd again, verily I say unto you, he hath given a law unto all things, by which they move in their times and their seasons; [a]nd their courses are fixed, even the courses of the heavens and the earth, which comprehend the earth and all the planets."[80]

Legal Idealism. Idealist views of law seem enticing, for God is a God of order.[81] He invites us to come and reason together with him.[82] But

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72 *See generally* Carl S. Hawkins & Douglas H. Parker, *Divine and Eternal Law, in* ENCYCLOPEDIA OF MORMONISM, *supra* note 2, at 808, 809–10. The article explains traditional divine law theory and places it in current Mormon thought, primarily by comparing and applying it to Mormon scripture. *Id.*

73 DOCTRINE AND COVENANTS, *supra* note 20, at 88:42.

74 *Id.* at 130:20.

75 TEACHINGS, *supra* note 20, at 56.

76 See W. Cole Durham, Jr., Kantian Justice: The Dynamic Tension of Natural and Positive Law, 32, 59 (Apr. 10, 1972) (unpublished senior thesis, Harvard University) (on file with Brigham Young University), for a brief discussion of the relationship between natural law and positive law. See also Francis J. Beckwith, Assoc. Professor of Philosophy and Church-State Studies, Baylor University, Paper Presentation at the Princeton University Center for the Study of Religion Conference: Mormonism and American Politics (Nov. 10, 2007), *available at* http://fora.tv/2007/11/10/Politics_and_Religious_Identity (commencing at minute 51:30), relying on DOCTRINE AND COVENANTS, *supra* note 20, at 130:20–21, 134:1–5; TEACHINGS, *supra* note 20, at 181 ("Every principle proceeding from God is eternal . . . ."), to refute Damon Linker, *The Big Test: Taking Mormonism Seriously*, THE NEW REPUBLIC, Jan. 1–15, 2007, at 18–19 (asserting Mormonism does not have the resources to deal with moral law).

77 *Alma* 42:13 (The Book of Mormon).

78 DOCTRINE AND COVENANTS, *supra* note 20, at 82:10 ("I, the Lord, am bound when ye do what I say; but when ye do not what I say, ye have no promise.").

79 2 *Nephi* 2:13 (The Book of Mormon).

80 DOCTRINE AND COVENANTS, *supra* note 20, at 88:42–43.

81 *See id.* at 88:119 (stating that the Lord's house is "a house of order").

82 *Isaiah* 1:18 (King James, The Church of Latter-day Saints).

he reminds us that his thoughts are not our thoughts.[83] Still, law strives for ideal harmony, and "[t]he law of the Lord is [ideally] perfect."[84]

Legal Positivism. Positivist formulations abound in Mormon scripture and rhetoric. On one hand, God's sovereign commands are coupled with explicit sanctions (as epitomizes the positivist jurisprudence of John Austin[85]) and on the other hand, with rewards upon that which blessing is predicated.[86] In the Book of Mormon, Lehi even goes as far to say that where there is no law, there is no punishment.[87]

Sociology. Sociological theories of jurisprudence look to the instrumental values of law in furthering the purposes of life, in promoting the inner order of human associations, or strengthening the conditions of social solidarity.[88] Similarly, the intellectual generativeness of Mormon scriptures on social order, the plan of salvation, the purpose of life, community, Zion, and the relativity of revelations in different dispensations and languages all invite sociological insights into a Mormon jurisprudence.

Pragmatism. Pragmatic views of law are prescriptive (as in the jurisprudence of John Chipman Gray[89]); so are the scriptural "be ye therefores" and the rules of conduct prescribed for members of the church throughout scripture.[90]

Legal Realism. Even legal realism may have a place in a Mormon jurisprudence. Realist views are predictive, or at least attempt to predict future judicial outcomes based on past experience (as in the work of Oliver Wendell Holmes and Karl Llewellyn[91]). Likewise, the prophecies

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83 *Isaiah* 55:8 (King James, The Church of Latter-day Saints).

84 *Psalms* 19:7 (King James, The Church of Latter-day Saints).

85 *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE 157–59 (1954). For examples of commandments or laws coupled with punishments, see *Alma* 30:10 (The Book of Mormon); *Deuteronomy* 22:22 (King James, The Church of Latter-day Saints); *Genesis* 9:6 (King James, The Church of Latter-day Saints).

86 DOCTRINE AND COVENANTS, *supra* note 20, at 130:21.

87 2 *Nephi* 2:13 (The Book of Mormon).

88 SINHA, *supra* note 25, at 223–45.

89 *See generally* JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW (Roland Gray 2d ed., The Macmillan Co. 1921) (1909).

90 *See, e.g.*, DOCTRINE AND COVENANTS, *supra* note 20, at 105:41; *Exodus* 22:31 (King James, The Church of Latter-day Saints); *Luke* 6:36 (King James, The Church of Latter-day Saints); *Matthew* 5:48 (King James, The Church of Latter-day Saints); 3 *Nephi* 12:48 (The Book of Mormon).

91 OLIVER WENDELL HOLMES, JR., THE COMMON LAW (1887), *as reprinted in* JEFFREY A. BRAUCH, IS HIGHER LAW COMMON LAW?: READINGS ON THE INFLUENCE OF CHRISTIAN THOUGHT IN ANGLO-AMERICAN LAW 79, 79–80 (1999); Karl Llewellyn, "*Some Realism About Realism*," 47 HARV. L. REV. 1222 (1931), *as reprinted in* BRAUCH, *supra*, at 80, 82, 85.

about how the final judgment will proceed and what the consequences of human choices will be are also predictive.[92]

Psychology and Phenomenology. Psychological and phenomenological constructs of law[93] seem consonant with the scriptural injunctions to find and do justice, not in or with law books and past precedents, but "in the fear of the Lord, faithfully, and with a perfect heart."[94]

And so it goes: wherever truth may be found, it will be embraced and utilized by a Mormon jurisprudence. Jurisprudential conflict usually stems from different answers to the following question: where do we look for truth? Various theories provide answers such as universality,[95] consistency,[96] rationality,[97] stateability,[98] as well as enforceability, predictability, or measurability. Others say, look to experience; but to whose experience do we look? Again, various answers range from looking to the experience of the courts,[99] of officials,[100] of legislators,[101] of ordinary citizens, or of social scientists.[102] A Mormon jurisprudence would not exclude *a priori* any of these answers and would include others as well, which leads to one final main point.

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92 *Alma* 12:13–18 (The Book of Mormon); *Mosiah* 3:24–27 (The Book of Mormon).

93 SINHA, *supra* note 25, at 284–95.

94 2 *Chronicles* 19:9 (King James, The Church of Latter-day Saints); *see also* DOCTRINE AND COVENANTS, *supra* note 20, at 97:21.

95 *See* CAIRNS, *supra* note 26, at 118–20 (discussing Aristotle's concept of universal justice).

96 *See* ALDISERT, *supra* note 38, at 313–414 (discussing examples of observing precedent when making decisions in law).

97 *Id.* at 428–46 (explaining the use of logic in the law); *see also* Morris R. Cohen, *The Place of Logic in the Law*, 29 HARV. L. REV. 622, 630–38 (1916), *reprinted in* COHEN AND COHEN'S READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY, *supra* note 38, at 412–18 (same).

98 *See* ALDISERT, *supra* note 38, at 604–75 (justifying judicial decision-making in judicial opinions).

99 *Id.* at 527–28.

100 *Id.* at 121–80.

101 *See* William Robert Bishin, *The Law Finders: An Essay in Statutory Interpretation*, 38 S. CAL. L. REV. 1, 2–3, 13–17 (1965), *as reprinted in* COHEN AND COHEN'S READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY, *supra* note 38, at 340–46; Julius Cohen, *Towards Realism in Legisprudence*, 59 YALE L.J. 886, 886–97 (1950), *as reprinted in* COHEN AND COHEN'S READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY, *supra* note 38, at 346–53; SIR HENRY MAINE, EARLY HISTORY OF INSTITUTIONS (3d. ed. 1880), *as reprinted in* COHEN AND COHEN'S READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY, *supra* note 38, at 339–40.

102 Alvin K. Klevorick, *Law and Economic Theory: An Economist's View*, 65 AM. ECON. REV. 237 (1975), *as reprinted in* COHEN AND COHEN'S READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY, *supra* note 38, at 882–91; Laurence H. Tribe, PHIL. & PUB. AFF., Fall 1972, at 66, *as reprinted in* COHEN AND COHEN'S READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY, *supra* note 38, at 839–40.

IV. FUNDAMENTALLY PLURALISTIC

As one may readily discern from the foregoing discussion of the Latter-day Saint concept of open canon and from the strong Latter-day Saint preference for fullness, the main philosophical assumptions that will drive the engine of a Mormon jurisprudence are all distinguished by a strong inclination, not necessarily toward pluralism, but toward pluralistic manifolds.

Over the years, I have spoken with many scholars of various faiths. These discussions have made me keenly aware that words and phrases, concepts and presuppositions, all of which seem perfectly obvious and intuitively valid to me, may mean something completely different, or perhaps even nothing at all, to a person of another persuasion. Frequently, this results in frustration, misrepresentation, or abandonment of the topic.

As I sat listening to intellectual ships passing in the night, it dawned on me why so many points of disjunction exist between Mormonism and traditional Christian orthodoxy. The common element present in Evangelical objections against Mormon thought is this: Evangelicals, including such notables as C. S. Lewis, are monists, where Mormons are pluralists. Over and over again, Mormon doctrine relishes multiplicity. Many words found in traditional Christianity are principally understood in the singular; whereas, the same words in Mormon doctrine are predominantly understood as plurals[103]: priesthoods and priesthood offices;[104] kingdoms, powers, and principalities;[105] intelligences, two creations, and worlds without number;[106] hosts of heaven; messengers;[107] continuing revelations and gifts of the spirit;[108] scriptures, dispensations, covenants, ordinances, two Jerusalems, and two deaths; heavens;[109] degrees of glory;[110] many

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[103] Mormons typically rely on the King James version of the Bible published by The Church of the Latter-day Saints. All English translations of the Bible, including the New International Version, sometimes singularize words, even though the ancient Hebrew or Greek might have used a plural. I do not mean to imply that Evangelicals do not rely on the King James version; rather I simply wish to draw attention to the different doctrinal implication of the singular and the plural.

[104] *Ephesians* 4:11 (King James, The Church of Latter-day Saints); *Hebrews* 7 (King James, The Church of Latter-day Saints).

[105] *Titus* 3:1 (King James, The Church of Latter-day Saints).

[106] *Compare Hebrews* 1:2, 11:3 (New International Version), *with Hebrews* 1:2, 11:3 (King James, The Church of Latter-day Saints).

[107] *Amos* 3:7 (King James, The Church of Latter-day Saints).

[108] 1 *Corinthians* 12:4–11 (King James, The Church of Latter-day Saints).

[109] *Matthew* 5:3, 10:10, 6:9 (King James, The Church of Latter-day Saints). Although "heaven" is used in the singular in both the New International version and the King James version as published by The Church of the Latter-day Saints, Mormon doctrines rely on the

"mansions";[111] eternal lives; and even, in certain senses, saviours,[112] and gods.[113] It is second nature for Latter-day Saints to think, comfortably, in terms of manifold pluralities. In contrast, it is first nature for Evangelicals to think, readily, in terms of singularity: one kingdom, one scripture, one priesthood of all believers, one saving act, and one sanctifying human response of faith to God's singular grace.[114]

The debate over whether truth, reality, being, and matter are ultimately one or many has a very long and sagacious history. Greek philosophy traces its earliest origins to the debate over whether essence is ultimately one or many. Parmenides, Heraclitus, Thales, Anaximander, Democritus, and others argued over whether matter is one or many, and if many, how many.[115] Medieval alchemists subscribed to the view that matter was essentially homogenous, so one form of matter could be transmuted into another.[116] Newtonian science, Bohr's atomic theory, and now high energy nuclear physics, have offered views on ultimate valences of matter.[117] Scientific models, of course, do not control theology, but they do provide points of reference in understanding the nature of existence, or better said, of existences. Mormon thought would come down on the side of the pluralists in several important ways:

Epistemology. A Mormon jurisprudence will draw on multiple sources of knowledge. Logic, reason, and rationalism are sources of

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original Greek, *ouranos*, which is often referred to in the plural, *ouranoi*. NEW BIBLE DICTIONARY 465–66 (J.D. Douglas et al. eds., 2d ed. 1982).

[110] 1 *Corinthians* 15:40–42 (King James, The Church of Latter-day Saints).

[111] *John* 14:2 (King James, The Church of Latter-day Saints). The original Greek word is *monai*. NEW BIBLE DICTIONARY, *supra* note 109, at 735.

[112] *Compare Obadiah* 1:21 (New International Version) (translated as "deliverers"), *with Obadiah* 1:21 (King James, The Church of Latter-day Saints) (translated as "saviours").

[113] *Psalms* 82:6 (King James, The Church of Latter-day Saints).

[114] This should come as no surprise, since Evangelicalism is firmly rooted in Protestantism and its general affirmation of the five "*solas*": *sola scriptura* (scripture alone), *solus Christus* (Christ alone), *sola gratia* (grace alone), *sola fide* (faith alone), and *sola Deo gloria* (glory to God only).

[115] *See generally* THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 624–25 (Robert Audi ed., 1995). *Cf.* DANIEL W. GRAHAM, EXPLAINING THE COSMOS: THE IONIAN TRADITION OF SCIENTIFIC PHILOSOPHY 186, 220–23 (2006) (positing a new practice of cosmology, which, according to the standard interpretation of Anaxagoras' and Empedocles' later Ionian philosophy, is best termed *Eleatic pluralism*).

[116] *See* E. J. HOLMYARD, ALCHEMY 15–16 (Dover Publ'ns, Inc. 1990) (1957).

[117] *See* JOHN L. BROOKE, THE REFINER'S FIRE: THE MAKING OF MORMON COSMOLOGY 1644–1844, at 27, 95, 106 (1994). *See generally* William J. Hamblin et al., Book Review, 34 BYU STUDIES, No. 4, at 167 (1994–95). Quantum String Theory has recently jumped into this debate, postulating that the universe is only made of one kind of thing—"strings" that vibrate at different frequencies to become the different particles we observe. BRIAN GREENE, THE ELEGANT UNIVERSE: SUPERSTRINGS, HIDDEN DIMENSIONS, AND THE QUEST FOR THE ULTIMATE THEORY 15–17 (2003).

knowledge, judgment, and wisdom, but they are not exclusive sources. Revelation, inspiration, spirituality, and emotion are among sources of knowledge that all have important places at the Mormon jurisprudential roundtable. None of these places necessarily hold the right to trump the input of any of the other places, although in matters of reason, the rules of reason trump, and in matters of revelation, gifts of the spirit would hold sway. As I have written elsewhere, both are necessary: just as it takes two hands to play a violin, it takes both mind and spirit to approach truth.[118] One must "seek learning, even by study and also by faith."[119] Thus, I am dubious of compartmentalization.[120]

Cosmology. A Mormon jurisprudence presumes a complex layering of multiple worlds or kingdoms, which necessarily entails multiple laws. Especially important and interesting is the revelation in *The Doctrine and Covenants*, which reads:

> All kingdoms have a law given; [a]nd there are many kingdoms; for there is no space in the [sic] which there is no kingdom; and there is no kingdom in which there is no space, either a greater or a lesser kingdom. And unto every kingdom is given a law; and unto every law there are certain bounds also and conditions. All beings who abide not in those conditions are not justified.[121]

What one finds here is a very profound and important approach to law, which can be called, with apologies to Einstein, a general theory of *legal* relativity. Natural law cannot be universalized specifically because all creation is not in fact one homogenous universe, but a multiverse. Every kingdom has a law, yet it is a natural law, at least in the sense that it is consistent with the nature of the matter within that kingdom. A Mormon jurisprudence would recognize that many laws pertinent to this world are quite possibly irrelevant in the setting of another kingdom. Do laws against murder have anything to do with another world of immortal beings?

This point could be multiplied many times over. Metaphysically, Mormon thought uses time and eternity perspectives and realizes that justice may still be just, even if it is delayed. This diachronic factor solves a classic paradox of justice and mercy, of God being both just and

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[118] JOHN W. WELCH, NURTURING FAITH THROUGH THE BOOK OF MORMON: THE TWENTY-FOURTH ANNUAL SIDNEY B. SPERRY SYMPOSIUM 149, 149–86 (1995), *as reprinted in* ECHOES AND EVIDENCES OF THE BOOK OF MORMON 17, 26 (Donald W. Perry et al. eds., 2002).

[119] DOCTRINE AND COVENANTS, *supra* note 20, at 88:118.

[120] *Cf.* Young, *supra* note 48, at 1069–95 (arguing that compartmentalization of faith and scholarship stems, *inter alia*, from the historical separation of religion and academia, the tendency of man to compartmentalize competing demands, and the inevitability of bias; but that Latter-day Saint scholars should make a courageous effort to juxtapose vocation and faith).

[121] DOCTRINE AND COVENANTS, *supra* note 20, at 88:36–39.

merciful, for, as the prophet Alma explains, mercy resides in the fact that God stays his hand during a probationary time allowing people to choose to repent and accept the benefits of the grace and atonement of Jesus Christ.[122] Of course, only a God who exists and acts in time can do this, allowing such a stay in the execution of the demands of justice.[123]

A binary world is presumed in the opposites that constituted the Creation (dark and light, wet and dry, male and female), with both sides of these pairs of opposites being not only descriptive of the nature of this world, but also necessary to permit choice. As Lehi famously stated, "For it must needs be, that there is an opposition in all things."[124] A Mormon metaphysics, therefore, would address and include such concepts as causation, determinism, fate, freedom, influence, addiction, and relinquishment of freedom, accepting as fundamental the axiom that human nature is changeable, both for better or worse:

> And again, verily I say unto you, that which is governed by law is also preserved by law and perfected and sanctified by the same. That which breaketh a law, and abideth not by law, but seeketh to become a law unto itself, and willeth to abide in sin, and altogether abideth in sin, cannot be sanctified by law, neither by mercy, justice, nor judgment. Therefore, they must remain filthy still.[125]

A Mormon jurisprudence would work from a basic understanding of human nature that recognizes the seed of divinity and therefore of eternal value in every human being, however faint it may sometimes seem.[126] The jurisprudence of Thomas Hobbes begins with the premise that human nature is evil and needs to be contained and controlled by benevolent ruling forces.[127] While recognizing that evil forces influence and shape human decisions and that the natural or mortal element in man stands in a state of enmity toward the immortal or divine, a Mormon jurisprudence still assumes that humanity is in essence beneficent and that most of the people most of the time will prefer to choose good over evil.[128]

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[122] *See Alma* 42:4 (The Book of Mormon).

[123] *See generally* David L. Paulsen, *The Doctrine of Divine Embodiment: Restoration, Judeo-Christian, and Philosophical Perspectives*, 35 BYU STUDIES, No. 4, at 7, 8 (1996) (arguing for a rational acceptance of the divine embodiment of an infinite God).

[124] 2 *Nephi* 2:11 (The Book of Mormon).

[125] DOCTRINE AND COVENANTS, *supra* note 20, at 88:34–35.

[126] *See generally* Truman G. Madsen, *The Latter-Day Saint View of Human Nature*, *in* ON HUMAN NATURE: THE JERUSALEM CENTER SYMPOSIUM 95 (Truman G. Madsen et al. eds., 2004) (exploring the Latter-day Saint view of human nature in a collection containing nine different religious traditions' views on the same).

[127] THOMAS HOBBES, LEVIATHAN 74–78, 84–85 (Edwin Curley ed., Hackett Publ'g Co. 1994) (1668).

[128] *Mosiah* 29:26 (The Book of Mormon).

A Mormon jurisprudence would pluralistically place equal weight on rights and duties. In the United States, people speak often, and sometimes loudly, in behalf of rights: civil rights, human rights, legal rights, the right to bear arms, the right to assemble, the right to counsel. Less frequently, if at all, do people speak of duties. While I am a strong supporter of the Bill of (individual) Rights, I wonder if one should not begin to promote the idea of a "Bill of Communitarian Duties." I suspect that the twentieth century will go down in jurisprudential history as the century of personal rights (equal rights, voting rights, civil rights, etc.). I hope that the twenty-first century will become a century of legally recognizing and strengthening civic duties.

Ultimately, duty analysis turns on how people view other people. If other people are optional and all relationships are voluntary, duties are spineless. A Mormon jurisprudence, however, rejects the prevailing view of radical individualism and operates upon the fundamental assumption that all human beings are children of God, irrevocably brothers and sisters. In this view, other people are not optional.[129] Indeed, through the atonement of Jesus Christ, every human being may become fully exalted and receive all that he and his Father have. Moreover, these involuntary relationships may be sanctified by volitional, holy, and eternal covenantal bonds. This potent Latter-day Saint view supports not just ordinary but indeed robust views of communitarian social justice.

An ethics of merit and responsibility goes hand-in-hand with this Mormon self-perception, for no one will get to a state of justice by getting there alone. Permissiveness is not a blessing if it encourages self-destruction, and we mourn each loss as a loss of part of ourselves.

A pluralistic Mormon jurisprudence would reject the idea that all law can be reduced to economics.[130] In fact, one cannot buy anything and everything in this world for money. This irreducibility transforms a jurist's approach to damages, equity, remedies, fairness, justice, and

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[129] *See* TEACHINGS, *supra* note 20, at 159; *see also* DOCTRINE AND COVENANTS, *supra* note 20, at 132:15–19.

[130] *But see* C. Edwin Baker, The Ideology of the Economic Analysis of Law, PHILOSOPHY & PUB. AFF., Autumn 1975, at 3, *reprinted in* COHEN AND COHEN'S READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY, *supra* note 38, at 870; Thomas C. Heller, *The Importance of Normative Decision-Making: The Limitations of Legal Economics as a Basis for a Liberal Jurisprudence—as Illustrated by the Regulation of Vacation Home Development*, 1976 WIS. L. REV. 385, 468–73 (1976), *as reprinted in* COHEN AND COHEN'S READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY, *supra* note 38, at 891, 893; Klevorick, *supra* note 38, at 883–85, 890–91; Richard A. Posner, Observation, *The Economic Approach to Law*, 53 TEX. L. REV. 757, 759–78 (1975), *as reprinted in* COHEN AND COHEN'S READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY, *supra* note 38, at 853; Laurence H. Tribe, *Policy Science: Analysis or Ideology*, PHIL. & PUB. AFF., Fall 1972, at 66, *reprinted in* COHEN AND COHEN'S READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY, *supra* note 38, at 836.

punishment. A Mormon jurisprudence will likewise make room for multiple theories of punishment, not just the one right theory or approach (as seems to be the premise in the exchange between Martin Gardner and Steven Huefner[131]). Individual circumstances and needs will call for the use of an arsenal of various punishments. A Mormon jurisprudence might even favor a talionic approach to punishment, on some occasions having the punishment match the crime. The scriptures are full of examples of talionic justice, especially in cases involving divine or natural justice.[132] As I have suggested elsewhere, under a Mormon jurisprudence, if a person litters the highway he or she would be sent out to clean up roadways.[133] If a person lies under oath, that person should not be allowed to hold positions of trust, such as service on a board or as a trustee. We might punish those who commit perjury by having the IRS audit their tax returns, a fitting penalty; since tax returns are filed under penalty of perjury, if one has lied on the witness stand, "the government might want to presume that such a person would also have likely lied on his or her tax returns."[134]

V. CONCLUDING COMMENTS

In conclusion, I come back to a few things I passed over quickly at the beginning of this Article. While one may agree with Dean Michael Young that the task of articulating a Mormon jurisprudence may be much more difficult and perhaps even riskier than people might have assumed, I do not think that people should be hesitant or reluctant in trying. Offering a Mormon approach need not be a "conversation stopper." Members of all faiths should be engaged in the ongoing process of understanding jurisprudence. Indeed, anyone who asserts a right or advances a worldview bears the duty to articulate the implications of their exercise of that right or of adopting that worldview.

Mormonism, of course, is a young tradition, little more than 175 years old. Think where Christianity was when it was only 175 years old. No Mormon Thomas Aquinas has appeared yet. Latter-day Saints still have much homework to do, and in this they will need the help of many

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[131] *Compare* Gardner, *supra* note 40, at 861–62, 889 (arguing that a retributivist view of punishment best serves the Latter-day Saints Church doctrine), *with* Steven F. Huefner, *Reservations About Retribution in Secular Society*, 2003 BYU L. REV. 973, 973–74, 988, 992 (2003) (disagreeing with Gardner that a retributivist view justifies punishment and instead arguing that Latter-day Saints Church doctrine strongly supports a utilitarian justification).

[132] BERNARD S. JACKSON, STUDIES IN THE SEMIOTICS OF BIBLICAL LAW 271–97 (2000).

[133] John W. Welch, *Biblical Law in America: Historical Perspectives and Potentials for Reform*, 2002 BYU L. REV. 611, 641 (2002).

[134] *Id.*

intellectual friends. However, Mormonism is extraordinarily rich in potential. It is deeply devoted to both truth and goodness. How rich is the idea that people should become eventually like God (an idea not unique to Mormonism, as reflected in 1 *John* 3:2). Whatever a person's view of God's true character or characteristics might be, how much better the world would be if that person would strive to the extent possible in this present mortal experience to be like God.

The jurisprudential potential of Mormonism remains to be actualized. I mentioned several passages, such as the words of Alma, the founding Nephite chief justice, in *Alma* 42, regarding justice and mercy. A Latter-day Saint might see his words as jurisprudential matter unorganized and awaiting organization, and others may see these ideas as Wittgensteinian[135] notations; filled with choice kernels that in the Lord's time may blossom, containing nuggets that still need to be mined, and arrayed with loose gems that still need to be set.

Most of all, one may see in Mormon jurisprudence a potential to be pluralistic without degenerating back into chaos. In the postmodern world, Mormonism offers a logical alternative to the two prevailing paradigms—relativism and absolutism.

Postmodernism is heavily entrenched in relativism, despite the fact that relativism has its own philosophical problems.[136] Following Nietzsche and others, the relentless search for rationally based truth has been basically eliminated. Things are now "true" inasmuch as they correspond to their systems (for example, Wittgenstein's language games[137])—but there is no single system that dominates all other systems.

Based on this, what is true for one person can be false for another. Despite this entrenched relativism, however, few actually believe it when taken to its logical conclusion. For example, the New Testament states that Christ died on the cross. The Qur'an is equally emphatic that he did not. Few believe that the two statements can both be true, and hence people are absolutist in at least some weak sense of the word. But how is one to determine which of the two, or if both, are false?

The Enlightenment has failed in several important respects—unaided rationality cannot lead to ultimate truth. This failure has called

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[135] For a resource detailing the intricacies of Wittgenstein's philosophical contribution to logic and language, see generally DEEPENING OUR UNDERSTANDING OF WITTGENSTEIN (Michael Kober ed., 2006).

[136] I use "relativism" here as the various philosophical systems that deny ultimate truth. Any such system will necessarily have problems, like the fact that the sentence "all truth is relative" makes itself relative.

[137] LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 5e (G.E.M. Anscombe trans., Macmillan 3d ed. 1969) (1953).

into question whether there is ultimate truth.[138] But what replaced the mindset of the Enlightenment—namely, postmodernism—has plenty of problems of its own. This again is another one of the places where the Mormon worldview, and hence a Mormon jurisprudence, allows people to have their cake and eat it too. There is ultimate truth—in the Latter-day Saints view—in statements such as God exists; Jesus is the Christ, the Son of the living God; God speaks through prophets; the Bible contains the word of God; and so on. Though the ultimate goal, for Mormons and all other Christians, however, is to have every member of the human race hear and accept all ultimate truths, the emphasis for Latter-day Saints is not on immediately arriving at that truth and changing one's life instantaneously. The Latter-day Saints scriptures are replete with statements that those who continually seek after more light and knowledge are those who grow line upon line,[139] will increase in light and holiness,[140] and will eventually enter into the rest of God. Those who continually seek further light and knowledge will not be blamed.

This allows a Mormon jurisprudence to create a mediating position between relativism and absolutism. Two mutually contradictory facts are not true in the sense that they both represent reality, but depending on the individual circumstances of each human being, what is helpful in the development of one person's spirituality might not be helpful to another's. Ultimately, of course, the judgment of how well we have done is left to God.

An analogy from *Romans* is useful: Paul compares in *Romans* 12 the church of Christ to a body.[141] Extending that analogy, the human race itself is a body, and not all have the same office. Though Latter-day Saints believe they have the fullness of the gospel, they do not equate that fullness with all truth, as was mentioned above by Brigham Young.[142] The Latter-day Saint Church teaches that the great thinkers and religious leaders of the world—Muhammad, Zarathustra, Lao Tzu, Socrates, and others—were sent by God to bring further light and knowledge to their respective peoples inasmuch as those people were ready to receive.[143] Consequently, Latter-day Saints hope to learn much from the teachings of such great men.

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[138] The argument runs something like this: rationality cannot lead to ultimate truth; therefore there is no ultimate truth. This is obviously fallacious. Many postmoderns have thrown out the baby with the bath water.

[139] 2 *Nephi* 28:30 (The Book of Mormon).

[140] DOCTRINE AND COVENANTS, *supra* note 20, at 82:14.

[141] *Romans* 12:4–5 (King James, The Church of Latter-day Saints).

[142] *See* DISCOURSES OF BRIGHAM YOUNG, *supra* note 71, at 382.

[143] *See generally* Cardell Jacobson, *Official Declaration—2, in* ENCYCLOPEDIA OF MORMONISM, *supra* note 2, at 423–24 (discussing the revelation to President Spencer W.

This emphasis on doing the best one can, spiritually and intellectually, with what one has been given allows the Latter-day Saint to emphasize aspects of both the Enlightenment worldview, namely that there is ultimate truth, and the postmodern worldview, namely that what is "true" for one person might not be "true" for another, with the disclaimer that one must always be moving towards the ultimate truth inasmuch as it is revealed to him or her. Mormon thought is pluralistic without degenerating into chaos.

A pluralistic theology or jurisprudence should uniquely appeal to and serve the needs and interests of the ever-increasingly complex world in which various cultures, ideologies, interest groups, cultures, ethnicities, modalities, and religions abound. Indeed, it should serve the needs of all God's children, in every nation, kindred, tongue, and people. Is it too much to think that a Mormon jurisprudence might serve those ends even better than the other options that have been put on the jurisprudential table thus far?

Kimball, Official Declaration—2, which made it possible for all worthy males—including black males—to hold the priesthood).

EVALUATING SUPERNATURAL LAW: AN INQUIRY INTO THE HEALTH OF NATIONS (THE RESTATEMENT OF THE OBVIOUS, PART II)*

*Thomas C. Folsom***

"[W]e have now sunk to a depth at which the restatement of the obvious is the first duty of intelligent men."[1]

ABSTRACT

This Article provides a working definition of "supernatural law" and describes a pressing problem with it: some say morality is essential to good government and that supernatural law is essential to morality, while others deny one or both of these propositions. As used herein, "supernatural law" refers to any rule or command given to subjects ("believers") by an incorporeal sovereign and which includes at least one precept, rule, or command that is not necessarily determinable by reason. The term "supernatural law" is intended to be sufficiently general to apply to any such law whether proposed according to Judaism, Christianity, Islam, Mormonism, or any other religion; it also applies to "nonreligious" supernatural rules. Supernatural law is, has been, and probably will remain intertwined with conventional legal

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[1] George Orwell, *Review of* Power: A New Social Analysis *by Bertrand Russell*, THE ADELPHI, Jan. 1939 (book review), *reprinted in* GEORGE ORWELL, ESSAYS 107, 107 (2002); *accord* J. BUDZISZEWSKI, WHAT WE CAN'T NOT KNOW: A GUIDE 15 (2003); *see also* JAMES V. SCHALL, THE REGENSBURG LECTURE 13 (2007) ("Most people . . . are not learned but they are not idiots; they have common sense. They too seek to know and expect clarity from those of more leisure and genius than they."). My thanks to Professor Peter Richards for pointing me to the actual source of the well-known Orwell quotation.

systems not only in the United States but globally and transnationally. This Article proposes that the claims of supernatural law be subjected to rational evaluation against specified criteria. Those criteria relate to: (1) the rule of law; (2) the nonimposition principle; and (3) the ability of any system of supernatural law to provide adequate assurances of performance. "Adequate assurances" signify some reason to believe that their undertakings to observe the rule of law and the nonimposition principle will be honestly and faithfully performed if and when the adherents of a supernatural law become politically dominant and powerful enough to make legally binding rules for the rest of the polity. If, in fact, morality is important to the health of nations, and if supernatural law is important to morality, then the state of supernatural law is a leading indicator of the health of any nation. Surprisingly little systematic thought has been given to the general question of how to evaluate the claims of any given system of supernatural law (a "supernatural jurisprudence") against any specified criteria for rational judgment about those claims. This Article does just that. It asserts that if and to the extent any supernatural law positively supports the rule of law and respects the nonimposition principle, it is a great good which can contribute to the health of any nation. It also asserts the converse. Any system of supernatural law that cannot be trusted to be consistent with the rule of law and the nonimposition principle can be toxic to the health of a nation.

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INTRODUCTION

The argument is in four parts. Part I proposes criteria for a rule of law. Replacing generalities about "democracy" or "liberty" with a specified and determined set of criteria, this Article observes that it becomes possible to grade any system of supernatural law in relation to its conformity with testable propositions. Part II addresses the nonimposition principle. Replacing the narrow view of Western "disestablishment" with a more open concept, it proposes respect for the individual conscience and a commitment to refrain from imposing purely supernatural law upon those who neither accept nor believe the supernatural basis upon which it rests. Part III considers the problem of producing any credible assurances of performance by adherents of any given system of supernatural law. Part IV proposes the sequence in which the claims of any system of supernatural law might be evaluated in an orderly and rational process. This Article ends with a Conclusion summarizing the end of supernatural law, its perennial and growing global influence, and its vital importance. It also invites further work. Appendix A contains a succinct listing of the criteria identified during the course of the discussion herein. Appendix B illustrates the formal outline of an application of these criteria.

PROLOGUE

There are some, including some within the self-styled legal elites and among those wielding actual judicial power, who are no more comfortable with Christianity in American law and governance than with Islam in Turkish law and governance.[2] Given that one polity is a majority Christian nation,[3] and the other is a majority Muslim nation,[4]

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[2] The more general question with which this Article is concerned is the role of supernatural law, anywhere. But the discussion has to start somewhere.

[3] Estimates vary, but one source has it: "Protestant 51.3%, Roman Catholic 23.9%, Mormon 1.7%, other Christian 1.6%, Jewish 1.7%, Buddhist 0.7%, Muslim 0.6%, other or unspecified 2.5%, unaffiliated 12.1%, none 4% (2007 est[imate])." CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK, UNITED STATES (2008), https://www.cia.gov/library/publications/the-world-factbook/print/us.html.

[4] Estimates vary, but one source has it: "Muslim 99.8% (mostly Sunni), other 0.2% (mostly Christians and Jews)." CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK, TURKEY (2008), https://www.cia.gov/library/publications/the-world-factbook/print/tu.html.

both governed as constitutional, representative democracies,[5] this is more than odd. It is a curiosity. One might with as much reason exclude British culture from British law, or Chinese culture from Chinese law. It is all the more curious because some say morality is essential to good government itself, and that religion is essential to morality. George Washington is but one example, and the United States of America is but one exemplar. George Washington said the following:

> Of all the dispositions and habits which lead to political prosperity, Religion and morality are indispensable supports. . . . And let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle.[6]

Proposition 1—the practical syllogism. Let it be said that a practical syllogism is as follows: if national morality is good for the polity, and if supernatural law is good for national morality, then supernatural law is good for the polity.[7]

Notwithstanding the implied practical syllogism[8] expressed in the quoted passage from George Washington, some have challenged it, or have challenged particular religions, at least as expressed in certain religiously based laws and in certain countries.[9] Indeed, it has happened

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[5] *See generally* U.S. CONST. arts. I–VII, amends. I–XXVII; THE CONSTITUTION OF THE REPUBLIC OF TURKEY, pmbl., pts. 1–7 *available at* http://www.byegm.gov.tr/mevzuat/anayasa/anayasa-ing.htm (providing an English version, as maintained by the Office of the Prime Minister, Directorate General of Press and Information).

[6] George Washington, U.S. President, Farewell Address (Sept. 19, 1796), *in* THE AMERICAN REPUBLIC: PRIMARY SOURCES 72, 76 (Bruce Frohnen ed., 2002) [hereinafter AMERICAN REPUBLIC].

[7] This Article includes three propositions. This is the first. The second is at *infra* note 29 and accompanying text, and the third is at *infra* note 147 and accompanying text.

[8] The practical syllogism is inspired by, but not identical to, George Washington's formulation. I have softened and transposed it into a hypothetical mode and converted particular terms ("religion" and "religious principle" as well as what might be understood to be a "Christian or Judeo-Christian" religion) into the more general terms ("supernatural law") used herein.

[9] It is certainly the case that the practical syllogism might be valid but not true for the failure of one or more of the premises. It is likewise possible, and perhaps likely, that even if its premises be true, they may be true only for *some* supernatural law and not all systems of supernatural law. This is because there is more than one system of supernatural law, and those systems are not identical. *See infra* notes 40–43, 49, 52. The problem addressed by this Article is precisely the question whether *any* system of supernatural law might be "qualified" in accordance with some rational and testable standard. This Article asserts that some systems might qualify and others might not, according as they do or do not satisfy the standard. This Article does not itself do anything more than propose the standard. It leaves it to the proponents of various systems to make the case that their system meets the standard, and it leaves it to the members of their polity to respond and ultimately to determine for themselves. This Article proposes a rule-

in the United States, and it has happened elsewhere. Two examples might suffice. The first example of a challenge to the practical syllogism comes from within the United States itself, where problems of supernatural law have figured prominently in constitutional law doctrines that simultaneously recognize a right to the free exercise of religion while prohibiting any congressional establishment of it. Interpreting a clause in the United States Constitution[10] in light of a letter written by Thomas Jefferson,[11] and affirming the constitutionality of a law that provided some incidental state financial assistance to parents of children attending religiously affiliated schools, the Supreme Court has said, "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"[12] The Court went on to conclude, "The First Amend-

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based standard, sufficiently specified into testable propositions for use in legal or practical determinations of the question. "Testable" propositions are falsifiable propositions.

[10] *See* 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 of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.").

[11] While serving as President of the United States, Thomas Jefferson wrote to Nehemiah Dodge and other members of a Committee of the Danbury Baptist Association in the State of Connecticut:

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building *a wall of separation* between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.

Letter from Thomas Jefferson to the Danbury Baptist Ass'n (Jan. 1, 1802), *in* AMERICAN REPUBLIC, *supra* note 6, at 88 (emphasis added); *see also* DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE (2002) (including copies of prior drafts, prior sources and context, and opining as to the probable intent of the letter versus subsequent interpretations of it). Any student of the question would probably be curious to know the extent to which the language in Jefferson's letter tracked with the language and intent of the contemporaneously widely circulated and widely known common confession of many American citizens. Pertinent portions of Articles 23.1 and 23.3 of the Westminster Confession of Faith (the 1787 U.S. amended version adhered to, or well-known by, a substantial number of Americans at the time of the adoption of the First Amendment) are quoted *infra* at note 137.

[12] Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

ment has erected a wall between church and state. That wall must be kept *high and impregnable*. We could not approve the slightest breach."[13]

The United States is, of course, not the only nation that has dealt with supernatural law within the polity. Separated from the U.S. examples just given by time, distance, particular legal structure, and culture, the European Court of Human Rights recently ruled on the same general problem. The Refah Partisi case forced the court to review the place of supernatural law within the Turkish polity under the standard set by international conventions.[14] The European Court of Human Rights, addressing events in Turkey and applying the standards of the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention"),[15] provides a striking recent example of an objection to supernatural law.

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[13] *Id.* at 18 (emphasis added). Perhaps only coincidentally, the Court used the opportunity of combining a traditional result (affirming the constitutionality of the challenged state support of transportation costs borne by parents to send their children to religiously affiliated schools) with a decidedly nontraditional and new rubric (the "high and impregnable" wall, to be preserved against even "the slightest breach"). This happenstance permitted the next cases (the ones that actually enforced the newly redesigned wall) to assert they were simply following the rules announced in existing precedent, albeit by way of alternative negative dicta enunciated in Everson. *See id.* at 18 (dissenting opinion noting that, according to the new rule announced by the majority, the case should have come out the opposite way).

[14] Refah Partisi (the Welfare Party) v. Turkey, App. Nos. 41340/98, 41342/98, 41343/98, 41344/98 (Eur. Ct. H.R. 2003), http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=698813&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649.

[15] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 231, *available at* http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/ englishanglais.pdf [hereinafter Convention]. The applicants claimed violations of Articles 9 (freedom of thought), 10 (freedom of expression), 11 (freedom of assembly and association), 14 (prohibition of discrimination), 17 (prohibition of abuse of rights), and 18 (limitations on use of restrictions of rights) of the Convention and Articles 1 (protection of property) and 3 (right to free elections) of Protocol No. 1. *See Refah Partisi* ¶ 2 (noting applicants alleged violations of the Convention and of the Protocol). The court, in unanimously holding that there had been no violation of Article 11, found that it was not necessary to examine separately the complaints under the other articles of either the Convention or the Protocol. *Id.* ¶¶136–39; *see also* Press Release, Registrar of the European Court of Human Rights, Grand Chamber Judgment in the Case of Refah Partisi (the Welfare Party) and Others v. Turkey (Feb. 13, 2003), http://www.echr.coe.int/Eng/Press/2003/feb/RefahPartisiGCjudgmenteng.htm (defining the relevant articles of the Convention and Protocol).

The European Court of Human Rights quoted the relevant portions of Article 11 of the Convention as follows:

> Everyone has the right to freedom of peaceful assembly and to freedom of association . . . .
>
> No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or

The ruling came as an affirmation of a decision from the Court's Chamber, which upheld a decision of the Turkish Constitutional Court banning a political party (known, in English translation, as "the Welfare Party") and some of its members upon attribution to them of a plan to implement the religiously based legal system of sharia law.[16] The ban decreed by the Turkish Constitutional Court had been challenged by the Welfare Party and its members on the grounds that the ban violated human rights set forth in Article 11 of the Convention.[17] But the European Court of Human Rights ruled the ban was not a violation, at least where the supernatural law attributed to the political party was sharia law, and the affected nation was Turkey.[18]

The court explicitly agreed with the Chamber that "sharia [law] is incompatible with the fundamental principles of democracy as set forth in the Convention . . . ."[19] Quoting with approval the language of the Chamber, the court elaborated on the reasons for incompatibility:

> [S]haria, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it. The [Chamber] notes that, when read together, the offending statements [attributed to the Welfare Party], which contain explicit references to the introduction of sharia, are difficult to reconcile with the fundamental principles of democracy, as conceived in the Convention taken as a whole. It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts. . . . In the [Chamber's] view, a political party whose actions seem to be aimed at introducing sharia in a State [which is a] party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention.[20]

The court put its holding both in a general European context and also in the particular context of Turkey. It noted first that it "must not lose sight of the fact that . . . political movements based on religious fundamentalism have been able to seize political power . . . and . . . to set

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> crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

Refah Partisi, ¶ 49 (quoting Convention, *supra*, art. 11) (omission of text in original).

[16] *Refah Partisi*, ¶¶ 2, 5, 40–41.

[17] *Id.* ¶ 2.

[18] *See id.* ¶¶ 123–25 (particularizing to Turkey and to sharia); *see also id.* ¶¶ 135–36 (setting forth the holding).

[19] *Id.* ¶ 123.

[20] *Id.* (omission of text in original).

up the model of society which they had in mind."[21] The court considered that "each [c]ontracting State may oppose such political movements in the light of its historical experience."[22] It next noted that in Turkey's recent historical experience there had already once been "an Islamic theocratic regime under Ottoman law," which had been "dismantled," and a republican regime established in its place.[23] Under the republican regime, Turkey "opted for a form of secularism that confined Islam and other religions to the sphere of private religious practice."[24]

In light of these curious data points, one set from the United States and another set from Europe, this Article advances a restatement of the obvious, limited to what is obvious in any law proposed for actual implementation in a real polity.[25] In so doing, it makes no claim that there is anything obvious about, say, literary criticism, philosophical deconstruction or semiotic reconstruction of meaning, or any other specialized discipline, worthy as any of them might be for the pursuit of knowledge, pleasure, utility, or for any other reason (or for no reason). There may sometimes be advantages of specialization of labor, not only in ordinary trades and businesses but also in the trade or occupation of philosophy or speculation. It has been well said in connection with the wealth of nations:

> In the progress of society, philosophy or speculation becomes, like every other employment, the principal or sole trade and occupation of a particular class of citizens. . . . [T]his [specialization] of employment in philosophy, as well as in every other business, improves dexterity, and saves time. Each individual becomes more expert in his own peculiar branch, more work is done upon the whole, and the quantity of science is considerably increased by it.[26]

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21 *Id.* ¶ 124.

22 *Id.*

23 *Id.* ¶ 125.

24 *Id.* As a result, the court was particularly "[m]indful of the importance for [the] survival of the democratic regime of ensuring respect for the principle of secularism in Turkey." *Id.* The Grand Chamber also noted the observation of Turkey's own Constitutional Court, which expressed the same concerns in perhaps even stronger language, stating, "Democracy is the antithesis of sharia. [The] principle [of secularism], which is a sign of civic responsibility . . . enabled the Turkish Republic to move on from Ummah [*ümmet* – the Muslim religious community] to the nation." *Id.* ¶ 40 (alterations in original).

25 The restatement of the obvious is directed only to law, and then only to law as might be generally intelligible to its subjects. See *infra* Part I.A for the working definitions. It makes no claim of "obviousness" with respect to anything else. *See* 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, 314, 347–49 (2004) [hereinafter *The Restatement of the Obvious*]. While it might be nice for other disciplines to engage in a similar effort, this Article does not go there.

26 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1793), *reprinted in* 39 GREAT BOOKS OF THE WESTERN WORLD 1, 5–6 (Robert

But granted the value of specialized disciplines to the *wealth* of nations, the problem of governing a polity by law raises a very practical set of concerns relating to the *health* of nations. In the United States, for example, there are some 300 million persons to be governed.[27] These citizens and residents are not specialists either in academic law or linguistics. They may "not [be] learned but they are not idiots; they have common sense. They too seek to know and expect clarity from those of more leisure and genius than they."[28]

Proposition 2—the health of nations.[29] Let it be postulated that a healthy polity is one with relatively good laws that its subjects, or at least many of them, choose to obey (at least much or most of the time).[30]

The custodians of the law must be able to speak clearly to the law's subjects on the basis of common sense, or at least with some reason. There is a time and place for a general account, accessible to a general public. Moreover, the world is bigger than the United States alone. If an overwhelming majority of persons throughout the world are "religious" in some sense of the word,[31] it would seem highly unrealistic to attempt to govern them without giving some place to some sort of religious or

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Maynard Hutchins et al. eds., 1952). From the context, it is probable Adam Smith was commenting upon that subclass of "science," which contributes to the invention of new and useful industrial machines and to that subclass of "philosophers or men of speculation, whose trade it is not to do anything, but to observe everything," which leads to such inventions. *Id.* at 5. It seems not unfair, however, to adapt his general observations about specialization of labor to the sort of moral philosophy practiced by those who make ethical and political judgments about the place of supernatural law in modern nation states. It seems as if such persons are lodged in academic or semi-academic halls in which they engage in their peculiar and highly specialized trade.

[27] Estimates vary, but one source has it: "303,824,640 (July 2008 est[imate])." CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK, UNITED STATES (2008), https://www.cia.gov/library/publications/the-world-factbook/geos/us.html.

[28] SCHALL, *supra* note 1.

[29] This Article includes three propositions. This is the second. The first is at *supra* note 7 and accompanying text, and the third is at *infra* note 147 and accompanying text.

[30] If this postulate seems trivial because "everyone" within the polity already knows it, that in itself would be a sign of a healthy polity. But if this postulate should seem to be anything other than trivial, that is in itself a matter not only of some curiosity, but a sign of the opposite of health. The method here is simply that of honestly attempting to think the opposite: can it be said that a polity is healthy if it has relatively bad laws, or a citizenry that is unwilling to obey its laws? Can it be healthy for a polity to pretend that no one in it is competent to determine that one law is "better" than another just because it is more nearly "good" than another? Or can it be healthy to advocate that "good" or "bad" suddenly have no place in polite discussion of the law?

[31] Estimates vary, but one source has it: "Christians 33.32% (of which Roman Catholics 16.99%, Protestants 5.78%, Orthodox 3.53%, Anglicans 1.25%), Muslims 21.01%, Hindus 13.26%, Buddhists 5.84%, Sikhs 0.35%, Jews 0.23%, Baha'is 0.12%, other religions 11.78%, non-religious 11.77%, atheists 2.32% (2007 est[imate])." CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK, WORLD (2008), https://www.cia.gov/library/publications/the-world-factbook/geos/xx.html.

other supernatural source of a shared moral basis for a legal order. Any legal realist who discards so many data points seems less than realistic.[32] If it be claimed there is no room for supernatural law, then at least the ruler or the custodians of the law might consider giving some reasonable account why there should be no room, why there should be a "wall,"[33] or an "effectual barrier,"[34] or other device separating religion or any other supernatural law from the polity,[35] or why any supernatural law should be declared to be "incompatible" with the laws of any polity.[36] These are, of course, disputable propositions, and it is the very point of

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[32] Even granting that legal "realism" is in some sense a term of art, there still is the troubling, and obvious, observation that many legal realists omit a substantial body of apparently useful data from their conjuring. *See* Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236, 1254–55 (1931) (declaring only "[t]he *temporary* divorce of Is and Ought for purposes of study"). But he and the other "realists" never seem to get around to the remarriage of the two, and with the passing of time the methodological divorce proposed by the realists is looking less and less temporary. It seems odd any realist would ignore such a substantial and obvious body of evidence relating to supernatural law that might actually help to predict "*what courts will do*" or that might give some rather obvious clue about what might constitute the "felt necessities" of any society. *See id.* at 1241 ("*what courts will do*"); OLIVER WENDELL HOLMES, THE COMMON LAW 5 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881) ("felt necessities"). *See generally* Anthony D'Amato, *The Limits of Legal Realism*, 87 YALE L.J. 468 (1978) (noting the oddly unrealistic results).

[33] See Thomas Jefferson and "the wall of separation" between "church" and "state" at *supra* note 11.

[34] Writing to the United Baptist Churches in Virginia, George Washington said:

> If I could have entertained the slightest apprehension that the Constitution framed in the Convention, where I had the honor to preside, might possibly endanger the religious rights of any ecclesiastical society, certainly I would never have placed my signature to it; and if I could now conceive that the general government might ever be so administered as to render the liberty of conscience insecure, I beg you will be persuaded that no one would be more zealous than myself to establish *effectual barriers* against the horrors of spiritual tyranny, and every species of religious persecution. For you, doubtless, remember that I have often expressed my sentiment, that every man, conducting himself as a good citizen, and being accountable to God alone for his religious opinions, ought to be protected in worshipping the Deity according to the dictates of his own conscience.

Letter from George Washington to the United Baptist Churches in Va. (May 10, 1789), *in* AMERICAN REPUBLIC, *supra* note 6, at 69, 70 (emphasis added); *see also* DREISBACH, *supra* note 11, at 84–85 (discussing George Washington's use of the term "effectual barriers").

[35] James Madison, one of the founding fathers, wrote of a "great [b]arrier which defends the rights of the people," and Richard Henry Lee wrote of "necessary barriers." DREISBACH, *supra* note 11, at 85–87. Thomas Jefferson wrote of "certain fences" as well as of his famous "wall." *Id.* at 87–88. Madison also described a mere "line" of separation. *Id.* at 88–89 (remarking "'it may not be easy, in every possible case, to trace the line of separation, between the rights of [r]eligion [and] the [c]ivil authority, with such distinctness, as to avoid collisions [and] doubts on unessential points'").

[36] *See supra* notes 19–20 and accompanying text (discussing sharia law, adjudicated to be incompatible with democracy in Turkey).

this Article to open those propositions to exploration and reasoned discussion.[37]

This Article was invited as a critical response to a contemplated series of articles, the first of which addressed a specifically Mormon jurisprudence.[38] I accepted the commission only on condition that the Article would be (a) not necessarily critical, (b) not directly responsive, and (c) not limited to the question of Mormon jurisprudence.[39] The editors have generously offered the chance to address the wider question of supernatural law in general and to propose a method for evaluating supernatural jurisprudence of any sort. In so explaining the provenance of this Article, I gratefully acknowledge the genesis of this project, and at the same time advise the reader what to expect.

The problem this Article addresses is what to do with supernatural law of any kind in a polity of any sort, but it is no easy thing to write at the desired level of generality. To speak simply, for example, of any "Mormon,"[40] "Muslim,"[41] or "Christian" jurisprudence[42] is to invite

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[37] Detailed studies about particular claims of particular schools or varieties of supernatural law are all fine undertakings and well worth doing. But to survey the literature, much less to engage in a constructive critique of each school, would be potentially exhaustive of the reader's patience, not to mention the publisher's page limits. It would also produce a different article on a topic different than the one I have selected. All that needs to be said may be said relatively briefly, but only if presented at the level of general truths (and, presented in the absence of any claim to "science" or certain knowledge, but rather in an account merely of a practical art of governing, at the level of things that are possibly true, highly probable, good and useful). *See* ARISTOTLE, THE NICOMACHEAN ETHICS 7 (H. Rackham trans., new & rev. ed. 1934). Aristotle warned against seeking more certainty than the subject matter allows:

> We must therefore be content if, in dealing with subjects and starting from premises thus uncertain, we succeed in presenting a broad outline of the truth: when our subjects and our premises are merely generalities, it is enough if we arrive at generally valid conclusions. . . . [I]t is the mark of an educated mind to expect [no more than] that amount of exactness . . . which the nature of the . . . subject [matter] admits.

Id. at 9.

[38] John W. Welch, *Toward a Mormon Jurisprudence*, 21 REGENT U. L. REV. 79 (2008).

[39] I salute Professor Welch for his pioneering essay about Mormon Jurisprudence, and I look forward to additional developments. The remainder of this Article will be more generally directed towards proposing a template for evaluating supernatural law. The inferences of the template for any particular system of supernatural law might be drawn by the reader, but it is not the intent of this Article explicitly to make such implications.

[40] *See* Welch, *supra* note 38.

[41] The schools of Islamic law might constitute variations of Muslim jurisprudence. Five major schools of Islamic law have been categorized as: (1) Hanbali; (2) Ma'liki; (3) Sha'fi'i; (4) Hanafi; (5) Ja'fari, and two other movements have been styled as the Kha'riji and the Mu'tazili. Joseph N. Kickasola, The Schools of Islamic Law (unpublished paper, revised Sept. 2008) (on file with the Regent University Law Review).

In support of his taxonomy, Professor Kickasola cites several authorities. *See, e.g.*, AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELLER: A CLASSIC MANUAL OF ISLAMIC

difficulty because of the staggering array of particular views held by the adherents of each. There is a similar problem with nondenominational and "nonreligious" versions of supernatural law.[43] It is evident the authorities take opposing and sometimes contradictory positions, but that makes it all the more important to look for some common measure with which to make reasonable sense out of the apparent cacophony of voices. It is not without full awareness of the persistence of false starts in philosophy that it has recently been said:

> Here I am reminded of something Socrates said to Phaedo. In their earlier conversations, many false philosophical opinions had been raised, and so Socrates says: "It would be easily understandable if someone became so annoyed at all these false notions that for the rest of his life he despised and mocked all talk about being—but in this way he would be deprived of the truth of existence and would suffer a great loss."[44]

The problem is what to do with supernatural law in general and what to do with it in any polity—not just in the United States or in Turkey, but anywhere. This is a problem that not only does not require specialized treatment, but is one for which a specialized treatment may be counterproductive. What is needed is nothing more than a

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SACRED LAW (Nuh Ha Mim Keller ed. & trans., rev. ed. 1999) (circa 1363); MUHAMMAD ASAD, THIS LAW OF OURS AND OTHER ESSAYS (Islamic Book Trust 2001) (1987); ANTONY BLACK, THE HISTORY OF ISLAMIC POLITICAL THOUGHT: FROM THE PROPHET TO THE PRESENT (Routledge 2001) (2001); ENCYCLOPEDIA OF ISLAMIC LAW: A COMPENDIUM OF THE VIEWS OF THE MAJOR SCHOOLS (ABC Int'l Group, Inc. 1996); CYRIL GLASSÉ, THE NEW ENCYCLOPEDIA OF ISLAM (Nicholas Drake & Elizabeth Davis eds., rev. ed. 2001); MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE (3d rev. & enlarged ed. 2003); 1 THE OXFORD ENCYCLOPEDIA OF THE MODERN ISLAMIC WORLD (John L. Esposito ed., 1995).

[42] The schools of Christian law and variations on Christian jurisprudence might be rather numerous. *See, e.g.*, ST. AUGUSTINE, THE CITY OF GOD (Demetrius B. Zema & Gerald G. Walsh, trans., 1950) (presenting views relating to Christianity that include some observations on law); ST. THOMAS AQUINAS, THE SUMMA THEOLOGICA (Fathers of the English Dominican Province trans.), *reprinted in* 19 & 20 GREAT BOOKS OF THE WESTERN WORLD, *supra* note 26, at 3; CATECHISM OF THE CATHOLIC CHURCH (1994) (presenting views relating to Christianity that include some observations on law); ABRAHAM KUYPER, LECTURES ON CALVINISM (photo. reprint 1994) (1931) (presenting views relating to Christianity that include some observations on law); H. RICHARD NIEBUHR, CHRIST AND CULTURE (HarperCollins 2001) (1951) (counting some categories); VERN S. POYTHRESS, THE SHADOW OF CHRIST IN THE LAW OF MOSES (1991) (refuting the handful of modern day Christian theocrats); MICHAEL P. SCHUTT, REDEEMING LAW: CHRISTIAN CALLING AND THE LEGAL PROFESSION (2007) (assessing what it might mean to be a Christian and a lawyer in the United States); *The Westminster Larger Catechism*, *in* THE CONSTITUTION OF THE REFORMED PRESBYTERIAN CHURCH OF NORTH AMERICA: BEING ITS STANDARDS SUBORDINATE TO THE WORD OF GOD 59 (1949) (presenting views relating to Christianity that include some observations on law).

[43] *See infra* note 49 (counting some of the various schools of nonreligious, or antireligious supernatural law).

[44] SCHALL *supra* note 1, app. at 146 (quoting Pope Benedict XVI from the Regensburg Lecture given on September 12, 2006).

restatement of the obvious, limited to what is obvious about law, and addressed to those who must put up with it as well as those who make and interpret it. In this context, it is well to use common sense.

I. THE RESTATEMENT OF THE OBVIOUS AND THE RULE OF LAW

The restatement of the obvious in respect of the law is proposed as an exercise. Let it be said that law can be whatever anyone in authority wants it to be. The only question left to discuss is "what, then, would anyone want?" It might be obvious that a better law is preferable to a worse one. Unless juridical agents (including lawyers, law teachers, judges, legislators, and subjects who come into contact with law) choose to say they do not have any idea what makes one law better than another, they owe some explanation of what, exactly, they suppose. A restatement of the obvious in respect of the most fundamental principles underlying the law is something an organization like the American Law Institute might have prepared.[45] Since they have not, someone else might do so. Of course, to proclaim anything really to be obvious would be to make an audaciously banal claim, but one which at the same time might actually be controversial and also lead somewhere useful. There is nothing entirely new about such an approach. As to such audacious banality, G.K. Chesterton has said "[i]t is only the last and wildest kind of courage that can stand on a tower before ten thousand people and tell them that twice two is four."[46] And as to the controversy surrounding such a claim, C.S. Lewis has observed:

> Thus in a geometrical proof each step is seen by intuition, and to fail to see it is to be not a bad geometrician but an idiot. . . .
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> . . . [There can be progress and correction in the reception of facts, and in the art or skill of arranging the facts, but] the intuitional

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[45] The American Law Institute describes itself this way:

> There is no other association in the United States like The American Law Institute. It was founded in 1923 following a study by a group of prominent American judges, lawyers, and teachers, who sought to address the uncertain and complex nature of early [twentieth-century] American law. According to the "Committee on the Establishment of a Permanent Organization for the Improvement of the Law," part of the law's uncertainty stemmed from the lack of agreement on fundamental principles of the common-law system, while the law's complexity was attributed to the numerous variations within different jurisdictions.
>
> The Committee recommended that a perpetual society be formed to improve the law and the administration of justice in a scholarly and scientific manner. Thus was established our unique organization dedicated to legal research and reform.

The American Law Institute, Overview: The Creation of the Institute, http://www.ali.org/index.cfm?fuseaction=about.creationinstitute (last visited Dec. 3, 2008).

[46] G.K. CHESTERTON, HERETICS, *in* 1 G.K. CHESTERTON COLLECTED WORKS 39, 75 (David Dooley ed., 1986). It takes a certain daring to present simple truths in an era that prizes nuance.

> element[] cannot be corrected if it is wrong, nor supplied if it is lacking. . . . [W]hen the inability is real, argument is at an end. You cannot produce rational intuition by argument, because argument depends upon rational intuition. Proof rests upon the unprovable which has to be just "seen."[47]

A restatement of the obvious is a nonproprietary, nonsectarian, and nonantiquarian set of foundational principles upon which a rule of law, grounded in morality and history and balanced by pragmatic concerns, can be established among free and equal subjects. A restatement at this level of generality is both possible and highly desirable. This Article presents a further tentative draft of such a restatement.[48]

A. Law, the Rule of Law, and Supernatural Law

For purposes of discussion, let the following terms be used in the following ways:

1. Law. "Law" is a rule or command imposed upon its subjects by a sovereign. By "sovereign" is meant an authorized governor. For the sort of law (human law) that is imposed upon citizens and residents, this implies a "state" having a visible executive actually enforcing rules and commands upon its subjects, who are not free to nonacquiesce by withholding belief. For the sort of law (moral law) that is self-commanded, this implies a "person" who is self-binding. For the sort of law (supernatural law) imposed upon believers, this implies an incorporeal soverign whose commands and rules can be discerned by believers. "Law" in each of these senses is a primary fact.

2. The Rule of Law. A "rule of law" is a set of laws its subjects can obey voluntarily and rationally, in conscience and in the absence of external force because doing so is (or seems to be) good for the person affected (such action being referred to as "autonomy"). Characteristic of a

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[47] C.S. Lewis, *Why I am Not a Pacifist*, *in* C.S. LEWIS, THE WEIGHT OF GLORY AND OTHER ADDRESSES 33, 34–35 (Walter Hooper ed., rev. & expanded ed. 1980). The danger and the controversy must be apparent. At the claimed level of confidence, argument ends and a sort of name-calling begins. Compare Richard Dawkins, *Ignorance Is No Crime* (May 15, 2006), http://richarddawkins.net/article,114,Ignorance-is-No-Crime,Richard-Dawkins, where he explains his 1989 book review that has been criticized as uncivil—in which he characterized "somebody who claims not to believe in evolution" as "ignorant, stupid or insane (or wicked, but I'd rather not consider that)"—by saying he'd left out the category of the nonignorant, nonstupid, noninsane victim of indoctrination or coercion. *Id.* He is not operating at the level of first principles, but rather at the point of remoter inferences, yet the tone of the rhetoric is suggestive, as he says "undisguised clarity is easily mistaken for arrogance." *Id.* But that is no objection in principle, only a warning to be careful in proceeding to claim any more than a handful of rational intuitions, and to be careful in drawing inferences further and further removed from them.

[48] *See infra* app. A. For an earlier tentative draft, see *The Restatement of the Obvious*, *supra* note 25, at 347–49.

rule of law is the condition that a subject might autonomously, and rationally, will both to think and to act in conformity with the law.

3. Supernatural Law. "Supernatural law" is any rule or command given to subjects ("believers") of an incorporeal or disembodied sovereign[49] and which also includes at least one precept, rule, or command not necessarily determinable by reason.[50] Although perhaps offered or given to all people, it directly and initially binds only those who have accepted or received it by submission to it or belief in it. The term "supernatural law" is intended to be sufficiently general to apply to any such law whether proposed according to Judaism, Christianity, Islam, Mormonism,[51] or any other religion, and also to "nonreligious" and secular traditions.[52] Supernatural law is distinct both from "morality" and from "epistemology" each of which rest at least in part upon some authority or upon an indemonstrable principle[53] not completely verifiable by natural means, but which do not claim an incorporeal sovereign.

4. God-Revealed Supernatural Law. A more specific type of supernatural law may be termed "God-Revealed Supernatural Law" because it deals with a very particular kind of rule or command imposed

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[49] The God of Abraham, Isaac, and Jacob within the Jewish revelation; the God and father of Jesus Christ within the Christian revelation; and the Allah of Abraham and Ishmael within the Qur'anic revelation, is characterized as incorporeal. The reification and subsequent promotion into a real or allegorical leadership, governing, or sovereign role of "history" or the "proletariat" or "the people" or "chance" or "survival" or of "society" or of the "idea" or of the "earth" within the various Marxist, Historicist, Darwinian, Materialist, Hegelian, Realist, Progressive, or Environmental traditions may likewise be characterized as incorporeal (or if used to signify some composite, abstract, or allegorical "thing" might be characterized as "disembodied" from the real thing itself) and constitutive of supernatural law when coupled with rules not necessarily determinable by reason.

[50] Precepts not necessarily determinable by reason include those against mixing fabrics in clothing, or dividing a week into seven days, and then taking one of them off. Other such precepts include those requiring everyone to work to the best of their ability, and then to give to everyone else in accordance with their needs. *See infra* note 134 (sourcing both religious and antireligious supernatural law roots of the precept).

[51] These are some of the major traditions that share common books. It is not meant to be an exclusive listing, but is illustrative only.

[52] "Supernatural law" certainly includes "religious" traditions other than those illustrative traditions listed here. In addition, it includes all other traditions, whether they are "religious" or not, that answer to the description. Among the candidates for inclusion are some forms of Marxism, Historicism, Darwinianism, Materialism, and other systems. It makes no difference whether the incorporeal sovereign is "the proletariat," the idea of history, progress, the working out of variations of the consequences of a competition to survive and produce offspring, material bodies in motion, or the people. The list of nonreligious varieties of supernatural law can actually encompass a very broad range of laws and legal systems.

[53] "Indemonstrable principles" such as those against contradiction, of cause and effect, of the basic reliability of sense perceptions, and of the rational preference for good over evil, life over death, and something over nothing, are discussed *infra* at notes 61–71. Other indemonstrable principles might include those that assert "matter is all there is."

by an incorporeal sovereign and which is not necessarily knowable by natural means. This is because the sovereign in this class of supernatural law is an asserted immaterial God, and the means of knowledge is a claimed written revelation *from* this God *to* someone to whom God has chosen to speak or otherwise to communicate. For ease of expression, the shorter term "supernatural law" will be used throughout this Article, and the reader will note from the context when the term is being used in its more specialized sense to refer to "God-Revealed Supernatural Law." This God-Revealed law does not necessarily imply a visible "church" though in some cases the body of believers may be referred to as such.[54] What this term does necessarily imply is a number of believers who, as such, are adherents to the rules or commands imposed regardless of whether they organize themselves into something called a visible church.

5. Other Constraints ("Influencers"). Human conduct is also constrained or influenced by extra-legal influences including markets, norms, associations (family, friends, firms, schools, entertainment and news media, neighborhoods and voluntary organizations, organized religions, and class or group identity), and by the architecture of external reality, some of which is fixed, but some of which may be changed or influenced by, or reciprocally influences, the law or its interpretation.[55]

As so used, the term "supernatural law" associates or relates the claims of a visible and corporeal "state" with the claims of an invisible and incorporeal sovereign. It does this by the univocal use of the term "law" in the context of both "human law" and "supernatural law."[56] One term ("human law") asserts the real effect of the evident force of observable law as manifest in a visible "state." The other term ("supernatural law") proposes the real effect of an unseen world which

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[54] This is almost certainly the limited sense in which most discussions of "religion," "church," and "state" probably use the terms when referring to "religion" and the "church." Because this limited sense of the expression is also the one that most starkly raises the problem which this Article addresses, it is the sense in which most of the Article's discussion occurs.

[55] These influencers are commonly understood. Professor Lessig has given an elegant recent reformulation of them. LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 87–88, app. at 235–39 (1999) (describing, in addition to "law," the influence of markets, norms, and architecture).

[56] As used herein, "law" univocally relates sovereign and subject by way of command or precept imposed by the one upon the other. Subcategories depend upon the characteristics of sovereign and subject: human law implies a sovereign state and subject citizens or residents; moral law implies a person who self-binds according to a standard; and supernatural law implies an incorporeal sovereign and a believing subject. For ease of expression, this Article sometimes uses adjectives or parentheticals to distinguish (human) law from supernatural law or moral law, but sometimes simply uses the word "law." The context, and the underlying univocal usage, should make the meaning clear in cases where the adjectives are omitted. "Moral law" is discussed *infra* at Section III.B.

may or may not be manifest in any visible "church," but which does claim a visible law, given by an invisible sovereign. The connection of the two terms is made in a way not limited to the United States or to the Western nations. While this usage is not inconsistent with common Western notions of "faith" and "reason," "nature" and "grace," and "church" and "state," it also invites a general understanding and is intended to be open to participation from any perspective. It thereby illuminates the controversy, which is precisely the intersection of two sovereign regimes, one "seen" and one "unseen," but both of which are sources of manifest commands and rules.

It would seem unobjectionable to contend that any believer in an unseen world of law who also resides in a visible polity is a subject of dual citizenship because of dual sovereignty. Moreover, it would seem safe to say that any unbeliever must have a reciprocal causal connection with any believer within the polity. This is simply to say the unbeliever both affects the believers, and is in turn affected by them to the extent they participate in the same polity. So also the believer has some effect on the nonbeliever. As a result, and to the extent of their mutual interactions in respect of their respectively desired policies within the polity, the believer and the unbeliever must necessarily be mutually supportive, nonsupportive, or indifferent to each other (there being no other choices). On matters that make a difference, the question is whether the relationship is supportive and friendly, or is nonsupportive and hostile. The potential for conflict is enhanced, *ex hypothesi*, because it is in the nature of supernatural law to be indemonstrable at least in part. Where the law of the polity is opposed or contrary to supernatural law, not only must one yield to the other, but there is little apparent room for useful discussion. Of course, if it is possible to divorce, separate, or exclude one or the other entirely from influencing policy choices within a polity, then what the excluded one desires might be utterly irrelevant to what happens.[57]

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[57] This creates the real potential for a "gap" between human law and supernatural law (and also a gap involving any moral law to the extent a moral law is congruent or not congruent with any particular human law or any given supernatural law). It might well be supposed that a fairly standard historical pattern, transnationally and across cultures, involved the commonplace congruence within a given polity of human, moral, and supernatural law among one another, and the further congruence of extra-legal influencers with all three; and it may well be that the attempted separation of the three laws (and the other influencers) is a relatively novel and fairly recent policy choice. In any event, it must be a rather obvious observation that the mere fact of a gap creates an issue. Some persons might celebrate, just as others might decry it (and the parties might cross paths: it may be there are some supernaturalists in favor of maintaining the gap of separation, and some others in favor of closing it, and some who take intermediate positions). What to do about the gaps involving moral law and extra-legal influencers is a problem that this Article identifies in the context of supernatural law, but it is a bigger problem than that, and must await more complete resolution in a subsequent article.

The problem is illustrated by the opposite conclusions drawn about the consequences of dual sovereignty. Some have celebrated the phenomena to the extent of prescribing supernatural law as a tonic for the polity, and others have warned against it to the extent of proscribing supernatural law altogether as toxic. If there is some middle position between the "all" or "nothing at all" approaches to supernatural law, it has not been well articulated by the courts that have dealt with the question. To speak (outside the current legal categories) of "just a bit" of shari'a, or of the "church," or any other supernatural law, would seem to raise the questions: "how much" and "is it really 'supernatural' at all, or is it just a policy choice that does not need or depend upon supernatural authority?" To test the moral claims of any supernatural law, it is necessary to postulate a moral purpose to the law of any polity. If the law of any polity is directed to a moral end, then any supernatural law may be tested according to that end.

B. Mediating Terms: Common Morality and Indemonstrable Principles

A mediating term between "law" and "supernatural law" is a common sense moral philosophy supporting a normative jurisprudence. If a normative jurisprudence may be posited, and if it may serve as a measure, then the claims of any supernatural jurisprudence may be assessed against that measure.[58] It is rather obvious that the practical syllogism (if morality is good for the polity, and if supernatural law is good for morality, then supernatural law is good for the polity)[59] is dependent upon a commitment to "morality" prior to any commitment to supernatural law. What might be said about "law and morality" is worth discussing. Without it, law makes no moral sense and any conversation about supernatural law as friend or foe to the moral foundations of the polity is rendered pointless at the outset.

The need to propose a moral philosophy of common sense accessible to all citizens and not just academic specialists, and then to evaluate the

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[58] It is beyond the scope of this Article to do anything other than take this point as a hypothetical. Of course, one might assume it to be so as a sort of presuppositionalism or foundationalism, or one might recognize that it is in fact so, as a sort of empirically observed moral "sense," or one might fashion some other explanation. It suffices for present purposes to observe simply that *if* there were a normative jurisprudence, *then* it could serve as a measure, and a model of a set of rational intuitions and inferences that can serve as the basis for a reasoned discussion. But if the posited moral philosophy should fail to persuade, then the next argument is a contingent-transcendental one: if anyone desires a rule of law (rather than rule by compulsive force alone) then what conditions must obtain? The basis of a common sense direct moral argument is set forth in Section I.B. The basis of a transcendental argument investigating the conditions for a rule of law is set forth in Section I.C. Both arguments are interwoven in the discussion of the nonimposition principle and reasonable assurances of performance in Sections II and III.

[59] *See supra* note 8 ("the practical syllogism").

claims of supernatural law and its contribution to the health of modern nations, should be apparent. It has already been proposed that a "rule of law" is a set of laws that its subjects can obey voluntarily and rationally, in conscience and in the absence of external force because doing so is good for the person affected (such action being referred to as "autonomy").[60] Characteristic of a rule of law is the possibility that a person might autonomously will to think and to act in conformity with the law.

Embedded in the idea of a rule of law is the concept of a free subject who makes moral choices. The best term for such a subject is a "human being" (or "person") and there is no way to avoid the manifest evidence that persons routinely make choices on the basis of indemonstrable principles. Any restatement of the obvious would be incomplete if it failed to propose a set of definitions or testable propositions having to do with common morality. For purposes of this Article, let it be postulated:

1. **Human Beings.** A "human being" (or "person") is anyone who is either (1) capable of conceptual thought, syntactical speech, and apparent freedom of moral choice, or (2) biologically and naturally descended from persons having that capability, including by DNA signature, regardless of whether those capabilities are being exercised or even exist in such a descendent.

2. **Indemonstrable Principles.** "Indemonstrable principles" are those principles that are both manifest and claimed to be true even though they cannot be proved by reference to their conformity with external objects of perception. Some of these are analytically or tautologically expressed, as in the case of a material composite whole and its parts.[61] But others are predicated to be true on their own, and these include principles both of thinking and of acting. The significance of asserting these to be true is that they are not advanced as postulates, but as axioms.[62] The significance of admitting they are indemonstrable is that no one can demonstrate or prove them to a person who claims to deny them, yet they are true regardless.[63]

3. **Indemonstrable Principles of Thinking.** Indemonstrable principles of thinking about things include: the rule against contradiction;[64] the rule of causation;[65] the essential reliability of sense

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60 *See supra* Part I.A.2.

61 *E.g.*, EUCLID, ELEMENTS, *reprinted in* 1 GREEK MATHEMATICS: FROM THALES TO EUCLID 436, 445 (G.P. Goold, ed., Ivor Thomas trans., 1939).

62 *See id.* (distinguishing axioms, definitions, and common notions from postulates).

63 LEWIS, *supra* note 47, at 34–35 (giving the example of the student who "cannot get" geometry and who, if really unable to "see" the principles, cannot be convinced of them any more than a color-blind student might be convinced to "see" the colors red or green).

64 A thing cannot both "be" and "not be" at the same time and in the same mode. *E.g.*, ARISTOTLE, *Metaphysics*, bk. IV, ch. 3, *in* THE WORKS OF ARISTOTLE (W.D. Ross trans.,

impressions;[66] and the use of language to signify meaning and of numbers to signify relationships.[67] These have been called the first principles of the speculative reason, probably because they are necessary to establish any subsequent thought or speech about things.[68] Because the fundamental predicate of such thinking is that a thing is thought either "to be" or "not to be," all of these indemonstrable principles have to do with—and lead to subsequent statements about—what "is," which is the copula in any such statement. These statements, in the affirmative mode, take the form "*A* is *B*."

4. Indemonstrable Principles of Acting. Indemonstrable principles of acting and of thinking about choices between actions include: the rule that good is better than its absence or opposite and so,

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1908), *reprinted in* 8 GREAT BOOKS OF THE WESTERN WORLD, *supra* note 26, at 499, 524 ("[T]he most certain [principle] of all . . . . [is] that the same attribute cannot at the same time belong and not belong to the same subject and in the same respect . . . . [f]or it is impossible for any one to believe the same thing to be and not to be . . . .").

[65] Compare the statement "every effect must have a cause," with the statement "everything must have a cause." *See* R.C. SPROUL, DEFENDING YOUR FAITH: AN INTRODUCTION TO APOLOGETICS 51–53 (2003) (also combining the four indemonstrable principles of thinking, as set forth herein). The first statement properly states the law of causality and is analytically true. The second statement neither states the law nor is true. *Id*; *see also* IMMANUEL KANT, *The Critique of Pure Reason* (J.M.D. Meiklejohn trans., 1901) (1781), *reprinted in* 42 GREAT BOOKS OF THE WESTERN WORLD, *supra* note 26, at 1, 17 (analyzing the concept that "'[e]verything that happens has a cause'").

[66] It is impossible to prove sense impressions are real, but where thoughts or words are evaluated by their conformity to "reality" (and where their truth resides in such conformity), an objective reality, knowable either by its sensible effects or by its sensible accidents, is taken to be true, even if imperfectly knowable. *See* SPROUL, *supra* note 65, at 58–60; PLATO, THEAETETUS 157e–158d, *reprinted in* 7 GREAT BOOKS OF THE WESTERN WORLD, *supra* note 26 at 512, 520–21 (raising the problem: "How can you determine whether at this moment we are sleeping, and all our thoughts are a dream; or whether we are awake, and talking to one another in the waking state? . . . You see, then, that a doubt about the reality of sense is easily raised . . . [a]nd may not the same be said of madness and other disorders?").

[67] It is not entirely clear why the external world seems intrinsically ordered so that it might be described at least analogically by words or numbers. But though the fundamental truth of these relations is clear, there is no demonstrable proof why these should be so, and no proof even that such relations "are" or must be so. *Cf.* SPROUL, *supra* note 65, at 61, 66–68 (discussing univocal, equivocal, and analogical uses of the word "good"—"good work," "good grief, Charlie Brown," "good guy," and "good dog"); *see also* ARISTOTLE, *Physics*, bk. VII, ch. 4, *in* THE WORKS OF ARISTOTLE (R.P. Hardie & R.K. Gaye, trans., 1930), *reprinted in* 8 GREAT BOOKS OF THE WESTERN WORLD, *supra* note 26, at 259, 331 (discussing the word "sharp"—a sharp pen, a sharp wine, and a sharp note).

[68] *See* ST. THOMAS AQUINAS, THE SUMMA THEOLOGICA, Ia IIae, Q.94, art. 2, ans. (Fathers of the English Dominican Province trans.), *reprinted in* 20 GREAT BOOKS OF THE WESTERN WORLD, *supra* note 26, at 1, 220–22 (considering the precepts of natural law). "Therefore the first indemonstrable principle [of speculative reason] is that the same thing cannot be affirmed and denied at the same time, which is based on the notion of being and not-being; and on this principle all others are based . . . ." *Id.* at 222.

as an independent proposition, "ought" to be preferred;[69] and the cognates or corollaries—something is better than nothing, life is better than death, love is better than hate—and so "ought" to be preferred; and a person "ought not" cause harm to another person.[70] The fundamental predicate of acting is the conviction that one action is better than another (and so "ought" to be sought or done). The copula "ought" has to do with free choices by a person to will one thing over another beginning with some deontological or categorical moral principle. These statements concern what "ought" to be chosen by free persons who are free to choose. Sometimes they have been called the first principles of the practical reason, probably because they are necessary to establish any subsequent practical action about things to be done (or not done). These statements, in the affirmative mode, take the form "*A* ought to do or seek *B*."[71]

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[69] "[T]he first principle in the practical reason is one founded on the notion of the good, namely, that the good is what all desire. Hence this is the first precept of law, that good is to be pursued and done, and evil is to be avoided." *Id.* Perhaps an equally fundamental starting point is the proposition that "something is better than nothing" so that "good" is something that is better than its absence (nothing) as well as better than its opposite (evil).

[70] These are no more demonstrable than the first principles of the speculative reason, and no less solid. One could, of course, discard both and replace them with arbitrary will or power only, but that would be irrational. The point is that both speculative reason and practical reason depend on indemonstrable truths.

[71] It should be clear that these statements might be put in the form of a practical syllogism that begins with an indemonstrable but axiomatic "ought" statement (for example, life ought to be preferred to death) and ends with a conclusion having the same copula (*A* ought to do *B*, where "*B*" answers to a minor premise added to an axiomatic major premise). There is no illicit conversion of any "is" statement to any "ought" statement. The familiar bromide attributed to David Hume is inapplicable. *Compare* DAVID HUME, A TREATISE OF HUMAN NATURE: BEING AN ATTEMPT TO INTRODUCE THE EXPERIMENTAL METHOD OF REASONING INTO MORAL SUBJECTS bk. III, pt. I, sec. I, at 320 (Batoche Books 1999) (1740) (suggesting that many unexamined "ought" statements are illicit conversions), *with* MORTIMER J. ADLER, THE TIME OF OUR LIVES: THE ETHICS OF COMMON SENSE 130–34 (1970) (demonstrating how to fashion "ought" statements without any illicit operation, and maintaining that valid "ought" statements follow as inferences from syllogisms based upon a self-evident, categorical "ought" statement as the initial premise). *See also* ADLER, *supra*, at 281 nn.18–19. Adler's position goes further than the limited claim advanced for the sake of the argument herein: an indemonstrable yet true statement already in the form of "ought" (Adler contends not only for the truth of, but also for the demonstrable proof of the fundamental "ought" proposition; for the sake of the argument presented herein, I need not go so far—a common moral truth, even if unprovable, suffices). Of course, the practical syllogism is subject to limitations that carry through to its conclusion that if the opening premise is qualified (for example, other things being equal), then the conclusion will be likewise contingent. These "ought" statements are not only not illicitly converted from "is" statements, but have, if anything, a higher degree of confidence. One test of the validity of a generalized "ought" statement is the impossibility of honestly thinking the opposite—it cannot be honestly thought that (other things being equal) any person "ought" to seek what is bad for that person, or that (assuming something good is available) any person "ought" nonetheless to desire nothing at all in preference to something.

5. Rational Choice. The reason any human being might voluntarily and rationally obey a rule of law is that doing so seems "good" to the person subject to the law. A thing is rationally "good" for a person if it is an object of reasonable desire, even on the basis of indemonstrable principles. Such an object is likely to make any person better off than its absence, and better off than the presence of its opposite. A reasonable desire is one subject to discussion governed by practical reason (or "right reason") and also subject to the dictates of conscience as well as to the conclusions of "pure" intellect.

6. Individual, Common, and Legal Goods. Among those things individuals might desire are:

(a) wealth, including material goods and an abundance of them;

(b) pleasures, including leisure activity, amusements, play, the enjoyment of things that feel good in the consumption or use of them or afford disinterested pleasure in the contemplation of them, relaxation, good health, and the absence of pains or disappointments;

(c) power or reputation, including fame, glory, celebrity, and honor, and the absence of insult or discredit, unfair deprivations, and slights;

(d) freedom from any restraint at all, including not only freedom of thought and freedom of the will, but freedom to think and will anything at all, and to act upon such impulses to the maximum extent possible;

(e) various eclectic goods, including liberty or equality, knowledge and skill, sharing, caring, consensus-building, and all-around "niceness," efficiency, and the avoidance of waste;

(f) relational goods, including friendship, love, family relations (husband and wife, parent and child, and extended family connections), social relations, voluntary associations, and other affiliations;

(g) virtue or character, including the virtues of courage, temperance, justice, wisdom, and the absence of dangerous addictions, laziness, untrustworthiness, meanness, or cruelty; and

(h) happiness considered, technically, as a whole life well lived in accordance with complete virtue and accompanied by at least a minimum sufficiency of external goods.[72] In addition to health, wealth, pleasure and reputation, the "good" of a good government is one of the greatest external aids to happiness.[73] The common good and the political

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[72] In this sense, most of the goods in subparagraphs (a) through (e) would be considered "external" goods because they are more or less outside the unilateral power of the individual, or require favorable circumstances to acquire. Those in paragraphs (f) and (g) may be considered "internal" because they are more nearly within the power of an individual to attain and less subject to outside disruption.

[73] The list could be extended almost indefinitely. It might include, for example, some commitment to the public acting out of a person's self-declared sexual identity; some sort of positive commitment to absolutely nothing whatsoever; some commitment to rude, ugly, mean, or death-friendly pursuits; and any number of other cafeteria-style "goods," all

good consist in those goods that can be shared by all members of a polity and also may be supported by the polity because they are nonrivalrous, nonexclusive, and because they suffer from the public goods analysis of collective action, externalities, and free-riding. If "happiness" is defined, technically, as comprising individual and internal virtue plus a minimum sufficiency of external goods, then the pursuit of happiness as a goal of the polity (taken either as an active or passive goal: actively to facilitate,[74] or passively just not to interfere with, its citizens' pursuit of it) becomes not only reasonable but realistic.[75] It is possible for a polity to cooperate with a pursuit of happiness so defined without privileging or sacrificing any of its subjects. On the contrary, if "happiness" is defined on any other basis, it seems impossible for a polity to achieve, and futile for a polity to try to deliver or compel, never-ending and always increasing wealth, pleasure, power, fame, or any other object of desire for itself or its subjects.

The legal good has to do with whether and, if so, the extent to which any particular legal system is placed at the disposal of (or is directed towards) the common good and thereby contributes to it.[76]

7. Absolute and Relative Goods. It may be posited, absolutely, that good is better than evil; life better than death. But at the same time, it is obvious and evidently true that any particular instance is often relative to time, place, and circumstances. A soldier, policeman, fireman, and others might deliberately give their life to save another's. But the general proposition, "life is better than death" is unaffected by this particular. It is an obvious fact that the good has an absolute and unchanging aspect and also has a contingent aspect that is relative and uncertain. Reasonable persons do not differ as to the first, but can and do differ as to the second.

8. Moral Law. Law in general is a rule or command imposed upon its subjects by a sovereign. Where (1) the sovereign and the subject

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of which might deserve to be named in a restatement of the obvious. But some of those might contradict a rule of law and many of the other omitted items could probably be subsumed under one of the categories already listed, which suffice for purposes of discussing the conditions favoring a rule of law (while nothing might be interesting to the nihilist, it seems inherently implausible to build a rule of law around nothing at all).

[74] Active support of the goal might include nothing more than indirect aid or encouragement by supporting various extra-legal influencers on conduct that support congruent systems of supernatural (or moral) law. For a listing of "extra-legal influencers" (including markets, norms, associations, and architecture), see *supra* note 55 and accompanying text.

[75] This argument has probably been made many times and by many persons because it seems so obvious. *See, e.g.*, MORTIMER J. ADLER, ARISTOTLE FOR EVERYBODY: DIFFICULT THOUGHT MADE EASY 92–94 (1978) [hereinafter ARISTOTLE FOR EVERYBODY].

[76] As a subspecialty, it might also be asked whether a particular law contributes to the common good by being (a) retributive, (b) corrective, (c) distributive, (d) commutative, (e) deterrent, or the like.

coincide within a self-binding person who has accepted a moral imperative by choosing to act in accordance with it, and (2) the consequent rules or commands are claimed to be based upon practical reason, indemonstrable principle or other moral authority, the resulting claims constitute a "moral law" binding upon that person.

A key to the practical syllogism, as it relates to morality, to the polity, and to supernatural law is the proposition that virtue (in the sense described in 6(g) of the above list) is an internal good somewhat, but not completely, impervious to externals. Virtue is, in fact, both a nonrivalrous and nonexcludable good, and one of the very few goods that is. But, though it is largely impervious to externals, it is not completely so. It is a sort of public good, subject to the collective action problem and to public goods analysis much like any other public good.

From this it follows governments really can contribute (actively or passively) to the pursuit of happiness, for the common good, but only in the technical sense of "happiness" indicated in 6(h) herein. Because each of wealth, pleasure, and power are rivalrous, excludable, finite and limited, no government can maximize any of those without taking sides in favor of one person, faction, class, or group against another. It follows none of these can be maximized for the "common" good of all, but only for the particular good of one faction, group, or class. On this unfortunate understanding, there can be no "rule of law" for the outsider, for the members of the "other" faction, group, or class. But a government can rationally encourage the common good, which consists in the pursuit of happiness, understood as a technical term of art. This is because virtue, the internal good that chiefly constitutes happiness, is free to all, and the external goods contributing to happiness are limited to those essential for virtue to thrive. It does not take much for that to occur. A modest sufficiency of external goods, as opposed to the infinite multiplication of them, is all any good government needs to provide, given its citizens are themselves virtuous.

Among those who hold that the polity has an active, positive role[77] (or even a passive but nonneutral role) to play in its citizens' pursuit of

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[77] An "active" role does not imply anything more than indirect support of the polity's goal by its choices to support various congruent extra-legal influencers. See *supra* note 55 and accompanying text (describing extra-legal influencers on conduct). Because the modern state taxes; subsidizes; allocates airwaves, cables, and communication outlets; mandates compulsory education; has something to say about its schools' selection of books, viewpoints, and curriculum; and grants various concessions and privileges, a modern state is very able to "influence the influencers." In doing so, the polity may be understood to be actively encouraging the pursuit of virtue or happiness and supporting a congruent moral law or a supernatural law (or not) by the direct and indirect choices it makes in respect of these extra-legal influencers. This observation has nothing to say about the so-called positive legal rights versus negative rights analysis, but is limited to the rather obvious fact that the polity might take an active or a passive stance in its relation to extra-legal

happiness, it is this that must have been the rational meaning of the "pursuit of happiness."[78] This must be the rational meaning of the proposition that the polity must have a moral and virtuous citizenry. This is the basis for the moral law component of the practical syllogism previously asserted as a hypothetical. It is also the basis for a rule of law, for it is what enables a polity to fashion the kind of law a person would be prepared voluntarily to obey. The next subsection explores additional conditions for a rule of law.

C. *The Restatement of the Obvious and the Rule of Law*

If a rule of law is desirable and possible, it is desirable because it is fitting for persons. Only persons have any claim to be ruled for their own good. Outside of the obvious principles so far set forth in Sections A and B of this Article, there is no basis for anything else to claim a rule of law. Neither cows nor any other subhuman animals have any such claim because none of them make apparently free moral choices based upon conceptual thought and evidenced by syntactical speech. If, as asserted in Section B above, the mediating term between "law" and "supernatural law" is a common sense moral philosophy supporting a normative jurisprudence, then it is to normative jurisprudence we should turn. Assuming a rule of law might be desired, what are the conditions most likely to support or attain it? Rather than speaking vaguely of "democracy"[79] or of "liberty,"[80] this Article proposes a specified set of testable propositions. The rubric is "rule of law" and not "democracy" or any other term. The following five topics draw the outlines of a rule of

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influencers, and that this stance is independent of any commitment to negative legal rights, and does not require any embrace of positive legal right theory or practice.

[78] ARISTOTLE FOR EVERYBODY, *supra* note 75, at 92–96 (commenting on the assertion of a right to the "pursuit of happiness" in the U.S. Declaration of Independence).

[79] *See* David Bukay, Review Essay, *Can There Be an Islamic Democracy?*, MIDDLE E. Q., Spring 2007, at 71, http://www.meforum.org/article/1680 (citing Professor John L. Esposito and others for the proposition that "democracy" is variously defined and culturally determined). Granted, "rule of law" is likewise variously defined, but this Article proffers its own specified definition. Whether it is culturally determined must be answered by the adherents of any given system of supernatural law who might object to it on that basis. Regardless of the minute controversies, if "democracy" ultimately means something like "whatever any majority wills into law," it does not begin to answer the question whether any person subject to such laws has any obligation in conscience to obey them if given an opportunity to disobey.

[80] *See* MORTIMER J. ADLER, THE IDEA OF FREEDOM: A DIALECTICAL EXAMINATION OF THE CONCEPTIONS OF FREEDOM 29–34, 198 (1958) (explaining that "freedom" or "liberty" is variously defined). If "liberty" has many meanings, and if, to some persons, it ultimately means something like "whatever any person wills and has the capacity to do," it does not seem particularly useful on the question without some additional elaboration. It seems more productive to elaborate upon the conditions for a "rule of law" than upon the various notions of "liberty" because it more completely answers the question posed herein.

law. For the convenience of the reader, all of these are summarized in the attached Appendix A.

1. Topic One: Principles of Moral Realism

It makes no sense to speak of comparatives relative to supernatural law, or to speak normatively without a first look at things obvious to most people. The reference is to the great multitude subject to the law, if not to the elite lawgivers themselves. There are four things to be said at the outset. First, there is an objective reality. Second, at least some things about objective reality are knowable or subject to a reasonable opinion at the level of working probabilities and plausible concepts. Third, these things knowable about objective reality include not only matters of fact and probable opinion about things, but also matters of conduct, and doing one thing in preference to another thing (morality). Fourth, the (human) law sometimes fails to demand all of what might be demanded by the moral laws which its subjects also embrace, and the resulting gap is a matter of some dispute. Some say the gap is good and ought to be maintained, while others suppose the gap is a fault and ought to be closed. The same gap is also a matter of continuing dispute when it comes to the claims of supernatural law within any polity. These four propositions are claimed to be obvious because it is evident from observation that a great multitude of people do, in fact, act upon them.

These principles afford a basis for the postulated rule of law. *If* there is any law a subject might be inclined voluntarily to obey because doing so seems good to the person, it is likely to be some law that appears to be good for that person. Should a law be announced on any basis opposite or contrary to one of the first three foundational premises just stated, namely, if it should be maintained that "nothing is true, and so what if it is," it would seem rather obvious the lawgiver is undermining any claim to voluntary obedience. In what amounts to another way of saying the same thing, if the law were posited by lawmakers who deny there is an external reality, or deny they can know anything about it, or concede only that they might know something about matters of fact, but nothing at all about matters of morality, they undercut the moral authority of their own law.

The lawmakers who are in denial of objective moral reality might assert some efficiency, safety, protection, or advancement of particular interests; they might assert a "policy" or some way to avoid waste—but they will not have asserted that the subject "ought" to obey when the subject can get away with not doing so.[81] The argument is not that such

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[81] If it is affirmed that honesty, for example, is "a good policy" then the speaker is confessing that the moment a better policy appears, the speaker will forsake honesty

nonmoral bases are completely ineffective to counsel voluntary obedience, but only that they are not as effective as they might be if a positive moral basis were also explicitly asserted and defended. This is not so hard to do if the general population already accepts the underlying and basic intuitions upon which a moral basis is asserted. The argument is, assuming a rule of law is possible, that a plausible claim the lawgiver actually knows something about reality, including moral reality, affords a better set of conditions for attaining a rule of law than does the opposite claim.

So also with the fourth premise. If the lawgiver strives to close any perceived gap between the demands of (human) law and any more stringent demands of a moral law or a supernatural law, the attempt might create burdens which its subjects cannot or will not bear. The resulting conditions might be as unfavorable to a rule of law as those that stem from a lawgiver's refusal or denial of any moral reality.

2. Topic Two: Sources of Any Existing Law

The creative or interpretative sources of any existing law can be nothing more than fiat, reason, and history. This claim is obvious because it is exhaustive. There is simply nothing else that generates or interprets law. To be sure, things other than law influence conduct and even command obedience. One elegant recent formulation is by Professor Lessig, who recognizes a regulatory matrix including not only law, but also norms, markets, and code (or "architecture").[82] Another is by Professor Berman, who recognizes the tripartite nature of law, and the desirability of a moral basis for it.[83] There are other formulations of the broader mix of things forcing conduct outside of or in addition to law, but when it comes to law in its univocal sense it still seems quite obvious that law itself can only come from one of three broadly understood fonts—fiat, reason, and history.

Fiat law most obviously means the law that is what it is by virtue of having been made. It is positive law because it is "posited" by some person or group of persons who had the power both to posit and enforce it, as a sovereign in a state, or as any soveign over any other subject. Fiat itself implies nothing other than power imposed by a state or any other sovereign. It might be a power exercised with restraint, in a reasonable way, and for the good of the people being governed. Or it might not. It could just as easily be a power exercised without restraint,

(unless the speaker also believes there is something to commend honesty beyond mere policy).

[82] LESSIG, *supra* note 55 and accompanying text.

[83] HAROLD J. BERMAN, LAW AND REVOLUTION, II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION, at xii (2003); Harold J. Berman, *Law and Logos*, 44 DEPAUL L. REV. 143, 149–53 (1994).

as an arbitrary act of will, pleasure, or whim, and for no good at all. It might exist, or some special authority might exist, only during some "emergency." It could be anything between either extreme. It is, however, the most obvious and most undeniable source of law imaginable. Fiat law simply is, and because it is, it is evident to anyone. Fiat law has been not only evident from time immemorial, but has been exhaustively discussed, enough to have produced several variations or "schools."[84]

Reasonable law most obviously refers not only to a source that is generative of law, but also a heuristic that drives the interpretation of any law. As a source of law, reason is a method of creating law not only as a gap-filler but as a deliberate extension or development of existing law and as a creator of new law. As a heuristic, reason is a method of interpreting any given law. When speaking of "reason" for these purposes, what is signified is any coherent application of reason and observation, using methods of induction or deduction. It is not necessary to call it a "science" of the law. It is at least as good to call it an "art" in the sense of "rhetoric" dealing with matters of probabilities reasonably sufficient for rational decisionmaking in contingent and practical affairs in the face of irreducible risk, uncertainty, and imperfect knowledge. Reasonable law has been apparent from ancient times, and continues to be exhaustively discussed. Some of the schools using reason and observation either to generate or to interpret law include the various sorts of "natural" law, the various schools of "utilitarian" or "realistic" law, and the various kinds of "law and [whatever]" provided the "[whatever]" is based on reason and observation.[85] Of these many variations of natural law, the "law and economics" school has been quite influential in the recent course of law in the United States and elsewhere.

Historical law most obviously connotes the source and anchor of law that emphasizes a historical foundation, in the sense, for example, of the historical schools of Anglo-American and German law, either for the

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[84] These include the one formulated by Hans Kelsen. *See* HANS KELSEN, PURE THEORY OF LAW 33–37 (Max Knight trans., Lawbook Exchange, Ltd. 2005) (1967); *see also* OTTO A. BIRD, THE IDEA OF JUSTICE 43–46 (1967) (counting Hans Kelsen among many other positive law proponents).

[85] *See* BIRD, *supra* note 84, at 118–22 (listing some proponents of, and discussing a "natural right" theory). There is, of course, nothing entirely natural about the "natural law" except only that it may be known or profitably discussed on the basis of natural reason alone (and without any appeal to "supernatural law"). *See* AQUINAS, *supra* note 68, at 222. My category of "reasonable (or natural) law" combines the so-called natural law schools with all the other schools that rely upon reason and observation, and so I also include the various approaches that have been labeled utilitarian or "realistic," of which there are many. *See* BIRD, *supra* note 84, at 79–82 (listing some proponents of a "social good" or utilitarian theory).

origin or the interpretation of existing law. Moreover, as used in any restatement of the obvious in law, it also includes the related social, cultural, and normative elements having the practical effect of influencing, generating, interpreting, and channeling any fiat law or reasonable law otherwise enacted or imposed in any particular community at any particular time. Historical law is the obvious explanation why it is not always possible to "export" "democracy" (that is to say, to enact laws or to create constitutions thought to be conducive to democracy in nations or states in which there is no historical or cultural basis for such things), or for that matter, to "impose" any other "new" law. Such "improvements" might be thwarted by inhospitable historical law, even if the proposed improvements are supported by the power of positive law or are alleged in reason to lead to economic prosperity, and even if it they are contended to be reasonably preferable to existing norms in any given society.

These three sources—fiat, reason, and history—are claimed to be obvious because each of the three is evident. They are plainly manifest in observable legal systems and would appear free from doubt. They are claimed to be exhaustive because, so long as "law" is used in a univocal sense, there seem to be no other sources of law.[86]

A candid recognition of these sources of law affords yet another basis for the postulated rule of law. *If* there is a law any subject might be inclined voluntarily to obey, it is likely to be some law that appears to be good for that person. If the three sources of law are congruent, then it is more likely the law will appear to be good. That is, if any given adjudication, or any act of new lawmaking is seen to be consistent with existing positive law, is also evidently and reasonably related to something good, and is at the same time in accordance with long-established customs and norms of the subjects, it would seem a more likely candidate for voluntary adherence by its subjects. So, for example, if a written constitution actually and explicitly provided some basis for an asserted right, and if that asserted right were reasonably ordered to some good, and were grounded in historical norms, then the concurrence of all three sources of the law would be expected more nearly to lead to voluntary consent than if only two, or only one (or none) of the three sources were apparent. This is to say, law that is nothing more than brute force (that is, if there are nine votes, then five of nine rule simply

[86] To refer, say, to the workings of a market as a "law" is to speak allegorically. It is part of the power of Professor Lessig's formulation that he claims markets are *not* laws, but that together with law, norms, and code, they influence human conduct. *See* LESSIG, *supra* note 55, at 86–91. Likewise, in context, it appears he is using "norms" to refer not to the historical school of law in which norms and customs become law or are a font of law, but to an extra-legal influencer of human conduct. *See id.*

because they can),[87] and cannot command any plausible or convincing support from reason or from history, is not likely to be obeyed absent brute force or the presence of a docile and trusting citizenry.

3. Topic Three: Making or Changing Law

It is evident laws can be made over time because many new laws have, in fact, been made. It is equally evident law can change over time because many laws have, in fact, changed over time. It is obvious that if law is created or changed, then at least sometimes it might be that the law was created or has changed for a reason (rather than simply made up on a whim of arbitrary fiat, or simply changed in mindless and purposeless response to some blind historical, accidental, or chance evolution).[88] This is particularly obvious when it is observed that a great many people actually—actively, openly, notoriously, purposefully, and deliberately—try to change the law, and many make a concerted effort to explain, justify, convince, or rationalize their goals. It is obvious there are only a finite number of reasons that might be given by anyone, to anyone else, in support of a change in law or the creation of any new law. The nonexhaustive list of deliberate and purposeful reasons for change must include at least the following four:[89]

- ***Is it reasonable?*** If any existing law no longer makes any reasonable sense, or is not as sensible as it once was, then perhaps it may be time to improve or replace it by something more reasonable.

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[87] *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 6 (1971).

> [A certain kind of man] claims for the Supreme Court an institutionalized role as perpetrator of limited coups d'etat.
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> . . . What can he say, for instance, of a Court that does not share his politics or his morality? I can think of nothing except the assertion that he will ignore the Court whenever he can get away with it and overthrow it if he can.

Id.; *see also id.* at 10, 20–21 (identifying some problems along these lines).

[88] *Cf.* Kennedy v. Louisiana, 128 S. Ct. 2641, 2649 (2008) (explaining that the applicability of the Eight Amendment's excessive cruelty standard must change with "evolving standards" of human decency). There are other judicial opinions that contemplate an "evolving" law, perhaps in the technical sense of the word. Surely there must be at least a few instances in which a new law was actually developed on purpose and for a purpose. It might be readily admitted that the Uniform Commercial Code, and especially Article 4A on electronic funds transfers, for example, shows at least some signs of intelligent design. UNIF. COMMERCIAL CODE art. 4A (2007).

[89] These are posed in the form of questions, in the rhetorical mode of one who is questioning any existing law with an eye towards changing it, or who might be proposing a new law that better answers the need the question implies. They conform to Topic Three of the attached Appendix A. *See infra* app. A. They are by no means original. *See* AQUINAS, *supra* note 68, Ia IIae, Q. 90, art. 4, ans., at 207–08.

- ***Is it any good?*** If the law is good for nothing or no one,[90] or for very few or only for a particular sect, faction, class, or other subgroup, then it may be time to redirect the law either to the common good, or at least to some good of some kind, or for someone, which is claimed to be better than the current status.
- ***Is it articulate, intelligible, and clear?*** Granting that law in its generality may be expected to be not entirely certain until applied in particular instances,[91] there is a problem if any particular law is so general or obscure and subtle[92] as to be unintelligible, or lacks clarity sufficient to predict whether conduct conforms or does not conform. If not even the most informed legal advisors can confidently predict outcomes, then it would be better to clarify the law, if such clarification is possible and if the benefit is worth the cost.
- ***Is it authorized?*** Almost everyone, even the most ardent champion of fiat law, makes a distinction between the authorized law of a polity that compels its subject and the unauthorized force of the pirate, outlaw gang, or highwayman that compels its victims at the point of a knife or gun.[93] The

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[90] To be sure, a law that truly is good for nothing is a law that might be deemed good to a nihilist. But aside from the nihilist, a law that is good for nothing would not seem to have any obvious appeal to anyone.

[91] ARISTOTLE, THE NICOMACHEAN ETHICS bk. 5, pt. x, at 317 (G.P. Goold ed., H. Rackham trans., new & rev. ed. 1934) (circa 350 B.C.) (it is "equitable" to correct any law where it is defective, owing to its universality). *See generally id.* bk. 10, pt. ix, at 641 (discussing the problems in framing laws).

[92] At least some fields of law—copyrights and patents, in particular—"approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtile [sic] and refined, and, sometimes, almost evanescent." Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4,901). One might well worry about any strategy committing the wealth of nations to a "law" of such subtlety few can explain it coherently and no one can predict its outcomes confidently.

[93] *Compare* ST. AUGUSTINE, THE CITY OF GOD (Marcus Dods trans., T & T Clark, Edinburgh 1871), *reprinted in* 18 GREAT BOOKS OF THE WESTERN WORLD, *supra* note 26, at 129, 190 ("[Without justice], what are kingdoms but great robberies?") (others translate the same passage more freely as "Without justice, what are kingdoms but great robber bands?" ST. AUGUSTINE, POLITICAL WRITINGS 30 (Michael W. Tkacz & Douglas Kries trans., 1994)), *with* KELSEN, *supra* note 84, at 313 ("If the state is comprehended as a legal order, then every state is a state governed by law (*Rechtsstaat*) . . . . In fact, however, the term is used to designate a special type of state or government . . . . A *Rechtsstaat* in this specific sense is a relatively centralized legal order . . . bound by general legal norms . . . and certain civil liberties of the citizens, especially freedom of religion and freedom of speech . . ."). By raising this possibility, Kelsen suggests that a basic norm, while perhaps initially established as a matter of will and affording the basis for pure positive laws established as a matter of will, is something that preserves the distinction between lawful and lawless force.

notion seems to be almost universally held that laws are "authorized" and other compulsive orders are not. A citizen is obligated to follow the law of the state, but not the demands of an outlaw. If it should be the case that one or more laws have been created or interpreted beyond the authority vested in any agent within a polity, such laws should be undone, removed, or changed back to their original and authorized form.

It is rather obvious these four all tend to relate to one another. Thus, if reason is part of the law, it is reasonable to suppose any fiat or historical law that leaves a gap may be filled, without any usurpation of authority, by a reasonable gap-filler provision.[94] Likewise, if a law is understood to be dedicated either to the common good or to any particular good, then a gap in any sort of law may be filled, without usurpation of authority, by a gap-filler calculated to accomplish the good intended by the existing law. Moreover, if there are judges who have historically been given the authority to develop a sort of organic or common law, then their authority permits them within the discipline of the polity to develop that law, presumably in accordance with the historical and reasonable bases of the law.

There are other reasons for changing law than these four. Among the other factors that might make any law arguably good, better, or best are questions whether existing law is predictable, consistent, systematic, humane, compulsory, and validated.[95] These characteristics are related to one another and to the four factors already mentioned. The more it is reasonably related to some articulated good, the more predictable it might become. Any law might be even more predictable to the extent it is also consistent (both internally coherent and also consistent over time)

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[94] It should go without saying that a law based upon reason may be completed by reason—as the maxim says: "[where the reason leads the rule follows,] where the reason ceases the rule ceases." *See* SIR EDWARD COKE, *The First Part of Institutes of the Lawes of England*, *in* 2 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 577, 687 (Steve Sheppard ed., 2003) ("*Cessante ratione legis cessat ipsa lex.*"). It might be reasonable to fill the gap with a term the parties (or the lawgiver) would have agreed upon in hypothetical negotiation; or with a different term the more dominant party might have insisted upon; or with a forcing term the more dominant party might have rejected but that might, in subsequent instances, create an incentive for someone in the position of a dominant party to explicitly include in the agreement. The point is simply that "reason" itself can provide an argument for an authorized interpretation if, but only if, the law itself is deemed to be reasonable. Provisions such as these are sometimes appended to comprehensive civil codes to provide for their application. *See generally* 3 THE CIVIL CODE OF THE STATE OF NEW YORK: NEW YORK FIELD CODES 1850–1865 (as reported by the commissioners of the code, but not enacted by the State of New York), at 638 (Lawbook Exchange, Ltd. 1998) (1865) (reporting proposed Section 1996: "An interpretation which gives effect is preferred to one which makes void"); *id.* at 639 (reporting proposed Section 1997: "Interpretation must be reasonable").

[95] See *infra* app. A, ch.2, Topic 3, §§ 301–11.

and systematically ordered in its patterns and structures to permit a kind of deductive process to predict juridical outcomes—a degree of "formalism" that is not an entirely bad thing. Finally, if a law is not properly ordered to human beings or imposes burdens that are or seem to be inhumane, it cannot be obeyed;[96] if a law is honored more in the breach than in the observance, then obedience becomes not compulsory but optional, and enforcement begins to look arbitrary and unjust;[97] and if a law consistently fails of its intended purpose, result, or object and is negatively validated, it becomes an obvious candidate for change.[98]

These other factors seem equally as obvious as the first four. Certainly, if any law is systematic, then it is easier to develop and to fill gaps with authority and with intelligibility. If a law is also validated, it is easier to demonstrate that it is good for something rather than nothing, and it becomes more possible to count the cost of attaining the identified good. All of these factors in the nonexclusive listing given here are claimed to be obvious. These factors are claimed to be obvious because it seems unreasonable to think the opposite. It seems evident (even when qualified by the phrase "other things being equal" or the phrase "insofar as reasonably possible") that a law which is more nearly reasonable, good for something, articulate, authorized, predictable, compulsory, humane, consistent, systematic, and validated is better than its opposite.

It would seem no one could seriously advocate laws that are unreasonable, immoral, amoral, good for nothing, incoherent, unauthorized, unpredictable, voluntary, inhuman, inconsistent, random, or never validated. This obvious understanding creates a rather unremarkable taxonomy containing categories against which to evaluate an assertion that any given law "ought" to be changed, or any new law "ought" to be enacted. If a "change" is proposed, it is obviously and easily questioned whether and exactly why the change is asserted to be better rather than worse. As a condition to the postulated rule of law, it would seem safe to say new or modified laws are more likely to command the voluntary obedience of their subjects to the extent the new or modified laws constitute a change for the better.

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[96] It would be utopian, fit for imaginary or nonhuman beings possessed of imaginary or nonhuman powers and abilities, but not fit for actual human beings.

[97] Selective enforcement of laws that the polity will not generally submit to, but that have not been repealed, creates disrespect for the law, coupled with opportunities for corruption of law enforcement agents. Some laws are worth that risk, but all that is claimed here is that such laws are worth reexamining from time to time.

[98] Something that is not working is a good candidate for reexamination and overhaul.

4. Topic Four: Law and Justice (the concept of justice as a rule or measure against which any law may be evaluated)

Justice is not a synonym for "law" nor is it the same thing as benevolence, love, charity, or generalized goodness. If it were, it would be redundant. Justice typically signifies something to which someone is entitled while at the same time signifying a standard against which the law is measured. Other terms, including benevolence, love, or charity, typically signify something to which a person is not entitled. It seems a substantial, confusing, and obfuscating category mistake to use "justice" to refer to anything to which a person is not entitled. It is substantial and harmful because this is a consequential category mistake. As a matter of common sense, many persons think it is appropriate to demand justice and to expect their polity to deliver justice for all. But if "justice" is so confused as to cover things to which no one has any right, then the resulting polity would seem an exercise in tyranny, all the worse because the objects sought by the compulsory force of the polity might seem intrinsically "good" (things such as mercy, love, and other gifts certainly are good, but only when voluntarily rendered and not when coerced by force).[99]

As used in this Article, "justice" is a term signifying an objective standard against which a law might be measured. It includes three sets of terms, introduced in overview in the following chart:

Column *A* *(misguided moralism)*	**Column *B*** *(4-dimensional justice)*	**Column *C*** *(incomplete analytics)*
An interest or construct	The right	Something other than lawful
. . . of the stronger	The fair	Neutral process or rules

[99] One of the important claims advanced in this Article is precisely that the dual sovereignty concept is the only one that might deliver the nonjustice goods of love and charity that might enrich a polity. The supernatural law is recognized as binding only by those who voluntarily submit to it. If a supernatural sovereign commands a law of love which extends to believers and to nonbelievers, such an obligation binds only the believers, to the advantage of the believer (that is, the believer who benefits from an act of love performed by another believer) and also to the advantage of the nonbeliever (assuming, of course, that a nonbeliever might remain free to decline unwanted gifts). Such a supernatural law would contribute to the health of a nation in tangible ways. It preserves the limits of the visible state by allowing the state to confine its laws to the realm of justice, and yet encourages the voluntary provision of the nonjustice goods that so many persons want and need. It may be only the believers of supernatural law who recognize an obligation to love their neighbor, but there is no state sanction for failure to love, and the believer is free to abandon the supernatural law without any visible penalty at any time the burden might seem too great or whenever the believer finds some ground to withdraw belief.

. . . a false consciousness	The lawful	An empirical factor
A nomophobic impulse	The good	Opportunity or results
Instrumental and adjectival "justice"		

Considered as the set of four terms tabulated in Column *B* above, justice consists in the right, the fair, the lawful, and the good. As so considered, "justice" consists in a combination of each of the four dimensions. It is asserted that each is irreducible to any identity with any of the other four, and that justice itself consists in a combination of all four elements. Moreover, it is conceded that each of the four is partially predicated on a moral and partially on a conventional or analytic basis—each of the four is partially categorical (deontological) and at the same time partially conventional (contingent).

The "right" is a correlative of duty, and it is also a matter of giving to each what is due.[100] It constitutes paying the debts, or performing the obligations of duty. Were there no duties, there would be no rights. This is in some sense analytically or tautogically true.[101] To go further, if there were no constant duties, this tautology would be grounded simply in convention or will: whatever duty is determined upon, as a matter of will or arbitrary decision, that is the duty which must be obeyed and whence a set of correlative but equally conventional "rights" would be derived.[102] But because it seems, instead, rather obvious that there is among the population of the polity a number of persons who believe there is a human duty to live, to live well, and to make the choices

[100] *See, e.g.*, PLATO, THE REPUBLIC bk. 1, *in* THE DIALOGUES OF PLATO (Benjamin Jowett trans., 1914), *reprinted in* 7 GREAT BOOKS OF THE WESTERN WORLD, *supra* note 26, at 295, 297 (defining justice as telling the truth and repaying debts); *id.* at 298 (defining justice as rendering to each his due); *id.* bk. 4, at 349, 354 (minding one's own business).

[101] *E.g.*, WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS 38 (Walter Wheeler Cook ed., 1919).

[102] *See* W.S. GILBERT & ARTHUR SULLIVAN, THE PIRATES OF PENZANCE, OR THE SLAVE OF DUTY (Bryceson Treharne ed., 1879). If accidentally indentured to serve as apprentice to a pirate (should have been a "pilot" but for a mistake), then the subject has a duty to be a full-bore pirate; when released from the pirate profession upon the twenty-first birthday, the subject has a duty to hunt down and capture his former comrades; when confronted by the accident of a birthday that falls on the leap year-only day of February 29, and that most ingenious paradox creating a situation of an apprentice who is twenty-one years old but has had only a handful of birthdays, then the subject has the duty to give up the task of hunting the pirates and to take up the duty of betraying the pirate hunters to the pirates. *Id.* And so it goes in staggering incoherence. As with any *reductio*, one obvious solution is to give up the premise (here, the embedded premise that duty is wholly conventional). If there were not an inherent human duty to live well by making moral choices, there would be no inherent or inalienable right to choice, to freedom, or to life, liberty, property, and the pursuit of happiness. See *infra* Part I.D.3.

conducive to a whole life well lived in accordance with virtue,[103] then there exists a claim to the existence of an obvious common duty which sets the standard for measuring what is right. In a restatement of the obvious, there is no need to take sides—either there is nothing but a conventional duty, so "justice" measures only the extent to which any law actually promotes the "right" as conventionally understood; or else there is an inherent human duty, so "justice" also measures the extent to which any law promotes the inherent and inalienable rights of humankind. Either way, it is obvious that the "right" is something justice can (and does) hold up as a standard against which to measure any law.[104]

The "fair" consists in a twofold relationship: treating equals equally in respect of a relevant criterion, and at the same time treating unequals unequally in respect of the given criterion (treating those who do not meet the criteria differently from those who do). It is as unfair to advance unequals as it is to deny equality to those who are equals in respect of the criteria at issue. For human rights based on equal personhood, the only relevant criterion is humanity (personhood). There are, of course, other ways in which to use the term "fair," but each of them seems to go beyond any obvious application of fairness in the context of a legal relationship.[105] It is not, for example, at all evident why it should be imagined that "fairness" requires an uneven application of a standard. There might be good reason to waive, excuse, or bend a standard criterion, or to discard a given standard altogether, but "fairness" is not the reason for doing so. If, for example, a given standard is irrelevant to something it is supposed to measure, the objection is not lack of "fairness" but lack of reason. So also, if a given standard fails to recognize some basic human right, fails to comply with law, or fails to deliver a human good, the objection is not lack of "fairness," but rather lack of right, the presence of illegality, or a failure to do what is good.

The "lawful" consists in conformity to the law. It is so simple a relationship of justice to law as sometimes to be overlooked, but even common speech indicates it is hard to call anyone a "just" person if that person is habitually a scoff-law. It is also a more subtle but telling critique of certain laws and certain interpretations of them. If any

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[103] These duties generate corresponding rights to life, liberty, and the pursuit of happiness. Mere survival has long been taken to be so strong a drive in all persons that it is treated "as if" survival itself were a duty.

[104] Either "right" connotes a duty coterminous with "the law" and is a conventional measure, or it connotes a duty higher than the law and is a categorical, absolute measure. In either event, it affords something to measure.

[105] So "fair" in the context of beauty, or of a quality level, or of an even-mindedness (it is this last denotation that actually approaches very closely to that used in this Article) does not connote a connection to any specific legal relationship.

interpretation of the law is, in fact, not in accordance with the law (after all allowances are made for ordinary "play in the joints," ordinary gap-filling, or reasonable interpretation or application of the law in a new set of circumstances), it is unjust. This is perhaps a special reproach to judges, but it is also a reproach applicable to executives and prosecutors in respect of criminal or public law, and to private actors and their lawyers in respect of private law.

The "good" consists in a moral relationship,[106] and this aspect of justice consists in comparing any law to some good of some sort. The good with which justice is concerned must be either the particular good of the law (is it appropriately distributive, restorative, retributive, and the like),[107] or the greater good of the polity and/or its citizens. Does it promote the good of the community, or the good of at least some if not all of its citizens; if there is a common good, does the law support and encourage it or does the law do the opposite? In either the public or private sphere, the term might be used to signify a contingent or hypothetical good; or it might be used to signify a categorical or deontological good. So, if it were a set policy to create a copyright for the purpose of enriching the public by providing some incentive to authors, then it would be, according to this hypothetical good, fitting to judge existing copyright law as better or worse to the extent it more nearly does or does not achieve this contingent end. Likewise, if it were intrinsically good for all human beings to be free and equal citizens, entitled to life, liberty, and the pursuit of happiness, then it would, according to these categorical goods, be fitting to judge existing public and private law to be better or worse to the extent it interferes with these deontological ends, and some might suppose the polity ought actually to encourage them or at least secure them against trespass.

It would seem obvious that "justice" resides in some combination of all four of the foregoing, each of which is irreducible to the others, but each of which influences and guides the others.[108] If, for example, "fairness" in any law is said to reside in equal treatment according to a criterion, then something beyond fairness must be used to evaluate the appropriateness of the criterion itself. A particular criterion might be challenged on the basis that it is unlawful, is not right, or, finally, is not

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[106] See *supra* Section I.B (setting forth various "goods" and moral relationships based on choices that a person "ought" to make among or between competing goods).

[107] See *supra* note 76 and accompanying text (listing some of the specifically legal goods).

[108] This is a proposition made by implication in a number of authorities, and made quite explicitly by at least one. *See* MORTIMER J. ADLER, SIX GREAT IDEAS 186–205, 228–43 (1st Touchstone ed. 1997) (discussing the concept of "justice" in chapters dealing with the domain of "justice," the authority of law, and the conception of "justice" joined with liberty and equality).

good but evil. It seems both evident and obvious that these considerations work together, but are neither synonyms nor antonyms. Together they constitute the four dimensions of justice, taken as an integral whole.[109]

Considered as a second set of related terms as tabulated in Column *A*, there are yet other things that have been said about justice as a measure of the law, and those lead to different and contradictory consequences. Any restatement of the obvious must at least account for these other uses. They include the use of "justice" as a *merely* conventional interest,[110] as the interest of the stronger,[111] as a false consciousness[112] or mental illness (which should, perhaps, be lifted in

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[109] *Id.*

[110] This usage places an emphasis on the conventional aspect of justice. Of course, the "right" also raises an element of the conventional, as does "fairness" in respect of any arbitrary choice of criterion, as does the "lawful" in respect of purely conventional law, and as does the "good" in respect of hypothetical goals. The difference is that this usage, as it refers to law as *merely* "an interest," tends to be purely and exclusively conventional and tends towards a misapprehension or dogmatic denial of the mixed nature of the contrary positions (there is a notion of the deontological and categorical in the questions of the right, the fair, the lawful, and the good, at the same time and coexisting with the notion of the hypothetical and conventional in each of these relations—each of these is a mixed proposition). This usage tends to be used to "debunk" the notion that law is ever anything but a conventional interest, and hence is never anything other than an ultimately arbitrary or totally conditioned interest. This usage might well lead to the view that justice demands that persons "ought" to get over the primitive idea that one set of legal rules is "better" than any other, since each set of laws is simply a way of expressing some community's privileged or favored "interests."

[111] PLATO, *supra* note 100, at 301 (expressing the view of Thrasymachus). This usage seems to do more than express the merely trivial notion that laws are passed and enforced by those who are authorized to do so, which implies that they are empowered to do so, which suggests that they are able to do so, and therefore they must be stronger than those who choose to disobey the law. It seems to go so far as to say that there are different and irreducibly conflicting interests among the members of a polity. According to this view, a first interest *X* (the few, or the "rich," or the "talented") will rule over a contrary interest *Y* (the many, the "poor," or the "untalented") only if *X* imposes its special "interest" against *Y*. This sort of zero sum game theory leads to an odd view of justice. If the observation is more than a simple statement of a fact, it tends to lead to the odd notion that because the law favors *X* over *Y* (as the interest of the stronger over the weaker) then perhaps justice "ought" to prefer *Y* over *X* (perhaps on an "underdog" principle, some sort of odd, indemonstrable categorical imperative that the weaker "ought" to overcome the stronger, or for no reason whatever). Perhaps the "many" are considered to be weak, and the "few" are strong, and so perhaps this is some sort of inarticulate attempt to say that "democracy," taken as the rule of the many, is what "ought" to be law, though this apparently contradicts the notion that the law is always the interest of the stronger, and might be more forthrightly and candidly premised on a frank acknowledgment that democracy is "good" or that self-government is a "right" or that all persons who are adult citizens have a right in "fairness" against the criterion of citizenship to an equal vote.

[112] The term is often associated with Marxists, though its usage by Karl Marx and Fredreich Engels is not robust. *See* Doğan Göçmen, *False Consciousness*, *in* 1 ENCYCLOPEDIA OF SOCIAL PROBLEMS 350, 350–51 (Vincent N. Parrillo ed., 2008). This

favor of some more nearly true consciousness, or cure of the psychosis), or as an evil imposition checking the desires or the will of its subjects. I have previously coined the term "nomophobia" to refer to this unqualified fear of law.[113] The unchecked progression of related concepts under this head leads to nomophobia and embraces an ungrounded instrumentalism—"justice" becomes either some sort of misguided moralism or a simple hammer with which to strike any opponent.

Considered as yet a third set of terms, and as tabulated in Column *C*, there is a yet further set of things that have been said about justice. "Justice" is sometimes used as if it were merely a neutral process, a matter of merely conventional jurisdiction or "rules of the game." It is sometimes used as if it were an empirical derivation from an inductive study of the science of the law. Occasionally "justice" is used as if it were simply an empirical fudge factor or catch-all term to explain the result in a case that is not understandable on any other basis. This set of usages embraces any number of unrelated and contradictory notions (indeed, the peculiar result is that "justice" is sometimes used to describe just about anything other than what is lawful).

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usage seems to go yet further in the direction marked by the prior terms. If the law is always and only the interest of the stronger, why is it that the "weaker," or at least some of them, comply with apparent docility against their own self-interest? The answer, according to this view of the question, is that there must be some pathology. If an interest of, say, the proletariat, is one that the proletariat (or the worker, or the subservient domestic partner) fails to notice or to act upon, it must be that the proletariat is deceived, deluded, sick, or doped with some sort of opiate (such as "religion") and must be in need of a cure to be administered by some political doctor. The cure, of course, must be against the "patient's" express desire to be left alone and must be administered against the "patient's" protestation that he or she is "just fine as I am, thank you." This would seem to lead to the notion that "justice" ought to act contrary to law, for the simple reason that existing law is not merely the interest of the stronger, but a pathogen that is a positive harm to its subjects, who must be treated as the law's victims. This orientation differs markedly from similar results reached under a different way of thinking. Black African chattel slavery, for example, was in fact opposed on the basis that it was not right (it offended against inherent rights derived from categorical duties), that it was not fair (skin pigmentation is not a reasonable criterion for dividing slave from free), that it was not lawful (if a legal determination hinged upon a finding of "personhood" and if there is no way legitimately to hinge personhood on skin pigmentation, the "laws" are in fact not lawful at all), or that it was not any good (it is an evil thing to treat human beings as if they were nonhuman animals). It was not necessary to overcome slavery on the basis that the slaveholder was stronger and that any slave who seemed even partially resigned to his or her lot was mentally diseased by false consciousness. The one view saves justice while reforming the law, while the other view sacrifices both justice and law while supporting some sort of elite vanguard who is self-appointed to act on behalf of and to "raise the consciousness" of those who are (per the hypothesis of the vanguard) wholly blind and totally unable to see even where their own self-interest lies. Its apparent logic also incidentally but necessarily denies the equality of humankind and instead posits different species of humanoids permanently divided according to class as expressed in historical stages.

[113] *The Restatement of the Obvious*, *supra* note 25, at 335.

As so used in these counterfeits,[114] "justice" becomes a meaningless term and the unchecked progress of such concepts leads both to an unjust regime and to a kind of instrumentalism. "Justice" becomes a nonsense word, a nomophobic shibboleth of misguided moralism from the perspective of Column *A*, or a term used in some sort of incomplete analytics dedicated to an inhuman "science" of the law that leaves a moral gap in the heart of the law as it pursues "pure" justice from the perspective of Column *C*. At best, there is an instrumentalism from these perspectives.[115] So also it is possible to attach adjectives to create category mistakes: "social" justice, or "economic" justice would seem, at best, useless terms. If justice is good for society, then all justice would constitute a social good; but this seems an odd reason to call it "social" justice rather than simply calling it "justice."[116] If some sort of law had to do with good economics and were otherwise just, perhaps one might say such a law tended to produce some kind of good economic result and is also a just law, but to call such a thing "economic" justice is to add nothing beyond an epithet.

It certainly seems obvious that a law which is also itself lawful, right, fair, and good, and which is accepted as such by its subjects is a law more likely to be voluntarily obeyed than if it were not so understood. At the same time, a law understood to be some sort of conventional or arbitrary rule imposed by some alien yet powerful faction, to support the interest of that faction and not the interest of the subject, is less likely to be voluntarily obeyed. And likewise a law seen, at best, as some sort of neutral rule of some game that the subject never much wanted to play in the first place might produce some instrumental obedience but is not likely to produce anything deeper or more reliable.

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[114] A careful reader will notice that the approach of this Article is suggesting a somewhat new formulation of justice as a virtue, as an habitual attitude towards the rule of law, and having both a defect (here characterized as "incomplete analytics" because it fails to include the common moral core of a rule of law) and an excess (here characterized as "misguided moralism" because it fails to include the rational basis of moral impulses). This suggestion also leads to an inference concerning the necessity of combining a certain kind of "faith" (in the existence of a common moral truth) with a certain kind of "reason" (by which moral impulses, including those attributed to "religion," might be rationally tested). But that must await for another article; this one is limited to a mere survey of the existence of various terms used to describe "justice" and to their arrangement into a table as illustrated herein.

[115] There is an instrumentalism, of sorts, in the Column *B* "justice" as well, but it is as the instrument of doing justice itself.

[116] All justice is social justice. Most counterfeits are not just at all, except when they accidentally hit upon the right result.

5. Topic Five: The Use of Language in the Law

This topic remains for further development, but an easy and obvious observation follows from a simple multiple choice question: if you call a tail a leg, how many legs does a cow have? Please explain your answer.

(a) one, and only one
(b) four
(c) five
(d) all of the above, depending
(e) none of the above, because there is no way whatsoever to answer this question, which is either a category mistake or otherwise so flawed by embedded but erroneous assumptions as to make it nonsensical even to ask.

It is rather obvious the first answer might be correct, if we take language as a convention and if we take the call of the question as indicating a change of convention: assuming a "tail" is both like a leg (it is an elongated extension of matter) but also unlike (it is not a weight-bearing member), then the question itself implies that what "we" once called a tail, we will now call a leg. Therefore what "we" used to call legs no longer qualify because they are unlike the thing we now call a leg. The previously single tail now becomes the single leg simply as a function of its different nature, characteristics, and qualities compared to the weight-bearing thing formerly known as a leg.

The second answer might also be correct, if we take the question as not establishing any power on the part of the implied speaker to determine meaning. You might call yourself the King of Prussia, the Queen of Persia, or an artichoke, but you have no power to compel meaning beyond your own speech or your own manuscript. The speaker cannot arbitrarily force a changed meaning on the reality signified by the words used, even granting the words might have some aspect of convention about them. Thus, if there were four legs prior to the call of the question, there remain four legs after. Assuming a tail is a verbal token referring to a substantive thing which is different from the substantive thing (a leg) referred to by a different word, then "calling" a tail a leg cannot make it so. There are still four and only four legs, and calling a tail a leg does not change any real attribute of the thing; calling a tail a leg does not make it one.[117]

The third answer is also good, if we take the question as establishing a simple addition to the prior category of "legs." It is as if "we" were to say that "leg" now refers to any elongated extension of

[117] This is the answer commonly attributed to Abraham Lincoln. *See, e.g.*, Lawrence A. Cunningham, Compilation, *The Essays of Warren Buffett: Lessons for Corporate America*, 19 CARDOZO L. REV. 1, 198 (1997); Calvin H. Johnson, *Accounting in Favor of Investors*, 19 CARDOZO L. REV. 637, 648 (1997).

matter. In that case there are (at least) five such things on the cow. Therefore, with ease and confidence one might answer there are now five legs on the cow.

The fourth answer is also good, by reference to the three already given. Of course, were this an actual examination, we could refine this answer by calling out any combination of two of the prior answers, thereby allowing the test-taker to reject some one of the prior three as being untenable.

The fifth answer is not impossible, simply by reference to the four answers already given. If the question can be answered, essentially, in any way imaginable, then there must be no one answer that is necessarily determinative. And so it goes. It is not the purpose of this Article to answer the question posed, but simply to illustrate how ordinary men and women (and also self-described subtle and learned persons) must use language to communicate, using words even though analogous and imprecise at best and positively equivocal or misleading at worst. Yet despite these obvious difficulties, it is evident that human beings communicate, more or less effectively, by way of language.

No one can talk about law for very long without noticing both the usefulness of language and the irreducible difficulties. Law presents at least a double difficulty: the things signified are probably uncertain at least at the edge, and the words used to signify those blurry things are themselves not univocal or otherwise perfect markers. There comes a point at which any ordinary observer can discern words are being distorted beyond any reasonable semblance of truth. If, and when, such distortion occurs in the language of the law, it might be expected its subjects will be less likely to voluntarily obey. Indeed, upon such distortions, it begins to seem as if the law has been stretched to the point it is no longer lawful. But where the law is understood to be interpreted at least plausibly in accordance with the words by which it was first given, then it seems rather obvious its subjects might more nearly consent to the interpretation so given.

If it happens, not only that language is difficult in the best of circumstances, but that some juridical actors are thought to be partisans and are often understood to be using words as weapons and intentionally equivocating with them, it is not to be wondered that trust in the rule of law might suffer erosion. If "justice" is lost as a reliable and intelligible concept embodying the lawful, the fair, the right, and the good, confidence in the rule of law is bound to suffer. If the rational reasons for changing the law are neither explained nor examined, it is likely the rule of law will be jeopardized. Over time, the law will remain only somewhat good, reasonable, intelligible, or authorized, and it will come to be measured by some merely instrumental standard of "justice." Moreover, when law itself is generated sometimes by fiat including arbitrary will,

occasionally by reason, and almost always by history and cultural norms and by some odd mixture of the three, and when it is concerned with moral actions by reference to an objective moral reality, it must be obvious that disputes will arise. Almost everyone knows this, or could know it upon reflection. Many people probably have known this, from time immemorial and across cultures and across many barriers of time, place, and circumstances. But perhaps it is especially in our own age, with the accidents of globalization, communications, and insistence upon self-government for a purpose, and upon self-will for any purpose or no purpose that these obvious conflicts require an explicit restatement. It appears the rule of law itself is under attack in a way that is, if nothing entirely new, at least a pressing problem of the current age.

It is for the sake of addressing this issue that more needs to be said in respect of the obvious connections between law and morality, hence the inquiry now turns back to the problem first identified and to the practical syllogism first proposed.

D. Law and Morality

Morality is a basis of justice and law. The obvious premise is that good "ought" to be done and its opposite ("evil") "ought" to be avoided. Reverting to the practical syllogism with which we began,[118] unless there is some ground to assert at least a provisional "national morality" or any other kind of morality or moral law,[119] there is no basis for a truth claim to the syllogism. Based upon an understanding that there are indemonstrable moral principles with which the law must be concerned if it is to be at all realistic, certain moral bases for the familiar divisions of private and public law must follow. At the outset it should be noted the argument proceeds according to a form. The form is to assert: (a) the existence of a moral principle, *plus* (b) some other ground to support the conversion of a moral principle into a legal rule or legal precept. Thus, the method of law and morality proposed herein is to affirm a moral principle as a necessary condition, but at the same time to affirm that moral principle by itself is not a sufficient basis to claim a useful "law and morality" approach to the examination of any particular human law. The law and morality approach proposed herein is claimed to be a useful way to understand, explain, and predict the development of law. It is not claimed to be the sole source of, or the only justification for any law.

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[118] *See supra* note 8 (if morality is good for the polity, and if supernatural law is good for morality; then supernatural law is good for the polity).

[119] *See supra* note 9. It is beyond the scope of this Article to do more than make the assumption.

1. The Moral Basis of Private Law

In deriving the law and morality basis of private law, we begin with the moral intuitions:

(a) Contract is based on the moral intuition that promises ought to be kept.[120]

(b) Property is based on the moral intuition that the person who makes, improves, or transforms something ought to have it.[121]

(c) Tort is based on the moral intuition that one person ought to use their own person, things, or agents, so as not to harm another person's.

(d) Agency is based on the moral intuition that one person might act on behalf of another and, in so doing, should have the power to incur obligations for which the other might be responsible or secure rights which the other might enforce. In doing so, the one incurs a set of obligations to the other,[122] as well as to third parties.

(e) Partnership is based on the moral intuition of mutual agency because each partner has a share of ownership and control.

(f) Limited liability entities are based on the moral intuition of nonagency because there is separation of ownership from control.

(g) Family law is based on the moral intuition that children ought to be protected, nurtured, and supported by their parents, and parents ought to be accountable to one another.

(h) Fraud (and private law remedies against fraud) is based on the moral intuition that one person ought not lie to another.[123]

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[120] That is to say, deliberate promises in accordance with their terms including all conditions and other qualifications.

[121] That is to say, it is based on the precept that people own their own bodies, the labor of their bodies, and the fruits of their labor, subject to limitations based on sufficiency for others and against waste and spoilage. *See* JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT ch. V., pts. 26–30 (1690), *reprinted in* THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION 15–17 (J.W. Gough ed., 1948) (speaking of property); *id.* pts. 31–45, at 17–24 (speaking of real property).

[122] And vice versa.

[123] That is, the prohibition is based upon the intuition that a lie is wrong, coupled with the more remote definition or determination that a lie consists in a false statement made knowingly and for the purpose of inducing reliance causing harm to another. It is interesting, by the way, to concede there might be room to discuss the precise contours of the more remote determination notwithstanding agreement upon the foundational intuition. Persons who agree that "lying" is wrong still have much to figure out, and there is great room for diverse views. In any given polity, its own fiat laws, reasonable

In each case, the moral basis is a constituent of a "law and morality" analysis of any law. In such an analysis it is apparent the moral basis is only a partial explanation. In addition to a moral intuition, there is almost always some other factor[124] that explains, predicts, or determines whether a law will be enacted to support the moral intuition, and it is to those other factors we now turn.

(a) (*bis*). In the case of contracts, the additional factor includes the observation that certain promises tend to produce or enhance aggregate wealth, to induce detrimental reliance by other persons, to cause the promisor to expend wealth in anticipation of a promised counter-performance, or to be of the sort the parties themselves desire to have enforced. When these additional factors are weighed, and when they are balanced with countervailing factors (some promises tend to be personal, tend to be of the sort the parties either do not want to be enforced at law or could not tolerate if they were, or would tend to foster a degree of interference by the polity in private matters which the subjects deem to be invasive) it is possible to consider the moral dimension as an obvious force on the direction of the law.[125]

(b) (*bis*). Property rights under law, as dependent upon other factors added to the moral intuition, might have to do with observations concerning the costs of externalities compared to the costs of internalization. Such other factors as these, added to the preexisting moral intuition, might shape an

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observations, and historical experiences will color its own determinations, and a "law and morality" approach will factor these elements. *See supra* Part I.C.2.

[124] The rubric is "almost" always some other factor. There may be cases, such as murder, where the moral intuition functions alone, but even in such cases there may be other factors that explain, predict or determine the specific contours of the prohibition, as by establishing degrees of culpability, or excuse.

[125] "Promissory estoppel" tends to enforce promises not otherwise enforceable for want of consideration, and for a host of other defects, if reliance was "reasonably" expected and "injustice" can be avoided only by enforcement. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981). The notion that it is ever reasonable to rely on a promise not otherwise enforceable, or that "justice" would ever require anything the law does not otherwise demand, might be more readily understood upon the moral basis that everyone has an intuition that promises ought to be kept, and that justice ought to consider not only what is lawful but also what is good; and that the current doctrine of "promissory estoppel" is but a way station towards a more comprehensive "law and morality" explanation of contract law. *Cf.* Thomas C. Folsom, *Reconsidering the Reliance Rules: The Restatement of Contracts and Promissory Estoppel in North Dakota*, 66 N.D. L. REV. 317, 329–33 (1990) (recounting the various kinds of reliance recognized by the Restatement). It should be noted that the law and morality approach does not predict nor expect uniformity in remote consequences. There are obviously at least two comprehensive systems of contract law (civil law and common law), and probably more, that can be developed from the same moral intuition.

> explanation of particular laws of property within a given polity.[126]

Omitting the other headings, which may be filled in later, in a subsequent article, we proceed to (h).

> (h) (*bis*). So it is also with fraud. There are plenty of lies for which the law provides no remedy. But when the moral intuition is coupled with additional factors—lies in respect of the purchase and sale of derivative property interests (like securities)[127] tend to be economically costly, wasteful, and likely to spoil the efficient use and allocation of resources, and tend to be the sort of lies the parties themselves want to prevent[128]—then the moral analysis is an aid in determining whether, for example, one polity might wish to address the moral issue by requiring disclosure, and another polity might wish to address the moral issue by substantive regulation about the quality of derivatives offered or sold, and yet another polity might take some other approach. Similarly, lies under oath, in a court proceeding, or in an official investigation, or which constitute "ordinary" fraud might attract special attention.

In respect of a rule of law, it should be obvious that the subjects of any private law which has an explicit moral intuition as an integral part will be more likely to embrace and voluntarily observe it. Conversely, the less there is any moral intuition, or the more the moral intuition is denied or obscured, or the less the subjects believe in the moral intuition, the less likely it is the law will be observed voluntarily (and, not coincidentally, the attempt to provide any coherent explanation for the law itself will be less plausible). The cycle of observance or nonobservance might be thought to create a feedback loop.

For example, as it becomes more common for contract law to be taught as if it were some sort of amoral or even immoral set of conventional rules, the more completely will some students actually come to believe that contract "law" consists in nothing more than

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[126] *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. (PAPERS & PROC.) 347 (1967).

[127] I am using "derivative" in its broad sense to refer to any asset whose value is derived from the value of something else. So stock in a joint stock company derives its value from the "present discounted value of all future dividends to be paid by the corporation." STEPHEN M. BAINBRIDGE, MERGERS AND ACQUISITIONS 194 (2003). In turn, this value depends on the value of the firm's net assets, free cash flow, capital structure, and other attributes. *See id.* at 197–202.

[128] See ROBERT CHARLES CLARK, CORPORATE LAW 150–54 (1986) for a reflection on various reasons for "our common belief" that fraud is wrong—it makes the markets imperfect, increases transaction costs, and encourages free-riding, thereby undermining the social utility of established patterns of truthfulness.

determining whether any promise is "enforceable" at law and then calculating the relative costs of performance or nonperformance. It should be obvious, to the extent these students teach those lessons to clients and communicate them to other members of the polity, that there will be less voluntary performance of promises, even those imagined to be enforceable as contracts.

This leads not only to an "efficient breach" mentality in contract law, but to precisely the same manner of calculation in all areas of the law.[129] It should not be in the least surprising that some of the "best and brightest" in a polity might make a cost/benefit analysis and then violate any law whatsoever when they determine the risk-weighted cost of compliance is less than the benefit of noncompliance[130]—a generalized "choice theory" of law is precisely what their polity has taught them to embrace.

2. The Moral Basis of Public Law

Criminal law is based on the moral intuition that certain acts by which a person causes or suffers harm ought to be prevented, punished, or somehow recompensed.

Administrative and constitutional laws are based on the moral intuition that certain limits ought to be set within the polity, assuming the polity exists to serve its subjects and assuming there are various pressures pushing the polity into a different orientation towards its subjects.

Tax law is based on the moral notion that joint action implies joint payment for the instrumentalities of action.[131]

Democracy itself is based on a moral intuition best explained by example. If a democracy permits Timothy (as an elected representative) to impose a tax on Peter to pay Paul and Lydia; if Peter, Paul, and Lydia are voting; and if Paul and Lydia each get one vote as against Peter's one vote, it might be important to a rule of law for both Paul and Lydia to understand they ought not take from someone else just because they can.

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[129] *See* Kemezy v. Peters, 79 F.3d 33, 34–35 (7th Cir. 1996) (suggesting, in an opinion authored by Chief Judge Posner, that punitive damages are necessary in some cases to make sure that the costs of theft and sexual assault are high enough to rebalance the potential expropriator's "choice theory" calculations of costs/benefits).

[130] *See generally* HOWELL E. JACKSON ET AL., ANALYTICAL METHODS FOR LAWYERS 1–32 (2003) (reporting on methods of calculating and weighing the costs and benefits of the available options in strategic counseling concerning matters such as environmental cleanup investigations in land purchases, and tax deduction advice).

[131] Within a democratic representative polity, the equal status of persons as citizens implies at least two further tax-related moral determinations: "no taxation without representation" and also the converse "no representation with taxation" (no free-riders).

So if some other form of government permits a sovereign to take from its subjects, it might be important to a rule of law for the sovereign to understand there are circumstances in which it ought not to do so.

3. The Moral Basis of Human Rights Law

The subjects of a rule of law must be human beings ("persons"). Persons are those objects previously defined as having the capacity of conceptual thought, syntactical speech, and apparent freedom of choice (and those who are natural born descendents, or DNA matches, of those who have such capacities).[132] No other thing has any such claim to a law that is reasonable, directed to the good of the subject, and promulgated in advance by some person authorized to do so. Humankind, however, has a dignity which is distinctively different from other things that are ruled. It is not fitting to rule a person as a cow, dog, sheep, or wolf would be ruled. These things go together. If there are no human beings, there is no rule of law, or at least none that makes any sense. If there is no categorical human good and no human duty to make the choices leading to a good life, then there are no corresponding categorical human rights. To be sure, in the absence of personhood, categorical duties, and corresponding human rights, there may be hypothetical rights and there may be sovereigns who deign from time to time to extend privileges or concessionary prerogatives, but these are not offered on the basis that they are inherent rights, but on the basis that they are a revocable gift from the sovereign. From the perspective of the subject, if all law were merely the interest of the stronger, it is inexplicable why, exactly, any subject would reasonably consider himself obligated in conscience to obey an alien rule, absent force and absent the reasonable calculation that it would be inexpedient to challenge the ruling force. But if the subject ever had an opportunity to break the alien's law, it would seem hard to imagine why the subject would refrain from lawbreaking activity.

Just as the moral basis of contract law is the precept that it is good to keep deliberate promises in accordance with their terms, and as the moral basis of property law is the precept that people own their own bodies, the labor of their bodies, and the fruits of their labor, the moral basis of human rights is likewise specific.

- The moral basis of individual duties, rights, and liberties is the precept that a person has a duty to live and to make moral choices and therefore has a derived or correlative right, not only to life, but to liberty of conscience and a concomitant right to take actions in accordance with conscience that are consistent with just laws and which do no harm to any person.

[132] See discussion and definition of "human being," *supra* Part I.B.

- The moral basis of privacy extends liberty of conscience to matters that are, in fact, private (nonpublic).
- The moral basis of ordered liberty is the yet further extension of freedom of conscience to freedom of speech and action.

In each case, an actual and articulable moral basis is a necessary but not a sufficient cause for any particular morally based law. So contract law is not created simply by the moral principle of promise keeping, but by additional factors: there are some promises leading to the economic well being of the polity, there are members of the polity who demand legal enforcement of some promises, and efficient public rules allocating the costs of promise-keeping are a social good. So also with certain privacy rights, especially those relating to freedom of conscience—something that might be called "supernatural freedom"—the progression would be from the moral intuition more directly to implementation. There is, obviously, plenty of room to sort out what the rules might be, in particular.

A rule of law is necessarily dependent upon indemonstrable principles, as is most anything else of any particular worth. Perhaps the most important of these, at least for evaluating any particular supernatural law, is the human right to freedom of conscience. This leads to a discussion of the nonimposition principle, an aspect of the rule of law so important as to deserve its own separate heading.

II. The Nonimposition Principle and Freedom of Conscience

The argument asserted so far is that if a rule of law is desired, it is possible to specify conditions rather obviously contributing to it. In testing whether any system of supernatural law contributes to a rule of law, the first question is whether it is consistent with the rule of law. Part I has outlined a specified set of statements describing a rule of law. The second question is whether any given system of supernatural law is consistent with the nonimposition principle. This Part will map the contours of that principle.

The nonimposition principle, as a condition to any rule of law, follows from the definition of a supernatural law. If supernatural law is the law of an incorporeal sovereign received and accepted by believers and including at least one rule or precept not necessarily determinable by reason, it follows that it is neither received by, nor accepted by nonbelievers. The nonimposition principle asserts the freedom of the conscience, and supports a "supernatural freedom" relative to matters of pure supernatural law, for believers and nonbelievers alike. Those components of a system of supernatural law that are consistent with already known common moral principles do not constitute "pure" supernatural law principles. As moral principles they may be

independently based, as are all other moral or epistemological statements, on certain indemonstrable principles. But the acknowledgement of those moral intuitions does not necessarily depend upon any acknowledgement of any particular incorporeal being or sovereign.[133] Such common or shared portions of supernatural law (which may be shared in common by a system of supernatural law and by a system of moral law) comport with moral principles already and independently known within the polity and, hence, do not constitute any imposition of pure supernatural law upon nonbelievers within the polity.

The issue arises over what must be called precepts of "pure" supernatural law. So, if some version of supernatural law teaches that good is better than evil, life is better than death, and something better than nothing, or if any version of supernatural law teaches that promises ought to be kept, property ought not to be stolen, fraud ought not to be committed, and affirms, confirms, and supports similar moral principles already known to all persons within the polity, it is no objection to supernatural law that such categorical moral truths are already part of the "law and morality" analysis of the law.

This is to say the basic moral principles are not the exclusive province of any supernatural law, are not sectarian, and are nonproprietary. If some form of supernatural law embraces and confirms them, this is no more startling than if supernatural law were to embrace the law against contradiction (one might hope, and rather expect it does). If the law against contradiction is affirmed—not only by its obvious presence in human understanding, but also by its presence in some supernatural affirmation—this should be a basis for confidence in the supernatural law, not a ground for suspicion of it.[134] What is true of

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[133] The relationship is of complements, with (ideally) consistent outcomes. Those who focus on the indemonstrable principles of morality, who admit them to be unprovable while still advancing a truth claim, who decline to accept the burden of proof as to the indemonstrable truths of common sense, and shift the epistemological burden of proof to those who deny common sense, may refer to themselves as neorealists, modern moral realists, or practitioners of normative jurisprudence. Those who focus upon the commands of an incorporeal sovereign, whether by a direct study of God-Revealed supernatural law or by indirect study of the historical effects and traces of such a law upon particular cultures and nations might refer to themselves as theistic moral realists. The thesis advanced herein is that the two approaches (which might be paired somewhat clumsily as complementary faith and reason, or as evidence cooperatively discerned from the congruence, or noncongruence, of "nature's God" as seen in any given God-Revealed supernatural law and "nature" itself as seen by looking at the common moral law) can be tested to determine whether and to what extent they are supportive, counter to, or indifferent to each other.

[134] So if Theresa aids the poor and encourages others to do likewise because it is good to do so, how can it be an objection if she also does so because she acknowledges that God desires or commands that she do so? Likewise, in respect of errors doubly attributed, it would seem the supernatural provenance of the error is not the most relevant

speculative reason is also true of practical reason. The fact that supernatural law might confirm a common moral truth is a basis for confidence in the supernatural law, as when an incorporeal sovereign concurs with the moral truths that a person ought not to murder, to lie, or to steal.[135]

But when the supernatural law posits a purely supernatural rule or precept, a potential conflict arises. By definition, such a purely supernatural rule or precept cannot be sensible to a nonbeliever. Accordingly, it would seem to them as nonsense, and it is likely they would not want it, and would not obey it except by force. Pure supernatural law must not be imposed upon any nonbeliever if there is to be a rule of law. The term "nonimposition principle" is used herein to convey that requirement. It should be noted that the rule of law rubric proposed herein can also test, and the nonimposition principle can also very well apply to, systems of moral law as well as to systems of supernatural law. As such, the methodology proposed herein can perform a double test of the practical syllogism. It can test the syllogism in the case of any set of moral laws, as well as in the case of any set of supernatural laws, in which either is asserted to be good for any polity. This Article is directed at the place of supernatural law within a polity, but later applications might extend the analysis more explicitly to address the place of moral law within a polity that is committed to a rule of law.

The nonimposition principle might be expressed in various ways:

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distinguishing factor, at least where there is a dual source claimed by the proponent, or manifest in the circumstances. If Karl were a Marxist, say, by virtue of some indemonstrable moral claim (perhaps false) that private property is theft, or by some supernatural command of an incorporeal sovereign such as "history" or the "proletariat," and Karla were a Marxist, say, by virtue of some indemonstrable moral claim combined with a supernatural law that she ought to love her neighbor, or by a reading (or misreading) of *Acts* 2 or 4 of the Bible, how can Karl's version of an indemonstrable truth or supernatural law be presumed more eligible for implementation within the polity than Karla's? *Compare* KARL MARX, CRITIQUE OF THE GOTHA PROGRAMME 20 (Electronic Book Co. 2001) (1875), *available at* http://www.elecbook.com ("From each according to his ability, to each according to his needs!"), *with Acts* 2:42–47 (NIV) ("Selling their possessions and goods, they gave to anyone as he had need."), *and Acts* 4:32–35 ("[T]hey shared everything they had."). *But cf. id.* at 5:4 ("Didn't [your property] belong to you before it was sold? And after it was sold, wasn't the money at your disposal?") (reminding that the giving and sharing, though encouraged, was voluntary and not coerced).

[135] *See* ST. THOMAS AQUINAS, ON THE TRUTH OF THE CATHOLIC FAITH: SUMMA CONTRA GENTILES bk. 1, at 66–68 (Anton C. Pegis trans., 1955) (circa 1260). Aquinas asserted the proposition that one of the reasons for the existence of a supernatural law is precisely to confirm the congruence of nature with nature's God. *Id.* Supernatural law may also have been given as an aid to choose among plausible moral alternatives. *See id.* at 68; AQUINAS, *supra* note 68, Ia IIae, Q. 109, at 338–39 (observing that much if not all knowledge depends on something indemonstrable).

1. Separation. If what is separated from the law of the polity is pure supernatural law, then "separation" might be a fair way to express the concept. But the thing separated ought to be only pure supernatural law; there is no basis in reason also to separate moral law, and it would obviously be wrong to do so. The reason it would be obviously wrong to separate moral law is that a common moral law foundation is essential to a rule of law in a way that pure supernatural law is not. Though common morality depends upon an indemonstrable principle, it is still something knowable to all members of the polity in a way that pure supernatural law might not be.[136] If the statements of the United States Supreme Court in respect of its First Amendment constitutional jurisprudence were understood to signify nothing more than a separation of pure supernatural law within a moral polity, they might be largely unobjectionable. In this regard, it should be understood the target audience of this Article is not limited to Americans. It might well be that American law has drifted off course, but that makes no difference to a global audience, which might actually profit by seeing there is no necessary requirement that any axiom separating pure supernatural law from the (human) laws of the polity must also exclude common morality from the law. The rest of the world might learn from an American mistake, even if America does not.

2. A Disestablished Supernatural Law within a Moral Polity. If what is to be disestablished is pure supernatural law, without excluding moral law, then the "wall" formulation might not be the best way to articulate the principle. It seems the disestablishment formula has been captured, more than once.

One formula is that which was well known at the American founding. Article 23.3 of the Westminster Confession of Faith reads:

> Civil authorities may not take on themselves the ministering of God's word and the sacraments, the administration of spiritual power, or any interference with matters of faith. . . . [N]o law of any civil government should interfere with, abridge, or hinder the proper exercise of church government among the voluntary members of Christian denominations, acting in accordance with their own professed beliefs. It is the duty of civil authorities to protect the person and good name of all people so that no one is abused, injured, or insulted on account of their religious faith or lack of it.[137]

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[136] Morality (and thinking itself) depends upon indemonstrable principles. Supernatural law depends upon an incorporeal sovereign. They differ in their sources.

[137] THE WESTMINSTER CONFESSION OF FAITH 38, app. 1 (Douglas Kelly et al. eds., 2d ed. 1981) (1647) (including historical collation of changes made to the original 1647 document in the United States). The quoted language is a "modern [language] version" of Article 23.3, *id.* app. 1, at 57. The original 1647 Article 23 clearly privileged the Christian version of supernatural law. If it seems that the newer language is not entirely clear on disestablishment of supernatural law coupled with encouragement of moral law, the

But none of this was thought to exclude common morality (nor even so much of supernatural law as confirms it) from the polity. Article 23.1 declared that God had ordained civil authorities to "encourage those who are good and to punish wrongdoers."[138] This "supportive" disestablishment certainly seems as promising a formula as the "wall of separation" language as construed by the United States Supreme Court to express the historical and cultural norms of the founding generation.

3. Supernatural Law, Evaluated for Compatibility with Fundamental Principles. If what is to be measured is "compatibility," then the formula of the European Court of Human Rights is a starting point. In defense of the formula, the court had the opportunity to consider the fundamental laws of Turkey, which included a significant, explicit preference for "secular" law as opposed to some version of supernatural law.[139] It was, in fact, an aversion to a Muslim style of supernatural law which animated the Turkish constitution and, hence, some other, better, and more useful term might be substituted for "democracy" (such as "rule of law" and "nonimposition" coupled with "adequate assurances") having to do, *mutatis mutandi*, with the fundamental fiat law, reasonable law, and historical legal regime of Turkey or whatever other polity is affected.

4. Supernatural Freedom. Speaking specifically of one form of supernatural law, Professor George Weigel asserts there is "no Christian agenda for the politics of the world," although there are "a number of causes for which Christians are bound to contend."[140] He says further:

> The most important of these [causes] is religious freedom.
>
> . . . Coerced faith is no faith. As the *Letter to Diognetus* puts it, the God of Christians "saves by persuasion, not compulsion, for

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amended Article 23.3 might be compared against the original version of 1647. The original version included language affirming that the civil magistrate, although without power to administer the Word or the Sacraments, "yet . . . hath authority, and it is his duty to take order . . . that all blasphemies and heresies be suppressed, all corruptions and abuses in worship and discipline prevented or reformed, and all the ordinances of God duly settled, administered, and observed." *Id.* app. 1, at 60–61. The deletion of the quoted language, with the retention of language in Article 23.1 recognizing the power of the civil magistrate "to defend and encourage those who are good and to punish wrongdoers," supports the conclusion that the result is a disestablished supernatural law within a supportive moral polity. *Id.* at 38. Portions of Article 23 as originally written in 1647 were rejected ("not received") in the United States by the 1729 "Adopting Act" of the first Presbyterian Synod of Philadelphia in North America; Article 23.3 was amended, substantially as quoted here, in 1787 in preparation for the organization of the General Assembly of the Presbyterian Church, U.S.A., and were adopted as the doctrinal part of the constitution of that church. *See* THE CONFESSION OF FAITH OF THE PRESBYTERIAN CHURCH IN AMERICA xvii (2d ed. 1986).

[138] *Id.*

[139] *See supra* notes 21–24 and accompanying text.

[140] GEORGE WEIGEL, AGAINST THE GRAIN: CHRISTIANITY AND DEMOCRACY, WAR AND PEACE 80 (2008). I owe this source, and the selected quotations, to Professor Hewitt.

> compulsion is no attribute of God." The Church's defense of religious freedom is thus not a matter of institutional self-interest. Religious freedom is an acknowledgment, in the juridical order of society, of a basic truth about the human person that is essential for the right ordering of society: a state that claims competence in that interior sanctuary of personhood and conscience where the human person meets God is a state that has refused to adopt the self-limiting ordinance essential to right governance (not to mention democracy). *Religious freedom is the first of human rights* because it is the juridical acknowledgment (in constitutional and/or statutory law) that within every human person is an inviolable haven, a free space, where state power may not tread—and that acknowledgment is the beginning of limited government. In defending religious freedom, therefore, the Church defends both the truth about the human person and the conditions for the possibility of civil society.[141]

Perhaps this idea is what the United States Supreme Court so awkwardly attempted to convey when it suggested there is a "right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[142] If this is all the Court was trying to say, then its statement is not only not insane, but also actually makes sense. Indeed, converting the terms to those used in this Article, we may agree that the right to supernatural freedom is the first of human rights. Converting "religious freedom" (as used in the quoted passage) to "supernatural freedom" more clearly signifies that the meaningful right is not to define "reality" but is the right to accept (or to decline to accept) the commands of a supernatural, incorporeal sovereign.

5. Apostasy and Peaceful Persuasion Without Penalty. Crucial to the concept of dual sovereignty, in which believers coexist with nonbelievers is an exit strategy for disaffected believers. The premise of the polity is that its law equally commands all subjects. The premise of the supernatural law is that its law is received as binding only by those believers who have voluntarily submitted to it. Essential to the premise of supernatural law, if it is to coexist within a non-supernatural polity which respects freedom of conscience, is the ability of the believer to disassociate from supernatural law coupled with the freedom of believers peacefully to persuade others within the polity.

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[141] *Id.* at 80–81 (emphasis added) (quoting *The Epistle to Diognetus*, *in* THE APOSTOLIC FATHERS: GREEK TEXTS AND ENGLISH TRANSLATIONS OF THEIR WRITINGS 545 (J.B. Lightfoot et al. eds. & trans., 2d ed. Baker Book House Co. 1992) (1891)). Perhaps the nonimposition principle is itself a supernatural rule, but it is one so commonly held by so many cultures influenced by a common supernatural law that it seems obvious to them. It is beyond the scope of this Article to go further.

[142] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

III. REASONABLE ASSURANCES OF COMPLIANCE

Any system of supernatural law might be measured against a specified standard in respect of two questions: does it support a rule of law? Does it embrace the nonimposition principle? A third standard poses a third question: what assurances can the believers in supernatural law possibly give to their nonbelieving fellow members of the polity that, once the supernatural party gains the upper hand and is able to make law, it will abide by its professed allegiance to rule of law and to nonimposition? A merely verbal commitment to "democracy" cannot be sufficient to remove the risk of "one man, one vote, one time."

Some of the measures of assurance would be these:

1. Intrinsic Hermeneutics. Evaluation of the claims of any given system of supernatural law, especially that which is claimed to be God-Revealed supernatural law embodied in a written document is not itself a supernatural undertaking.[143] If a given supernatural law also has a long-standing, trustworthy, and reasonable history of interpreting itself according to the thinking and writing of its own believers in a way consistent with the rule of law and with the nonimposition principle, these would comprise one sort of assurance. If a given supernatural law has, historically, been inconsistent with the rule of law or the nonimposition principle, but there is some intrinsic basis to propose a change to previously held interpretations by way of something approaching a renaissance or reformation to long-held interpretations, and if the change permits an inference that it is both reasonable in itself and consistent with the God-Revealed text, and also moves the supernatural law system towards the rule of law and the nonimposition principle this, too, would count for something.

2. Toleration Versus Religious Liberty. A supernatural law merely tolerating other religions, other moral bases, and different supernatural law systems is less trustworthy than one which embraces religious liberty as a human right. The difference is between a concession which might be withdrawn and which is seen as a privilege, and a right which is God-given and irrevocable by God or by any other sovereign precisely because it owes its origin to an unchangeable God.

3. Voluntary Renunciation. A supernatural law whose adherents once had political power and who either refrained from violating the rule

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[143] Although I am a believer in a supernatural law, this Article is written from the perspective of an "outsider" (an unbeliever) relative to any claimed supernatural law system. It would seem the outsider's evaluation of any believer's interpretation would have to be nonsupernatural (or else we'd be talking about another believer, who wouldn't be an outsider at all). It would seem not unreasonable for the outsider to evaluate the interpretive claims made by the believers, and to do so as an undertaking that is not itself supernatural.

of law and the nonimposition principle, or who learned to respect both (and perhaps even contributed to the creation and articulation of those principles), or who voluntarily renounced their power might thereby afford a trustworthy reason to believe their present profession. The difference is between a voluntary renunciation (coupled with present professions of renunciation) and an involuntary disestablishment (perhaps coupled with vocal nostalgia for the ancient regime). The one would seem, obviously, more trustworthy than the other.

4. An Answer to the Continuity Problem. A continuity problem is that any claimed God-Revealed law comes at a fixed point in time, and times change; what to do about drawing normative conclusions or systems of casuistry from any narrative, possibly colored by some nonnormative accidental historical circumstances? An answer many Christians agree upon is the division of supernatural law into moral, juridical, and ceremonial parts.[144] They agree that the juridical and ceremonial are terminated, expired, abrogated, and of no effect (except insofar as their inherent equity may suggest).[145] They also agree that the moral law is perennial and still in effect.[146] To the extent any of the juridical or ceremonial ordinances conflict with any rule of law, the problem no longer exists. As an intrinsic answer to the concern over historic "theocracies" or peculiar dietary laws, criminal penalties, or historical warfare against nonbelieving nations, this counts for something because it relegates these to the past, abrogating any current effect. It certainly counts for more than an alternate answer from an adherent of a supernatural law system that refuses to address the issue or that seems manifestly disingenuous in light of the entirety of the God-Revealed text claimed by the adherent.

5. Positive Affirmations of Human Dignity Confirmed by Conspicuous Actions. A supernatural law whose adherents have given evidence of a commitment to human rights (not to "Christian" rights, or "Muslim" rights, but to human rights) by conspicuous and costly actions is one that implicitly gives some measure of assurance. If a supernatural law system acted against its own economic or power interests within its polity by, for example, dedication to freeing slaves at economic cost to the

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[144] AQUINAS, *supra* note 68, Ia IIae, Q. 99, arts. 2–4 (discussing moral, ceremonial, and judicial precepts, respectively), at 246–48; The Westminster Confession of Faith, ch. XIX, paras. II–IV (1647), *available at* http://www.presbyterian.ca/webfm_send/1307.

[145] AQUINAS, *supra* note 68, Ia II ae, Q. 103, art. 3, at 300–01 (ceremonial law has ceased); *id.* Q. 104, art. 3, at 305–06 (judicial law is annulled); The Westminster Confession of Faith, *supra* note 144, at ch. XIX, para. III (ceremonial laws are abrograted); *id.* at para. IV (judicial laws are expired and not obliging now except as "the general equity thereof may require").

[146] AQUINAS, *supra* note 68, Q. 100, art. 1, at 251–52 (the moral law lasts forever because it depends upon natural knowledge of first principles); The Westminster Confession of Faith, *supra* note 144, at ch. XIX, para. V (the moral law binds forever).

polity and even so far as sacrificing in war to end slavery, this is an implicit assurance it supports a rule of law. If it extends the franchise, or insists on freedom of thought and expression even when such extensions welcome new voters, and when such freedoms produce changed political alignment and speech that seems toxic to the polity and to the supernatural law's adherents, these provide assurances of a genuine commitment to the rule of law rather than mere instrumental posing or pretensions. If it protects innocent human life consistently with common morality and because it is the correct thing to do in support of human rights, even though wildly criticized for doing so, or if it engages in other costly undertakings in support of clear and clearly important principles of common morality contrary to its own immediate interests, but for the good of the polity and for the integrity of the supernatural law itself, and if it consistently renounces opportunities to intervene on behalf of unclear, remote or inconsequential issues, the supernatural system should be credited as trustworthy on the question of rule of law and nonimposition. It is the difference between words, which might be feigned, and actions which tend to be somewhat more confidence-inspiring to those who are trying to test the sincerity of the speaker or actor.

IV. EVALUATING SUPERNATURAL LAW

This Article has set forth a template for evaluating supernatural law. There are three steps: 1) does any supernatural law support the rule of law; 2) does it embrace the nonimposition principle; and 3) does it provide any reasonable assurance its adherents will keep their commitments when in a position of political power to do otherwise? A supernatural law that does so contributes to the health of a nation. It is also one that might be expected to add a truth component to the practical syllogism connecting supernatural law to a form of "national morality" and to the well-being of the polity.

Proposition 3—qualified supernatural law.[147] Let it be said that any supernatural law is "qualified" if it supports the rule of law, embraces the nonimposition principle, and provides credible assurances of performance in accordance with those professions.

Parts I, II, and III specified a set of standards for rational discussion of supernatural law to the end of determining whether any one or more such systems might be "qualified," and now we briefly propose a process for doing so. The process defers, in the first instance, to experts within each supernatural law system to interpret the system,

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[147] This Article includes three propositions. This is the third. The first is at *supra* note 7 and accompanying text, and the second is at *supra* note 29 and accompanying text.

and to outside experts to evaluate the interpretations. It leaves it to them to advance the claim that any given system is qualified or not. This Article proposes that interpretations should come from those who know what their own tradition teaches and what their tradition is, and that evaluations of those interpretations may come from those competent to judge. To be credible, the claims of any supernatural jurisprudence should be checked against the list summarized in Appendix A, which contains in brief compass the criteria discussed herein.

The second step, after proponents or evaluators of a supernatural legal system have made their claim, is that replies, critiques, or further questions may then subsequently be made by anyone. It would be expected that from such discourse according to specified criteria leading to falsifiable or verifiable propositions any given polity could finally make an assessment as to the claims of any given supernatural law, and transnational organizations may do the same.

The third step is the assessment, as made by the polities or transnational organizations affected. It is not the aim of this Article to go so far as to make the assessments, but only to set forth the template by which initial claims of compliance can be made, critiqued, and assessed. It proposes a process by which proponents of any system of supernatural law might carry something like an initial burden of producing credible evidence tending to persuade unbelievers why an unbeliever might rationally submit to political governance by persons professing their adherence to supernatural law. Next, unbelievers may test that evidence. And, finally, any polity might make assessments on the evidence. Each of these steps may be the subject of rational argument, discussion, and determination based on the specified rule of law, nonimposition, and assurance of performance principles set forth herein.

What, it might be asked, are the practical consequences of qualifying any one or more supernatural legal systems within any given polity (or determining any one or more is not qualified)? There might be a range of possibilities:

1. No Consequences. There might be no consequences whatsoever. Some polities may be so committed to free exercise and free association that even if there were a nonqualified supernatural law system and if it were taking steps to gain political power, the polity might do nothing at all about it.[148]

2. Interpreting or Enforcing a "Wall" of Separation. There might be a polity which has some history of concern about "church/state" "entanglement" or "establishment" and about the presence or absence of

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[148] Some might suppose this to be a bad idea, at least in a generally healthy and well-balanced polity that encourages and supports qualified supernatural law. It would seem to ignore a fundamental threat to the well being or continued existence of the polity.

"walls" of separation. A polity such as this might determine there is nothing to fear, and no need to erect any "wall" between the "state" and any "church" whose adherents are part of a qualified supernatural legal system.[149] It might choose to maintain its wall to separate only unqualified supernatural legal systems.[150] It might determine to put a door or gate in the wall, opening it for qualified supernatural law and closing it for unqualified supernatural law. Or it may continue to treat all supernatural systems the same and to wall off all of them simply because they are supernatural and regardless of whether they might help or hurt the polity.[151]

3. Excluding Inconsistent Political Parties. There might be a polity which fears all supernatural law, or which is prepared to ban or to forbid certain political parties if certain "religious" or "nonreligious" supernatural tenets are attributed to such parties and if those are "inconsistent" with some fundamental rule. This is exactly what has happened in Turkey, as affirmed by the European Court of Human Rights. One might reasonably wonder where such a practice might lead. A polity such as this might determine to channel its practice by distinguishing between those political parties to whom might be attributed the policies of a qualified supernatural law, and those of an unqualified supernatural law. A polity that has determined to ban some religious parties might be much better off were it to measure any religious party against a specified standard rather than some potentially shifting and perhaps subjective view. The same could be applied to supernatural law proposed by nonreligious or antireligious parties. This Article proposes a specified standard suitable for forensic use, if a polity determines to pursue this course.

EPILOGUE

This Article began with a prologue addressing issues in the United States, Turkey, and the International Court of Human Rights. It is a legitimate question whether the world might look to the United States of America as a model, or to Turkey, or to Europe, or elsewhere for a generalizable method of dealing with the claims of supernatural law

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[149] Some might suppose this to be a good idea. It would encourage a moral or God-fearing disposition in a disestablished polity. It has been claimed this was the genius of the original experience in the United States. Perhaps instead of a "wall" that is high and impenetrable it might have been better to propose a semi-permeable membrane. It should be recalled that what would be encouraged would be common morality, and not pure supernatural law. Moreover, the encouragement might amount to nothing more than "influencing the influencers" in support of common morality.

[150] This might make sense. Of course, all that is being proposed is the erection of a wall of separation against unqualified supernatural law.

[151] Some might suppose this to be a directionless course, or to constitute a decision not to decide a question that perhaps ought not to be abdicated.

within a constitutional order dedicated to the rule of law. Likewise there is a question whether controversies involving Christian or Muslim supernatural law exhaust the domain. There is not sufficient space in this Article to do more than raise the perplexities created by current approaches, and to propose a specified set of criteria for better understanding the issue in the future.

The model of Turkey is not entirely clear. It would seem that if the Refah Partisi case were rightly decided,[152] its aftermath cannot be easily reconciled. It is reported that the Welfare Party reconstituted itself in Turkey as the "Justice and Development Party" (or "AKP").[153] When, as governing party, the Islamic-rooted AKP and seventy-one of its members, including the prime minister and the president, were brought before the Turkish Constitutional Court in the summer of 2008 (as the Welfare Party had been some years earlier), only six of the eleven judges favored banning the party and its members.[154] It was contended that the AKP had a secret agenda slowly to bring religion into politics, which allegations were denied by the AKP.[155] As Prime Minister Recep Tayyip Erdogan (a member of the AKP who had previously been a member of Refah Partisi or other banned parties) put it, the AKP was "never the focal point of antisecular activity" and "will continue from now on to defend the republic's basic values."[156] That may be true, and a wonderful thing if so, but it is a rather thin reed upon which to lean. The AKP aftermath to Refah Partisi suggests that all a previously banned party in a relatively recently dismantled "Islamic theocratic regime under Ottoman law" need do is change its name, revise its platform, and get "lawyered up" to provide the right formulaic answers in support of "basic values." If the Refah Partisi case is not just an aberration or a fluke, and if its concerns are serious and are to be resolved under a rule of law, it would be better to articulate some specific criteria—a rule of law and a nonimposition principle—against which to evaluate the claims of any supernatural party, and then to seek some reasonable assurances of performance.

The model of the United States is itself not entirely clear.[157] It would seem that if George Washington were correct in asserting (as translated

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[152] See *supra* notes 14–24 and accompanying text.

[153] Farnaz Fassihi & Andrew Higgins, *Turkey Averts Crisis as Court Rejects Attack on Ruling Party*, WALL ST. J., July 31, 2008, at A1.

[154] *Id.* (noting it would have taken the vote of seven of the eleven judges to ban the AKP).

[155] *Id.* at A12.

[156] *Id.*

[157] The United States is a model of a nation that has dramatically changed its principles of accommodation with supernatural law over time. It appears, prior to its operation in March 1789 under the Constitution, to have contemplated establishment of

into the terminology of this Article) that morality is good for the polity and supernatural law is good for morality,[158] and if the Westminster Confession were correct in advancing the foundational concept of a disestablished supernatural law within a moral nation,[159] then the American aftermath cannot be easily reconciled. In the American context, a "wall" that is high and impregnable or impenetrable would seem to require a more sensible explanation than doctrinaire antiestablishmentarianism has thus far provided. It might have been sensible to erect a wall to exclude "pure" supernatural law, while admitting common moral law. It might have been sensible to erect a wall with a doorway through which "qualified" supernatural laws, both "religious" and "nonreligious" might pass. But it would seem perplexing to assert that the American model somehow recommends that modern democracies should be free of any support to common principles of morality that are shared with any given supernatural law, rather than simply requiring a nonimposition principle in support of a rule of law.

The models of Christianity in Europe and Mormonism in the state of Utah within the United States are equally perplexing. The nations of Europe present a multi-variable model of a series of interactions among supernatural law, morality, and various polities. It is a model of many things, one of which is a kind of radical antiestablishmentarianism.[160] It

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supernatural law at the level of the several states. Then, from shortly after the adoption of the Constitution and for about 150 years thereafter, it seems to have contemplated a disestablished but favored supernatural law—the view of disestablishment referred to as "supportive" herein. Then, as a third shift, from about 1947 through the present, it has flipped to a disestablished and at least nominally disfavored or unprivileged supernatural law. *See supra* note 13. This creates, not an easy "America-the-model" vantage point, but instead an opportunity to understand that America yields three choices. This is especially valuable when considering whether to "export" an American model. Because there is one pre-constitutional model and two post-constitutional models, it might actually be refreshing for the world outside the United States to reflect there is, or at least ought to be, no casual certainty that the American constitutional model "is" the antiestablishment model of the last sixty years. America might be stuck with it, but there is no need to insist to any part of the rest of world that either "modernity" or "democracy" necessarily requires an antisupernatural bias selectively employed against the religiously based supernatural law accepted by the majority. Instead, it might be quite possible and highly desirable to embrace a disestablished but favored supernatural law order—at least it seems the United States did so, and with pretty good results for a considerable period of its history.

[158] *See supra* note 6 and accompanying text.

[159] *See supra* note 137 and accompanying text.

[160] Having had experience on both the giving and receiving sides of imperialism and colonialism, religious (and nonreligious and antireligious) wars of offense and defense, clericalism and anticlericalism, missionary zeal and anti-missionary reaction, religious and antireligious fundamentalism and violence, perhaps some of the European nations have a special sensitivity to, or suspicion of, the claims of supernatural law that make the aggregate European experience more a special case than a bellweather example. In some historical experiences, as perhaps in some of the nations of Europe, a radical

may or may not be a model for anywhere else in the world, and it may or may not have been an altogether satisfactory response even in Europe.[161] It would, however, be interesting to see further work clustered around the criteria suggested herein. Utah is an interesting model of a kind of supernatural law within a federal nation. In the nineteenth century, Mormon Utah was widely understood to have been a theocratic territory within the United States,[162] having strongly held views of family law (polygamy) diverging from the common moral rules of the national federation. As a condition to entering the United States as a new state, Utah renounced its incompatible rules, and the Mormon strain of supernatural law may well have provided some assurances of performance, by way of an intrinsic interpretation, reinterpretation, or fresh revelation which satisfied its fellow citizens. It may or may not be a model for anywhere else in the world, but it is an interesting example of a voluntary renunciation that seems to have been effective despite somewhat skeptical, if not hostile, historical circumstances.

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antiestablishmentarianism might seem routine, but in other contexts it might seem extreme, peculiarly bigoted, and self-defeating.

[161] The European Court of Human Rights was keen to notice that political movements "based on religious fundamentalism" have from time to time, presumably in Europe, been able to seize power and to "set up the model society which they had in mind." *Supra* note 21 and accompanying text. If the court had been more focused on supernatural law as including nonreligious and antireligious versions, it might profitably have noted that many other political movements based upon supernatural fundamentalism, such as the several varieties of National socialism and various strains of Marxist-Leninist socialism, have also been able to seize power and set up their own model societies. If a supernatural law is given by an incorporeal sovereign (such as "the people" or the "general will" or the "movement of history" or like source) and is accepted by those who believe in its fundamental principles, rules, and commands, then the nations of Europe continue to have much to say about the experience of trying to discern "good" from "bad" supernatural law, perhaps succeeding by their misadventures in providing a lesson to others (none of whom are immune from similar disasters). The criteria proposed herein are intended to provide a better method for evaluating the claims of any supernatural law.

[162] See generally ARTHUR CONAN DOYLE, STUDY IN SCARLET, *reprinted in* 1 THE COMPLETE SHERLOCK HOLMES 3, 77 (Doubleday, Doran & Co. 1930) (1892), for an expression of some not entirely pleasant views of Utah: "[i]n the central portion of the great North American Continent there lies an arid and repulsive desert.... [having] the common characteristics of barrenness, inhospitality, and misery" and for a generally unflattering, if not prejudiced, view of Utah's Mormon settlers. *See also* ZANE GREY, RIDERS OF THE PURPLE SAGE (1912), *reprinted in* ZANE GREY: FIVE COMPLETE NOVELS 1, 79, 149 (1980) (evidencing unflattering, if not prejudiced, views of the Mormon settlers, but rather admiring the landscape). Crediting the foregoing works of fiction as perhaps capturing some of the sentiments of the times, despite mutual hard feelings and suspicions between themselves and those with whom they shared a nation, Mormons have prospered in the United States and might have something to teach about the adaptability of supernatural law and its contributions to a polity founded on a rule of law. A Mormon jurisprudence further developed against the criteria proposed herein could be very fruitful, and the work of Professor Welch should be a welcome beginning. *See supra* note 38.

This Article seeks to generalize a conflict involving supernatural law and to reframe the issues away from "church/state" and other localized formulations. The problem addressed by this Article is not the conflict between or among different versions of supernatural law, but is instead the problematic relationship between *all* versions of supernatural law on the one side and all who either welcome or forbid the robust participation of supernatural law's adherents in the polity on the other side. It is for this reason I have proposed to come to terms with the issue by translating "church," "religion," "religious principles," and "sharia law" on the one hand, and the "state" on the other hand into common terminology. In the reframed problem, it is "supernatural law" itself that is at the center of the issue, and it is at issue precisely in its relation to any polity. The modest goal was to identify a problem and propose a method of evaluating it in a manner open to nonspecialists. This method is what I and others have called the restatement of the obvious. There are many reasons for this terminology, but let it suffice for now to say that some have made of philosophy a sort of closed system in which only specialists work, but that is a bad idea when it comes to governing human beings under a rule of law.

There is much remaining to be done. A more exhaustive treatment of the rule of law principles outlined in this Article and summarized in the Appendices might be undertaken as an effort more fully to state the principles of a "*Normative Jurisprudence and the Restatement of the Obvious.*" One or more comparisons could be made, in the nature of "*Normative Jurisprudence and a Qualifying Interpretation of [Jewish] / [Christian] / [Muslim] / [Mormon] / [Marxist] / [nonreligiously or antireligiously based supernatural] Jurisprudence.*" Finally, a set of proposed laws, asserted to be consistent with the "law and morality" principles summarized in this Article might be promulgated.

Just as there is an American Law Institute engaged in promulgating "restatements" of the law, so there might be created a National Law Institute to promulgate "rediscoveries" or "reformations" of the law by drawing out the underlying common moral bases omitted from the existing restatements. And, as there is within the United States a National Conference of Commissioners on Uniform State Laws (NCCUSL) which drafts proposed uniform laws, so also there might be organized a Joint Associated Council of Commissioners on Uniform State Enactments (JACCUSE) to draft proposed uniform laws to include common moral components recognizable to those who are supposed to be subject to the law.

Finally, it is no accident this Article eschews some conventional terms that have become overused and carry inordinate baggage. While perhaps instinct with what has been called "natural law," I have avoided the term because it is the opposite of helpful. There is nothing more

"natural" about natural law than any other law except the claim that it is naturally knowable; in fact natural law is all about denying certain natural impulses and desires in favor of other and better goods that natural reason can discern, but the very label "natural law" obscures what is natural about it.[163] So also, others may later add many other fine formulations. The current problem, in short, is not any "lack of problem" (and will not be resolved by adding yet further technical complications) but rather a lack of clarity and lack of any rational method to address conflicts among moral and supernatural systems of law within any polity that desires a rule of law. It is past time for a nontechnical solution of the sort proposed herein.[164]

CONCLUSION

Lack of problems is not the problem.[165] As used herein, supernatural law describes any rule or command given to subjects ("believers") of an

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[163] This Article is not an exposition of the "classic" natural law theory, but a full or even partial explanation of how and why it diverges would require another article and would be contrary to the purpose of this one. One consequence of avoiding the classic natural law theory is that it avoids the unhelpful search (in this context) for prior authorities who have advanced the same, similar, or opposite positions on "natural" goods as those advanced here. As a commentator on Pope Benedict's Regensburg Lecture has written, "Philosophy was the search for truth, not for who said it." SCHALL, *supra* note 1, at 77; *The Restatement of the Obvious*, *supra* note 25, at pt. IV (noting the dilemma of sourcing things claimed to be obvious). The selective sources cited herein have deliberately included many drawn from a Hellenistic philosophic tradition (numbering Plato, Aristotle, Augustine, and Aquinas among them). This is because of the nonproprietary claim they make to the universal application of rational principles to all persons, everywhere, regardless of the accidents of culture and nationality, and without presupposing there are any "second class" persons anywhere. This Article invites a response, not limited by cultural conditioning.

[164] The approach has been to argue both directly for a restatement of the obvious, and also transcendentally for a set of conditions by which a rule of law might be obtained. It is nontechnical because it does not rely upon mastery of the literature or the technical terms of art of professional, academic philosophy (or of "legal" philosophy). It is addressed to all persons throught the world who are bound by law, in language and forms of discussion that should be understandable to anyone interested in living under a rule of law, in preference to living under a rule of brute force. It is couched in language sufficient to explain the situation. One might hope that professionally trained persons who are so inclined would advance the argument by rephrasing it in the language of the academy.

[165] Ludwig Wittgenstein's "last word" on his teacher, Bertrand Russell was: "[s]ome philosophers (or whatever you like to call them) suffer from what may be called 'loss of problems.' Then everything seems quite simple to them, no deep problems seem to exist anymore, the world becomes broad and flat and loses all depth, and what they write becomes immeasurably shallow and trivial. Russell . . . suffer[s] from this." *See* Posting of John Podhoretz to The Corner, http://corner.nationalreview.com/post/?q=NDM1OGRiND c4YmRjZDY4M2U3YzZjMGQ5MzczM2JkYzg= (July 13, 2006, 17:27). Given the immeasurably "deep" (technically nuanced but solipsistic and futile) discourse on law and morality in the current era, it cannot be imagined that loss of problems is today's problem. The restatement of the obvious proposed herein is a nontechnical method of resolving legal

incorporeal sovereign which includes at least one precept, rule, or command not determinable by reason. Supernatural law is, has been, and probably will remain intertwined with conventional legal systems not only in the United States but globally and transnationally. Among many other things, supernatural law underpinnings frequently support a "higher law" perspective which animates any living law and which generates meaning when it comes time to interpret any given law—it is certainly and evidently a large part of what creates "the spirit of the law" to aid in glossing the letter. In addition, its adherents sometimes forcefully advance supernatural law as a suitable rule for inclusion in the political life and law of human governments because they claim it enhances morality.

Supernatural law might be good or bad to the extent it either supports or opposes (1) the rule of law, and (2) the principle of nonimposition upon the freedom of conscience of unbelievers. Any given system of supernatural law might be qualified (or not) by responding to a series of testable questions. Does it acknowledge the equal human dignity of all persons? Does it appreciate that the only generative or interpretative sources of law must be fiat, reason and observation, or history? Does it affirm that any law might be better the more it is reasonable, good for something, authorized and clearly set forth, and to the extent it is also reasonably consistent, systematic, humane, and validated? Does it seek after justice as comprising the lawful, the fair, the right, and the good? Does it seriously work to understand the language in which its law is expressed? To the extent it does so, it supports a rule of law. In addition to supporting the rule of law, any given system of supernatural law may be tested against a second measure. Does it by its own terms embrace a nonimposition principle—whether by affirmation of freedom of conscience, by separation, by disestablishment in any of the senses of that term, or otherwise? To the extent it does, it further qualifies as an aid to the health of any polity.

Moreover, any particular brand or version of supernatural law might be greeted with a greater or lesser degree of proper suspicion on the part of unbelievers. This suspicion will exist to the extent that it does or does not provide reasonable assurances that its promises, if any, to support both the rule of law and the nonimposition principle will be honestly and faithfully performed if and when the supernaturalists become politically dominant and powerful enough to make rules for the

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conflict in an increasingly transnational world that is anything but simple, and yet without adding any artificially manufactured *faux* complexity. I believe the proposed approach outlined herein is neither simple nor likely to lead to simple solutions, but is simply nontechnical and therefore open to anyone for their consideration regardless of class, culture, bias, sect, or other nonessential divisions in a global community interested in a rule of law.

rest of the polity. Does any given system of supernatural law have a demonstrated internal heuristic of restraint? Does it have any historical experience, or any other basis for predicting how it (or its adherents) will likely behave in respect of the rule of law and nonimposition if and when entrusted with lawmaking and law enforcing power within a polity? To the extent any system of supernatural law provides reasonable assurances it yet further, and finally, qualifies itself as an aid to the good health of the polity.

This Article asserted three propositions, intermixed with the main thesis. First, it posited a practical syllogism (if morality is good for the polity, and if supernatural law is good for morality, then supernatural law is good for the polity). Second, it provided a standard for the health of a nation (a healthy polity is one with relatively good laws which its subjects, or many of them, choose to obey much or most of the time). Third, it identified a "qualified" supernatural law (any supernatural law is qualified if it supports the rule of law, embraces the nonimposition principle, and provides credible assurances of performance in accordance with those professions).

If in fact morality is important to the health of nations, and if supernatural law is important to morality, then the state of supernatural law is a leading indicator of the health of any nation. Surprisingly, little systematic thought has been given to the general question how to evaluate the claims of any given system of supernatural law (a "supernatural jurisprudence") against any completely specified criteria for rational judgment about those claims. This Article has proposed a specified method for such an evaluation.

If there is any one or more vibrant supernatural laws that supports the rule of law, embraces the nonimposition principle, and can be trusted not to violate the rights of unbelievers, such a thing would be a great good and would greatly contribute to the health of any nation. Conversely, the opposite system of supernatural law, if there be such a thing (and there may well be), would be a toxic threat and would undermine, weaken, or destroy the health of any nation.

APPENDIX A: LAW AND MORALITY BASED ON MODERN MORAL REALISM AND NORMATIVE JURISPRUDENCE*

This is a restatement concerning law

THE RESTATEMENT OF THE OBVIOUS

CHAPTER ONE: DEFINITIONS

Section 1. Law. Law is a rule or command imposed upon its subjects by a sovereign. Different subcategories of law depend upon the nature of the sovereign:

(1) Where the sovereign is claimed to be incorporeal or disembodied, and the rules or commands are accepted by a believer, the subcategory is "supernatural law;"
(2) Where the sovereign and the subject coincide within a self-binding person, and the rules or commands are claimed to be based upon practical reason, indemonstrable principle, or other moral authority, the subcategory is "moral law;" and
(3) Where the sovereign is a visible person, executive, or other agent of a state actually enforcing rules or commands upon its subjects the subcategory is "human law."

For ease of discussion, human law is frequently referred to as "law" but the context can govern when "law" is being used in a more specialized sense to refer to one of the other subcategories.

Section 2. Rule of Law. A rule of law is a set of laws its subjects can obey voluntarily and rationally, in conscience and in the absence of

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external force, because doing so is (or seems to be) good for the person affected (such action being referred to as "autonomy").

Section 3. Human Beings. A human being (or "person") is anyone who is either (1) capable of conceptual thought, syntactical speech, and apparent freedom of rational moral choice, or (2) biologically and naturally descended from persons having that capability, including by DNA signature, regardless whether those capabilities are being exercised or even exist in such a descendent.

Section 4. Rational Moral Choice. The reason any human being might voluntarily and rationally obey a rule of law in the absence of external force is that doing so seems rationally "good" to the person subject to law. A thing is rationally "good" for a person if it is an object of reasonable desire, including on the basis of indemonstrable principles. Such an object is one likely to make any person better off than its absence, and better off than the presence of its opposite. A reasonable desire is one subject to discussion governed by practical reason (or "right reason") and also subject to the dictates of conscience as well as to the conclusions of "pure" intellect.

Section 5. Goods. Among the things individual persons might desire because they are rationally good (or seem to be) are:

(1) Wealth, including material goods and an abundance of them;
(2) Pleasures, including leisure; activity; amusements; play; the enjoyment of things that feel good in the consumption or use of them, or afford disinterested pleasure in the contemplation of them; relaxation; good health; and the absence of pains or disappointments;
(3) Power or reputation, including fame, glory, celebrity, honor, and the absence of insult or discredit, unfair deprivations, and slights;
(4) Freedom from any restraint at all, including not only freedom of thought and freedom of the will, but freedom to think and to will anything at all and to act upon such impulses to the maximum extent possible;
(5) Various eclectic goods, including liberty or equality, knowledge and skill, sharing, caring, consensus building and all-around "niceness," efficiency, and the avoidance of waste;
(6) Relational goods, including friendship, love, family relations (husband and wife, parent and child, and extended family connections), social relations, and other associations;

(7) Virtue or character, including the virtues of courage, temperance, justice, wisdom and the absence of dangerous addictions, laziness, untrustworthiness, meanness, or cruelty; and
(8) Happiness, considered technically as a whole life well-lived in accordance with complete virtue and accompanied by at least a minimum sufficiency of external goods.

Section 6. Common Goods and Political Goods. Common goods consist in those that can be shared by all members of a polity because they are rationally good, nonrivalrous, and nonexclusive. Rational political goods consist in those common goods, the pursuit of which can be supported by the polity, and especially those that suffer from public goods and free-riding externalities. If "happiness" is defined, technically, as comprising individual or internal virtue plus at least a minimum sufficiency of external goods, then the pursuit of happiness as a goal of the polity becomes not only reasonable but realistic. It is possible for a polity to cooperate with the pursuit of happiness so defined without privileging or sacrificing any of its subjects; however, it seems impossible for a polity to achieve, and futile for a polity to try to achieve never-ending and always increasing, wealth, pleasure, power, absolute freedom, or other eclectic goods for its subjects.

Section 7. Indemonstrable Principles. Indemonstrable principles are those that are both manifest and claimed to be true even though they cannot be proved by reference to their conformity with external objects. Some of these are analytically true, others are claimed to be true independently.

(1) Among the indemonstrable principles of thinking are the rule against contradiction, the rule that every effect must have a cause, the essential reliability of sense impressions, and the ability of language to signify meaning and numbers to signify relationships.
(2) Among the indemonstrable principles of acting and of choosing between actions are the propositions that good is better than its absence or opposite, something is better than nothing, life is better than death, love is better than hate (and the independent moral propositions: good ought to be preferred over evil, something ought to be preferred over nothing, life over death, love over hate), and that no person ought deliberately to harm another person.

Section 8. Supernatural Law. Supernatural law is a rule or command imposed upon its subjects (and received and accepted by them

as "believers") by an incorporeal or disembodied (reified) sovereign and which also includes at least one precept, rule, or command not necessarily determinable by reason.

Section 9. Legal Foundations of the Polity. Any polity might make its legal foundations more intelligible, and possibly more secure, if it were to announce (somehow) that its laws are enacted in light of some one or more of the rules, definitions and sub-definitions set forth in Sections 1–8, or else that it explicitly denies, ignores, or modifies one or more of them.

CHAPTER TWO: RULE OF LAW

Topic One: Basic Principles

Section 101. Ontology. There is an objective reality.

Section 102. Epistemology. Human beings can know something about objective reality.

Section 103. Morality. The things knowable about objective reality include not only matters of fact and probable opinion about things, but also conduct. There are some things that human beings know every person ought to do, including on the basis of indemonstrable principles (these are the basic claims of morality).

Section 104. Legality. There are some things that the law requires every subject to do (these are the claims of human law).

Section 105. The Gap. There is reason to be concerned about the presence of, and also about the absence of a gap between what some persons believe ought to be done (the claims of moral law and of supernatural law) and what the law requires or prohibits (the claims of human law).

(1) There is a moral claim that *is* the same as everything that ought to be done because it includes all of morality, and there is a claim made upon its believers by supernatural law because it includes the law of a supernatural sovereign.
(2) There is a legal claim that is *not* the same as all that ought to be done because it includes only that which the human law requires; this often differs from the claims made by moral law or by supernatural law, even if the difference consists in the human law's

demanding less than what moral or supernatural laws demand of their believers.
(3) There is a legitimate question what to do about the presence or absence of the gap between the claims of human law and those of moral law and supernatural law.

Topic Two: Sources, and Integration of Law

Section 201. Fiat or Positive Law. Command, authority, rule, fiat, and will to power: the compulsive force of the state.

Section 202. Reasonable Law. Logos, reason and observation: the natural law and other empirical sources including law and economics, statistical methods; moral law and human conscience.

Section 203. Historical Law. The spirit of the law: history and realistic imagination; the possibility of normative history; designs or constraints on the future.

Section 204. Extra-legal Constraints (Influencers). Human conduct is also constrained or influenced by extra-legal influences including markets, norms, associations (family, friends, firms, schools, entertainment and news media, neighborhoods, voluntary organizations, organized religions, and class or group identity), and the architecture of external reality, some of which is fixed, but some of which may be changed or influenced by, or which reciprocally influences, the law or its interpretation.

Section 205. Any [human] law is integrated to the extent it is:
(1) positive (based upon a command or fiat); and/or
(2) reasonable (based upon reason and observation); and/or
(3) historical (based upon historical norms); and/or
(4) consistent with relevant extra-legal influencers.

Section 206. Integrated Moral Realism in the Law. Law is further integrated when [A] what ought to be done (the claims of morality and of supernatural law), is compared with [B] what the law requires to be done (the claims of the law), and, subject to the provisions of this restatement, a conclusion [C] is reached or a proposal is formulated for retaining, modifying, or making law. See especially, Sections 105, 205, 901 and Topics three and four.

Topic Three: Making or Changing the Law

Section 301. Is it compulsory?
Section 302. Is it reasonable?
Section 303. Is it good?
Section 304. Is it articulate?
Section 305. Is it authorized?
Section 306. Is it reasonably predictable?
Section 307. Is it reasonably humane?
Section 308. Is it reasonably consistent over time as well as internally?
Section 309. Is it reasonably systematic?
Section 310. Is it purposeful, and is it fairly validated?
Section 311. Is it fairly directed to the appropriate level, sphere or jurisdiction?

Topic Four: Law and Justice

First set—justice as a virtue in respect of the rule of law
Section 401. Justice as the right: paying debts; and justice as punishment.
Section 402. Justice as the fair: treating equals equally and unequals unequally.
Section 403. Justice as the lawful: following the law.
Section 404. Justice as the good: respecting inherent duties and rights.
Section 405. Justice as the normative: allowing for the possibility of normative history and culture.

Second set—misguided moralism*
Section 406. Justice as a construct.
Section 407. Justice as the interest of the stronger.
Section 408. Justice as a correction of a false consciousness.
Section 409. "Justice" as *nomophobia.*

Third set—incomplete analytics*
Section 410. Justice as a catch-all misnomer for things other than lawful.

* Perhaps including one or more of the foregoing, but also including one or more of the following.

Section 411. Justice as mere process or as a merely conventional jurisdictional matter.
Section 412. Justice as the empirical.
Section 413. Justice as social or economic opportunity or results.

Justice and modern moral realism
Section 414. Justice must be a combination of some one or more of the foregoing (Sections 401–413) depending upon time and place.

Topic Five: Law and language: the language of moral realism

Hypothetical: Consider the case, Johnny and the Cow: if we call a tail a leg, how many legs does a cow have? (a) five; (b) one (and only one); (c) four; (d) all of the above; (e) none of the above; (f) whatever you want it to be.

Section 500A. Language is not wholly conventional and subjective.
Section 500B. Language is able to signify something objective.

CHAPTER THREE: NONIMPOSITION

Section 900. Evaluating Supernatural Law and Moral Law.
(1) The Rule of Law Principle.
(2) The Nonimposition Principle.
(3) Adequate Assurances of Performance.
(4) Qualified Supernatural and Moral Law.

Section 901. Evaluating Human Law; rule of law, nonimposition, and the further limitations of architecture.

Section 902. Consequences (separation and disestablishiment).

CHAPTER FOUR: LAW AND MORALITY

Section 1000. The moral basis of family law.
Section 1100. The moral basis of property law.
Section 1200. The moral basis of contract law.
Section 1300. The moral basis of tort law.
Section 1400. The moral basis of criminal law.
Section 1500. The moral basis of agency law.
Section 1600. The moral basis of business associations and limited liabililty law.
Section 1700. The moral basis of individual rights and liberties.

Section 1800. The moral basis of abstention (or limits on the power to compel): rights, jurisdictions and spheres.
Section 1900. The moral basis of the police power and of the taxing power.

APPENDIX B: A FRAMEWORK ILLUSTRATING HOW A PARTICULAR SUPERNATURAL LAW MIGHT BE QUALIFIED

As to each item in Appendix A, an adherent of a supernatural law jurisprudence would respond with an analysis according to the standards of Sections 1–9, 101–05, 201–06, 301–11, 401–15, 501–10, and the other sections, and then might add a specific conclusion in each topic as indicated below] [various other supernatural systems might be inserted, and each might advance its own claims, according to the evidence of its own authorities, indicating which of the propositions they would affirm, and which they would deny—the examples below would, of course, be qualified by identifying which specific schools of Christian jurisprudence affirm (or deny) the propositions and which schools or versions of non-Christian supernatural law also affirm (or deny) the propositions.

Section 106. Christians affirm these things (Sections 1–9 and 101–105) because God has revealed them not only by the special illumination of the Holy Spirit and the special revelation of the Bible, but also by general revelation in creation and conscience.

[Non-Christians might also know and affirm these same things, because these things are manifest in nature—these are not special, secret, or private matters, nor are they mysteries of Christian-specific supernatural law.]

Section 207. Christians know these things (Sections 201–206) because they know that God is triune, and God acts by will (positive law *fiat*, and God the Father), by reason (*logos*, and God the Son), and by historical memory and imagination (*spirit*, and God the Holy Spirit), all three in one.

[Non-Christians might also know these things because these things are manifest in existing human law.]

Section 312. Christians are stewards of the (human) law because God is a lawgiver, whose laws reflect his nature, which is good and which seeks what is best for humankind, and because God has called Christians to good works prepared in advance for them to do. Good human laws constitute a benefit to humankind.

[Non-Christians might also be stewards of the law, because it might seem good to them to do so.]

Section 416. Christians are concerned about the definition of justice, understood primarily in accordance with Sections 401–05, because God has commanded Christians to act justly and, therefore, they need to know what "justice" is and how it should be conceived and implemented.

[Non-Christians might be concerned about the definition of justice because they in fact use the concept of "justice" (or at least the word) to contend for changes in, preferred applications of, or predictions about actual law.]

Section 511. Christians believe language can communicate because God reveals himself, not only in creation and conscience but also by language in the Bible.

[Non-Christians might agree that language can communicate because it is evident that language does in fact communicate, at least if honestly and carefully used.]

DOES "EMERGENCY" TRUMP CONSCIENCE, THUS DRAWING ANOTHER LINE IN THE SAND FOR PHARMACISTS?

INTRODUCTION

Lines are drawn every day. The law draws lines by deciding how fast a person should drive, when a person becomes a burglar, and when a baby actually becomes a "person."[1] The courts of the United States have taken it upon themselves to draw lines defining whether life begins at conception, three months, or birth.[2] Within this decision on life, the individual consciences of people are highly valued and protected by both the Illinois[3] and United States Constitutions.[4] Specifically, the issues surrounding a contraceptive and a woman having the right to obtain it have all led back to the focus on her right of choice—her right of conscience. Yet, what about the conscience of the other person in the transaction—the pharmacist? In Illinois, the question of whose conscience is protected was emphasized in the struggle between pharmacists' conscientious objections to dispensing the morning-after pill and the rights of patients seeking to obtain it.[5] Pharmacists in at least four states have obtained legislative protection and are allowed to object to filling certain prescriptions, Illinois became the fifth state to

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1 *See, e.g.*, 625 ILL. COMP. STAT. ANN. 5/11-601 (West 2008) (setting forth speed limits); 720 ILL. COMP. STAT. ANN. 5/19-1 (West 2003) (defining burglary); Roe v. Wade, 410 U.S. 113, 163 (1973) (determining when the State must protect fetal life).

2 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860, 873, 877 (1992) (affirming *Roe* but rejecting trimester system, substituting viability); *Roe*, 410 U.S. at 163–65 (permitting abortion based on trimester system).

3 ILL. CONST. art. I, § 3 ("The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed, and no person shall be denied any civil or political right, privilege[,] or capacity, on account of his religious opinions; but *the liberty of conscience hereby secured* shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State . . . .") (emphasis added).

4 U.S. CONST. amend. I; *see also Casey*, 505 U.S. at 851 ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641–42 (1943) ("We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes.").

5 *See* Vandersand v. Wal-Mart Stores, 525 F. Supp. 2d 1052 (C.D. Ill. 2007), *dismissed per stipulation*, No. 06-3292, 2008 WL 2774915 (C.D. Ill. May 29, 2008); Menges v. Blagojevich, 451 F. Supp. 2d 992 (C.D. Ill. 2006), *dismissed*, No. 05-3307 (C.D. Ill. May 13, 2008); Morr-Fitz, Inc. v. Blagojevich, 867 N.E.2d 1164 (Ill. App. Ct. 2007), *appeal allowed*, 875 N.E.2d 1113 (Table) (Ill. Sept. 26, 2007).

provide some legislative protection in April of 2008; other states are considering similar bills.[6]

Many articles take the perspective of the patient's rights, emphasizing the view that in the end the pharmacist must always do whatever the patient wants—thus ignoring the pharmacist's conscience.[7] In being denied the right of conscience, however, the pharmacist loses the same right that women fought so hard to obtain. This Note discusses the pharmacist's right of conscience to refuse to fill a morning-after pill prescription, the history of this issue in Illinois, and the consequences of such laws. More specifically, it looks at the history of Illinois's law and the case *Morr-Fitz, Inc. v. Blagojevich*.[8] In Part I, this Note considers the administrative rule ("Final Rule"), enacted based on Governor Blagojevich's Emergency Rule ("Emergency Rule"), and the amended rule ("Amended Rule"). Part II examines the specific facts of *Morr-Fitz*. Part III looks at two state laws that the Final Rule clearly violated.[9]

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[6] Lora Cicconi, Comment, *Pharmacist Refusals and Third-Party Interests: A Proposed Judicial Approach to Pharmacist Conscience Clauses*, 54 UCLA L. REV. 709, 711 (2007) (citing ARK. CODE ANN. § 20-16-304 (2005); GA. COMP. R. & REGS. 480-5-.03(n) (2005); MISS. CODE ANN. § 41-107-5 (2005); S.D. CODIFIED LAWS § 36-11-70 (2004)); *see also* ILL. ADMIN. CODE tit. 68, § 1330.91(j) (2005) (amended 2008).

[7] *See, e.g.*, Cicconi, *supra* note 6, at 709, 713; Mary K. Collins, *Conscience Clauses and Oral Contraceptives: Conscientious Objection or Calculated Obstruction?*, 15 ANNALS HEALTH L. 37, 57–58 (2006); Natalie Langlois, Note, *Life-Sustaining Treatment Law: A Model for Balancing a Woman's Reproductive Rights with a Pharmacist's Conscientious Objection*, 47 B.C. L. REV. 815, 815, 845 (2006); Claire A. Smearman, *Drawing the Line: The Legal, Ethical and Public Policy Implications of Refusal Clauses for Pharmacists*, 48 ARIZ. L. REV. 469, 473–75 (2006); Holly Teliska, Recent Development, *Obstacles to Access: How Pharmacist Refusal Clauses Undermine the Basic Health Care Needs of Rural and Low-Income Women*, 20 BERKELEY J. GENDER L. & JUST. 229, 231 (2005).

[8] 867 N.E.2d 1164 (Ill. App. Ct. 2007), *appeal allowed*, 875 N.E.2d 1113 (Table) (Ill. Sept. 26, 2007). A petition for leave to appeal was granted before the Illinois Supreme Court on the issue of standing and the appellants asked the court to determine if the Final Rule "is facially invalid under the Health Care Right of Conscience Act." Appellant's Brief, *Morr-Fitz, Inc.*, 867 N.E.2d 1164 (Oct. 31, 2007) (No. 104692) (on file with the Regent University Law Review).

[9] While an argument could be made under the Free Exercise of Religion Clause of the First Amendment of the U.S. Constitution, it will not be addressed in this Note. Should a pharmacist bring this type of claim before the courts, he would need to provide an analysis similar to the following:

The First Amendment, applicable to the states by the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." U.S. CONST. amend. I. The rights of the pharmacists, as protected by the Free Exercise of Religion Clause, were infringed upon when Governor Blagojevich and the Joint Commission of Administrative Rules ("JCAR") restricted the pharmacist's conduct through the Emergency Rule and the Final Rule. No longer could pharmacists in Illinois safeguard their rights under the First Amendment. By the simple action of enforcing the Final Rule, Illinois substantially burdened pharmacists in order to serve its own narrow interest.

Lastly, Part IV notes the potential effect the Amended Rule will have on pharmacists, patients, the Illinois Legislature, and the Illinois Supreme Court.

I. EMERGENCY RULE BY GOVERNOR BLAGOJEVICH MADE PERMANENT

The Food and Drug Administration ("FDA") defines an emergency contraceptive as "a method of preventing pregnancy after a contraceptive fails or after unprotected sex."[10] Levonorgestrel ("Plan B" or the "morning-after pill") is the FDA-approved regimen marketed for such use.[11] The initial pill must be taken within three days (seventy-two hours) after contraceptive failure or unprotected sex, and a second pill must be taken twelve hours later.[12] The morning-after pill's mode of preventing pregnancy sparks controversy. Unlike normal birth control pills, the sole active ingredient in the morning-after pill is the synthetic form of the hormone progesterone.[13] The morning-after pill works by: (1) "preventing fertilization of an egg (the uniting of sperm with the egg)"; (2) inhibiting ovulation; (3) "preventing attachment (implantation)" of a fertilized egg to the lining of the uterus (womb); or (4) some combination of these processes.[14]

Ethical and practical concerns present substantial hurdles to studying the actual physiological effects of this regimen.[15] Given these difficulties, it is presently impossible to state unequivocally its mode of action in humans; some contend, however, that it is not an abortifacient.[16] Currently, the FDA firmly holds that "Plan B will not do

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In analyzing discrimination of a party's free exercise of religion, a court applies the tenet found in *Employment Division v. Smith*, which holds that a "neutral law of general applicability" does not violate the First Amendment freedom. 494 U.S. 872, 879 (1990). If the government action specifically targets religion, however, and is therefore not a neutral law of general applicability, the *Sherbert v. Verner* test would apply. *See id.* at 882–86. Under the *Sherbert* test, the government must have a compelling government interest that is applied in the least restrictive means in order for the law not to violate the First Amendment. Sherbert v. Verner, 374 U.S. 398, 406–08 (1963). Because the Final Rule did not specifically target religion, the *Smith* test applies. *See Smith*, 494 U.S. at 872.

[10] FDA: Center for Drug Evaluation and Research, Plan B: Questions and Answers (Dec. 14, 2006), http://www.fda.gov/cder/drug/infopage/planB/planBQandA20060824.htm.

[11] *Id.*

[12] *Id.*; Duramed Pharmaceuticals, Inc., Plan B: Emergency Contraception, When Should I Take Plan B?, http://go2planb.com/plan-b-info.aspx (last visited Nov. 29, 2008).

[13] Association of Reproductive Health Professionals, *What You Need to Know: The Facts About Emergency Contraception* (Jan. 2008), http://www.arhp.org/uploadDocs/ecfactsheet.pdf.

[14] FDA, *supra* note 10.

[15] *See generally* 2 WOMEN AND HEALTH RESEARCH: ETHICAL AND LEGAL ISSUES OF INCLUDING WOMEN IN CLINICAL STUDIES (Anna C. Mastroianni et al. eds., 1994) (presenting papers ranging from the ethical issues of including pregnant women in clinical trials to compensation for research injuries).

[16] *See* Association of Reproductive Health Professionals, *supra* note 13.

anything to a fertilized egg already attached to the uterus. The pregnancy will continue."[17]

On August 24, 2006, the FDA approved Plan B for over-the-counter sale to women over the age of eighteen, while requiring girls seventeen years of age and under to have a prescription.[18] Furthermore, in dispensing the drug, a pharmacist must provide pharmaceutical care ("medication therapy management services"[19]) and must treat a patient holding a prescription for the pill the same as a patient holding any other prescription.[20]

In Illinois, Governor Blagojevich's Emergency Rule, later made permanent by the Joint Commission of Administrative Rules ("JCAR"),[21] brought the controversy surrounding the morning-after pill and a pharmacist's right of conscience to the forefront of the medical and legal fields.

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[17] FDA, *supra* note 10.

[18] Press Release, FDA News, FDA Approves Over-the-Counter Access for Plan B for Women 18 and Older; Prescription Remains Required for Those 17 and Under (Aug. 24, 2006), http://www.fda.gov/bbs/topics/NEWS/2006/NEW01436.html; *see also* Letter from Steve Galson, Dir., Ctr. for Drug Evaluation & Research, FDA, to Joseph A. Carrado, Vice President, Clinical Regulatory Affairs, Duramed Research, Inc. 2 (Aug. 24, 2006), http://www.fda.gov/cder/foi/appletter/2006/021045s011ltr.pdf.

[19] 225 ILL. COMP. STAT. ANN. 85/3(aa) (West Supp. 2008). Such services consist of:

> [T]he evaluation of prescription drug orders and patient medication records to resolve conflicts with the following:
>
> (1) known allergies;
> (2) drug or potential therapy contraindications;
> (3) reasonable dose, duration of use, and route of administration, taking into consideration factors such as age, gender, and contra-indications;
> (4) reasonable directions for use;
> (5) potential or actual adverse drug reactions;
> (6) drug-drug interactions;
> (7) drug-food interactions;
> (8) drug-disease contraindications;
> (9) identification of therapeutic duplication;
> (10) patient laboratory values when authorized and available;
> (11) proper utilization (including over or under utilization) and optimum therapeutic outcomes; and
> (12) drug abuse and misuse . . . .

Id. The services further require the pharmacist to "provid[e] patient counseling designed to enhance a patient's understanding and the appropriate use of his or her medications." *Id.*; *see also id.* at 85/3(bb) (defining "pharmacist care" as "the provision by a pharmacist of medication therapy management services . . . intended to achieve outcomes that improve patient health, quality of life, and comfort and enhance patient safety.").

[20] Press Release, Ill. Gov't News Network, Office of the Governor, Gov. Blagojevich Moves to Make Emergency Contraceptives Rule Permanent (Apr. 18, 2005), http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=3862.

[21] *See* Joint Committee on Administrative Rules, About JCAR, http://www.ilga.gov/commission/jcar/ (last visited Nov. 29, 2008).

A. Governor Blagojevich's Emergency Rule

On April 1, 2005, pharmacists in Illinois woke up and went to work unaware that Governor Blagojevich was in the process of passing the Emergency Rule that would require them to dispense emergency contraceptives or else face severe consequences.[22] The Governor's Emergency Rule read as follows:

> j) Duty of Division I Pharmacy to Dispense Contraceptives
>
> 1) Upon receipt of a valid, lawful prescription for a contraceptive, a pharmacy *must* dispense the contraceptive, or a suitable alternative permitted by the prescriber, to the patient or the patient's agent without delay. If the contraceptive, or a suitable alternative, is not in stock, the pharmacy *must* obtain the contraceptive under the pharmacy's standard procedures for ordering contraceptive drugs not in stock, including the procedures of any entity that is affiliated with, owns, or franchises the pharmacy. However, if the patient prefers, the prescription must either be transferred to a local pharmacy of the patient's choice or returned to the patient, as the patient directs.
>
> 2) For the purposes of this subsection (j), the term "contraceptive" shall refer to all FDA-approved drugs or devices that prevent pregnancy.[23]

Under Illinois Rules, an agency is permitted to pass an emergency rule if there is "the existence of any situation that any agency finds reasonably constitutes a threat to the public interest, safety, or welfare."[24] But an "emergency" did not exist in the Illinois situation because patients could get their prescriptions filled at another pharmacy or by another pharmacist. Therefore, as the law requires, public notice should have been given, or a public hearing held (if the circumstances mandated by the provision existed), by the Governor or agency prior to the Emergency Rule's promulgation.[25] In addition, the State Board of Pharmacy must review, approve, or authorize the "emergency rule" before enforcing it on pharmacists because of its power to revoke or

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[22] Notice of Emergency Amendment to Pharmacy Practice Act of 1987, 29 Ill. Reg. 5586 (Apr. 15, 2005); *see also* Notice of Proposed Amendment to Pharmacy Practice Act of 1987, 29 Ill. Reg. 5823 (Apr. 29, 2005).

[23] 29 Ill. Reg. at 5596 (emphasis added).

[24] 5 ILL. COMP. STAT. ANN. 100/5-45(a) (West 2005 & Supp. 2008).

> If any agency finds that an emergency exists that requires adoption of a rule upon fewer days than is required by Section 5-40 [5 ILL. COMP. STAT. ANN. 100/5-40] and states in writing its reasons for that finding, the agency may adopt an emergency rule without prior notice or hearing upon filing a notice of emergency rulemaking with the Secretary of State under Section 5-70 [5 ILL. COMP. STAT. ANN. 100/5-70].... [A]n emergency rule becomes effective immediately upon filing under Section 5-65 [5 ILL. COMP. STAT. ANN. 100/5-65] or at a stated date less than 10 days thereafter.

Id. at 100/5-45(b).

[25] *Id.* at 100/5-40(b).

change the status of a pharmacist's license.[26] The Board did not do so until after the Emergency Rule had already been put in place.[27]

B. The Joint Commission on Administrative Review Made Governor Blagojevich's Emergency Rule Permanent with Slight Changes

In mid-April 2005, Governor Blagojevich filed a permanent rule with the JCAR, and, like the Emergency Rule, the Final Rule "require[d] drug stores that stock and dispense contraceptives to fill birth control prescriptions without delay."[28] On August 16, 2005, the JCAR made Governor Blagojevich's Emergency Rule permanent.[29] As permitted by Illinois law, only slight changes were made to the Emergency Rule so that the pharmacist's drug utilization review would remain intact.[30] The Final Rule stated:

> j) Duty of Division I Pharmacy to Dispense Contraceptives
>
> 1) Upon receipt of a valid, lawful prescription for a contraceptive, a pharmacy *must* dispense the contraceptive, or a suitable alternative permitted by the prescriber, to the patient or the patient's agent without delay, consistent with the normal timeframe for filling any other prescription. If the contraceptive, or a suitable alternative, is not in stock, the pharmacy *must* obtain the contraceptive under the pharmacy's standard procedures for ordering contraceptive drugs not in stock, including the procedures of any entity that is affiliated with, owns, or franchises the pharmacy. However, if the patient prefers, the prescription must be transferred to a local pharmacy of the patient's choice under the pharmacy's standard procedures for transferring prescriptions for contraceptive drugs, including the procedures of any entity that is affiliated with, owns, or franchises the pharmacy. Under any circumstances an unfilled prescription for contraceptive drugs must be returned to the patient if the patient so directs.
>
> 2) For the purposes of this subsection (j), the term "contraceptive" shall refer to all FDA-approved drugs or devices that prevent pregnancy.
>
> 3) Nothing in this subsection (j) shall interfere with a pharmacist's screening for potential drug therapy problems due to therapeutic

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[26] *See* 225 ILL. COMP. STAT. ANN. 85/11 (West 2007 & Supp. 2008).

[27] Press Release, Gov. Blagojevich Moves to Make Emergency Contraceptives Rule Permanent, *supra* note 20.

[28] *Id.*

[29] Press Release, Ill. Gov't News Network, Office of the Governor, State Commission Gives Permanent Approval to Gov. Blagojevich's Emergency Rule Protecting Illinois Women's Right to Birth Control: Governor Applauds Timely JCAR Action (Aug. 16, 2005), http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=4247.

[30] Joint Committee on Administrative Rules, *Illinois Rulemaking Process*, http://www.ilga.gov/commission/jcar/ILRulemakingProcess.pdf (last visited Nov. 29, 2008) ("During the JCAR review, JCAR and the agency can agree to modifications in the rulemaking that are adopted through written JCAR Agreements."); Press Release, Gov. Blagojevich Moves to Make Emergency Contraceptives Rule Permanent, *supra* note 20.

duplication, drug-disease contraindications, drug-drug interactions (including serious interactions with nonprescription or over-the-counter drugs), drug-food interactions, incorrect drug dosage or duration of drug treatment, drug-allergy interactions, or clinical abuse or misuse, pursuant to 225 [ILL. COMP. STAT. ANN. 85/3(q)].[31]

C. The Final Rule Was Amended Based on a Legal Settlement

On April 16, 2008, the Final Rule was amended as "the result of an agreement based upon a legal settlement with the Department [of Financial and Professional Regulation] regarding the dispensing of contraceptives to patients."[32] The Amended Rule provides additional subsections that address several issues that the Final Rule did not address. Specifically, Subsection 2) addresses what pharmacies should do regarding its stock of emergency contraceptives, Subsection 3) notes the protocols to be followed when a pharmacist objects to dispensing an emergency contraceptive, and Subsection 4) requires a pharmacy to have a nonobjecting pharmacist available at all times or another licensed pharmacist available for remote medication order processing ("RMOP").[33] Subsections 5) and 6) in the Amended Rule were previously Subsections 2) and 3) in the Final Rule.[34] The exact language of the Amended Rule, with the newly added and amended language italicized and a portion of Subsection 3) omitted, is as follows:

j) Duty of *Retail* Pharmacy to Dispense Contraceptives

1) Upon receipt of a valid, lawful prescription for a contraceptive, a *retail* pharmacy *serving the general public* must dispense the contraceptive, or a suitable alternative permitted by the prescriber, to the patient or the patient's agent without delay, consistent with the normal timeframe for filling any other prescription, *subject to the remaining provisions of this subsection (j).* If the contraceptive, or a suitable alternative, is not in stock, the pharmacy must obtain the contraceptive under the pharmacy's standard procedures for ordering contraceptive drugs not in stock, including the procedures of any entity that is affiliated with, owns, or franchises the pharmacy. However, if the *contraceptive, or a suitable alternative, is not in stock and the* patient prefers, the prescription must be transferred to a local pharmacy of the patient's choice under the pharmacy's standard procedures for transferring prescriptions for contraceptive drugs, including the procedures of any entity that is affiliated with, owns, or franchises the pharmacy. Under any circumstances an unfilled

[31] ILL. ADMIN. CODE tit. 68, § 1330.91(j) (2005) (amended 2008) (emphasis added).

[32] Notice of Adopted Amendment to the Pharmacy Practice Act, 32 Ill. Reg. 7116, 7116 (May 2, 2008) (codified as amended at 68 ILL. ADMIN. CODE tit. 68, § 1330.91).

[33] ILL. ADMIN. CODE tit. 68, § 1330.91(j)(2)–(4) (2008).

[34] *Compare* ILL. ADMIN. CODE tit. 68, § 1330.91(j)(5)–(6) (2008), *with* ILL. ADMIN. CODE tit. 68, § 1330.91(j)(2)–(3) (2005).

prescription for contraceptive drugs must be returned to the patient if the patient so directs.

2) Each retail pharmacy serving the general public shall use its best efforts to maintain adequate stock of emergency contraception to the extent it continues to sell contraception (nothing in this subsection (j)(2) prohibits a pharmacy from deciding not to sell contraception). Whenever emergency contraception is out-of-stock at a particular pharmacy and a prescription for emergency contraception is presented, the pharmacist or another pharmacy registrant shall attempt to assist the patient, at the patient's choice and request, in making arrangements to have the emergency contraception prescription filled at another pharmacy under the pharmacy's standard procedures for transferring prescriptions for contraceptive drugs, including the procedures of any entity that is affiliated with, owns or franchises the pharmacy.

3) Dispensing Protocol - In the event that a licensed pharmacist who objects to dispensing emergency contraception (an "objecting pharmacist") is presented with a prescription for emergency contraception, the retail pharmacy serving the general public shall use the following dispensing protocol:

A) All other pharmacists, if any, then present at the location where the objecting pharmacist works (the "dispensing pharmacy") shall first be asked to dispense the emergency contraception (any pharmacist that does not object to dispensing these medications is referred to as a "[nonobjecting] pharmacist").

B) If there is an objecting pharmacist and no [nonobjecting] pharmacist is then available at the dispensing pharmacy, any pharmacy (the "remote pharmacy") or other [nonobjecting] pharmacist shall provide [RMOP] to the dispensing pharmacy. RMOP includes any and all services that a licensed pharmacist may provide, as well as authorizing a non-pharmacist registrant at the dispensing pharmacy, to dispense the emergency contraception to the patient under the remote supervision of a [nonobjecting] pharmacist. For purposes of this subsection (j) and the Pharmacy Practice Act, a registered pharmacy technician is authorized to engage in RMOP involving emergency contraception.

. . . .

4) A retail pharmacy that serves the general public is responsible for ensuring either that there is a [nonobjecting] pharmacist scheduled at all times the pharmacy is open, or that there is a licensed pharmacist available to perform RMOP for emergency contraception at all times the pharmacy is open and no [nonobjecting] pharmacist is available at the pharmacy.

5) For the purposes of this subsection (j), the term "contraceptive" shall refer to all FDA-approved drugs or devices that prevent pregnancy.

6) Nothing in this subsection (j) shall interfere with a pharmacist's screening for potential drug therapy problems due to therapeutic

duplication, drug-disease contraindications, drug-drug interactions (including serious interactions with nonprescription or over-the-counter drugs), drug-food interactions, incorrect drug dosage or duration of drug treatment, drug-allergy interactions, or clinical abuse or misuse, pursuant to 225 [ILL. COMP. STAT. ANN. 85/3(q)].[35]

II. *MORR-FITZ, INC. V. BLAGOJEVICH*

A. *The Parties to the Current Case*

The present case before the Illinois Supreme Court involves two pharmacists and three Illinois corporations who, at the time suit was filed, were subject to the Final Rule, which required them to dispense emergency contraceptives upon a patient's request without delay.[36] Luke Vander Bleek and Glenn Kosirog are the two pharmacists who have been adversely affected by Governor Blagojevich's Emergency Rule and the Final Rule.[37] They have strongly held conscientious objections to filling emergency contraception requests.[38] As pharmacists, they are proactive in their desire to follow their oaths of administering medicine to patients in order to maintain life.[39] In their efforts to be proactive, both have formed their beliefs and consciences and believe that "life begins at conception and therefore does not allow [them] to dispense the morning-after pill and/or 'Plan B' because of their abortifacient mechanism of action, i.e., they can cause abortions by preventing an already-fertilized egg from implanting in the womb."[40]

In passing the Emergency Rule, Governor Blagojevich required "pharmacies in Illinois that sell contraceptives [to] accept and fill prescriptions for contraceptives without delay."[41] On April 1, 2005, he indicated that the government would enforce the Emergency Rule against pharmacists who violate it, and that they would face "significant

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[35] *Id.* § 1330.91(j) (italics added). The omitted subsections outline the various requirements for RMOP. *See id.* § 1330.91(j)(3)(B)(i)–(vii).

[36] First Amended Complaint for Declaratory & Injunctive Relief ¶¶ 2–6, Morr-Fitz, Inc. v. Blagojevich, No. 2005-CH495 (Ill. Cir. Ct. Oct. 28, 2005) [hereinafter Complaint] (on file with the Regent University Law Review). While the case involves both pharmacies and pharmacists, this Note focuses solely on the pharmacist's right of conscientious objection.

[37] *See id.* ¶¶ 5–6, 22, 41.

[38] *Id.* ¶¶ 22, 41.

[39] *See id.* ¶¶ 31, 42; US PharmD, Pharmacist Code of Ethics § IV, http://www.uspharmd.com/pharmacist/Pharmacist_Oath_and_Code_of_Ethics.html (last visited Nov. 29, 2008) ("A pharmacist has a duty to tell the truth and to act with conviction of conscience.").

[40] Complaint, *supra* note 36, ¶¶ 30, 41.

[41] Press Release, Ill. Gov't News Network, Office of the Governor, Gov. Blagojevich Takes Emergency Action to Protect Women's Access to Contraceptives (Apr. 1, 2005), http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=3805.

penalties" for failure to comply with the Emergency Rule.[42] On April 13, 2005, Governor Blagojevich, in another press release, declared that "[p]harmacists—like everyone else—are free to hold personal religious beliefs, but pharmacies are not free to let those beliefs stand in the way of their obligation to their customers."[43] He confirmed that the government "will vigorously defend a woman's right to get her prescription for birth control filled without delay, without hassle[,] and without a lecture."[44] In addition, once the Final Rule was in place, the Governor's Office stated that the Department of Financial and Professional Regulation required every drug store to post signs providing a "toll-free pharmacy hotline number . . . and website . . . where a customer can file a complaint if they [sic] believe they were treated unfairly."[45]

Almost one month after the Illinois Supreme Court heard oral arguments in *Morr-Fitz*, the Amended Rule became effective.[46] The Amended Rule addresses issues that the Final Rule did not. As amended, the Rule appreciates that a situation might occur where a pharmacist conscientiously objects to filling a prescription for an emergency contraceptive.[47] The amendment outlines the steps that pharmacists and pharmacies must take in such a situation.[48] Thus, the Amended Rule recognizes that a pharmacist may object without facing direct repercussions, such as the revocation of his pharmaceutical license. Even though the Amended Rule appreciates that a pharmacist

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42 Complaint, *supra* note 36, ¶ 57.

43 Press Release, Ill. Gov't News Network, Office of the Governor, Statement from Gov. Rod Blagojevich: In Response to Lawsuit Filed by Pat Robertson's American Center for Law and Justice Challenging Governor's Emergency Rule for Pharmacies (Apr. 13, 2005), http://www.illinois.gov/PressReleases/PressReleasesListShow.cfm?RecNum=3849.

44 *Id.*

45 Press Release, Ill. Gov't News Network, Office of the Governor, Governor Blagojevich Introduces New Rule to Ensure Women's Access to Prescription Contraceptives After New Tactic to Deny Women Access to Birth Control Surfaces (Mar. 27, 2006), http://www.illinois.gov/PressReleases/PressReleasesListShow.cfm?RecNum=4738.

46 DOCKET: SUPREME COURT OF ILLINOIS MARCH TERM 2008 (Mar. 2008), *available at* http://www.state.il.us/court/SupremeCourt/Docket/2008/03-08.pdf (oral arguments heard on Mar. 18, 2008); Notice of Adopted Amendment to the Pharmacy Practice Act, 32 Ill. Reg. 7116 (May 2, 2008) (amendment effective on Apr. 16, 2008).

47 *See* ILL. ADMIN. CODE tit. 68, § 1330.91(j)(3) (2008). For a discussion of the Amended Rule, see *supra* Part I.C. *See also* Dean Olsen, *Plan B Rule Could Change; Possible Settlement Offers Compromise on Morning After Pill*, ST. J.-REG. (Springfield, Ill.), Oct. 10, 2007, at 1 ("'It changes the rule significantly, in that, for the first time, the state now at least recognizes the existence of objecting pharmacists and attempts by this amendment to deal with the problem that that causes,' Francis Manion, a Kentucky lawyer representing the pharmacists [in *Menges v. Blagojevich*] . . . ."). For a discussion of the *Menges* case, see *infra* Part III.A.

48 ILL. ADMIN. CODE tit. 68, § 1330.91(j)(3)(A)–(B) (2008). For the full text, see *supra* note 35 and accompanying text.

might have a conscientious objection, it was passed after *Morr-Fitz* was brought before the Illinois Supreme Court. The attorneys for the plaintiffs believe that *Morr-Fitz* is still relevant.[49] While the effect of the Amended Rule on the outcome of this case is not clear at this time, the Illinois Supreme Court, notably, has not dismissed the case for mootness nor has it published a decision.

The issue in *Morr-Fitz* remains important to the immediate parties, and to pharmacists and pharmacies in both Illinois and in the United States, because the court has yet to decide whose rights will prevail in a conflict over dispensing emergency contraception—the pharmacist's or the patient's.[50] Nine groups filed amicus curiae briefs at the outset of this case in support of the Illinois Supreme Court reaching a decision on this matter so that pharmacists would not have to wonder whether they could follow their consciences or be forced to violate them under the Final Rule.[51] In his address on October 29, 2007 to the 25th International Congress of Catholic Pharmacists, Pope Benedict XVI further emphasized the issue by encouraging pharmacists to conscientiously object to filling Plan B requests.[52]

B. Effects of the Application of the Final Rule on Pharmacists

With the Board of Pharmacy's approval of the Final Rule—and the JCAR making the Rule permanent—pharmacists were liable under the Pharmacy Practice Act of 1987 for not complying with the Final Rule. The Pharmacy Practice Act of 1987 provides for the following when a pharmacist violates the Act or the Rule:

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[49] *See* Dean Olsen, *Pharmacist Hopeful for Plan B Challenge: Drugstore Owner at Odds with Rule To Require Stocking of Contraceptive*, ST. J. REG. (Springfield, Ill.), Oct. 15, 2007, at 1 (explaining that though the Amended Rule was "designed [as a settlement] to end a lawsuit filed by several pharmacists in Springfield's U.S. District Court," Vander Bleek's attorney stated that it actually makes their pending challenge "more compelling, because the amended rule arguably makes it more certain that you must stock Plan B").

[50] *See* Dean Olsen, *Plan B Rule Threatens Religion, Pharmacists Say*, ST. J. REG. (Springfield, Ill.), Mar. 19, 2008, at 17 (explaining the pharmacists' dilemma); Judy Peres, *'Morning-After' Pill Deal Reached; Pharmacists, State Accept Rule Change*, CHI. TRIB., Oct. 11, 2007, at 1 ("Michael Patton of the Illinois Pharmacists Association said the settlement skirts a critical question: Do pharmacists have a legal right not to perform services that violate their beliefs?").

[51] Amicus Curiae Brief of the Ill. Pharmacists Ass'n & the Am Pharmacists Ass'n, Morr-Fitz, Inc. v. Blagojevich, No. 104692 (Ill. Oct. 31, 2007).

[52] John-Henry Westen, *Pope Tells Pharmacists Not to Dispense Drugs to Inhibit Implantation; Implications for Plan B at Catholic Hospitals*, LIFESITE NEWS.COM, Oct. 29, 2007, http://www.lifesite.net/ldn/2007/oct/07102902.html ("'[W]e cannot anaesthetize consciences as regards, for example, the effect of certain molecules that have the goal of preventing the implantation of the embryo or shortening a person's life.'" (quoting Pope Benedict XVI)).

> (a) In accordance with Section 11 of this Act, the Department may refuse to issue, restore, or renew, or may revoke, suspend, place on probation, or reprimand as the Department may deem proper with regard to any license or certificate of registration . . . for any one or combination of the following causes:
>
> . . . .
>
> 2. Violations of this Act, or the rules promulgated hereunder.[53]

Under the Final Rule, pharmacists could no longer conscientiously object to filling an emergency contraception request without fearing the revocation of their licenses and, in turn, loss of livelihood. Governor Blagojevich and the Illinois Legislature placed Illinois pharmacists in the precarious position of choosing between following their firmly held convictions or choosing to financially provide for themselves and their families while violating their consciences.

Fortunately, for Illinois pharmacists, the Amended Rule recognizes their right to object to filling a request for an emergency contraceptive, thus alleviating the fear of losing their licenses.[54] As noted above, however, what will happen in the future when pharmacists are presented with the mandate to fill another controversial drug? Will they be able to follow their consciences or forced to lose their licenses?

III. THE FINAL RULE VIOLATED PRECEDENT AND WAS THEREFORE VOID AND WITHOUT EFFECT

Although many believe that the "right of conscience" issue is a modern issue, the Founding Fathers considered the right of conscience important.[55] Thomas Jefferson wrote, "No provision in our Constitution ought to be dearer to man than that which protects the rights of

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[53] 225 ILL. COMP. STAT. ANN. 85/30(a) (West 2007 & Supp. 2008).

[54] ILL. ADMIN. CODE tit. 68, §1330.91(j)(3) (2008). While the Amended Rule recognizes a pharmacist's right to object, there is the potential for indirect consequences to an objecting pharmacist and the pharmacy. The Amended Rule requires a pharmacy to either have a nonobjecting pharmacist working at all times or another pharmacist available through remote access (RMOP). *Id.* § 1330.91(j)(4). With these requirements, pharmacists who object could potentially have their hours cut so that the pharmacy can have another nonobjecting pharmacist working in case an RMOP is not available. In addition, this provision could potentially affect a pharmacy's hiring procedures and encourage religious discrimination. Pharmacist's who object on the basis of religious belief would become a liability to a pharmacy because the pharmacy must monitor the number of objecting pharmacists to comply with the new rules. Both of these situations raise the possibility of an employment discrimination suit under Title VII. A full discussion of these new potential ramifications is beyond the scope of this Note. *See infra* note 91.

[55] *See, e.g.*, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1451–53 (1990) (explaining the free exercise views of the Founders).

conscience against the enterprises of the civil authority."[56] James Madison, in his *Memorial and Remonstrance*, also wrote:

> "The [r]eligion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. . . . It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him."[57]

Madison's views were not without historical precedent; William Penn, for one, espoused the same view.[58]

Illinois laws and the Constitution of the United States continue to uphold the view of the Founding Fathers.[59] Medical professionals are permitted to abstain from performing acts they believe are morally objectionable practices.[60] The issue of conscience came to the forefront of the nation when the United States Supreme Court in *Roe v. Wade* constitutionalized abortion.[61] In the aftermath, federal and state legislatures passed laws protecting the rights of healthcare professionals who feared that they would be forced, against their consciences, to

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[56] 16 THOMAS JEFFERSON, *Reply to Public Address to the Society of the Methodist Episcopal Church at New London (Feb. 4, 1809)*, *in* THE WRITINGS OF THOMAS JEFFERSON 331, 332 (Andrew A. Lipscomb ed., 1903).

[57] McConnell, *supra* note 55, at 1453 (quoting 2 JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, *in* THE WRITINGS OF JAMES MADISON 183, 184 (Gaillard Hunt ed., 1901)).

[58] *Id.* at 1451 ("William Penn wrote in 1670 that 'by *Liberty of Conscience*, we understand not only a meer [sic] *Liberty of the Mind*, in believing or disbelieving . . . *but the exercise of ourselves in a visible way of worship*.'" (quoting 1 WILLIAM PENN, *The Great Case of Liberty of Conscience*, *in* COLLECTION OF THE WORKS OF WILLIAM PENN 443, 447 (photo. reprint 1974) (Assigns of J. Sowle, 1726))).

[59] Letter from George Washington to the United Baptist Churches in Va. (May 10, 1789), *in* THE AMERICAN REPUBLIC: PRIMARY SOURCES 69, 70 (Bruce Frohnen ed., 2002).

> If I could have entertained the slightest apprehension that the Constitution framed in the Convention, where I had the honor to preside, might possibly endanger the religious rights of any ecclesiastical society, certainly I would never have placed my signature to it; and if *I could now conceive that the general government might ever be so administered as to render the liberty of conscience insecure*, I beg you will be persuaded that no one would be more zealous than myself to establish *effectual* barriers against the horrors of spiritual tyranny, and every species of religious persecution. For you, doubtless, remember that I have often expressed my sentiment, that every man, conducting himself as a good citizen, and being accountable to God alone for his religious opinions, ought to be protected in worshipping the Deity according to the dictates of his own conscience.

Id. (emphasis added).

[60] Healthcare Right of Conscience Act, 745 ILL. COMP. STAT. ANN. 70/1–70/14 (West 2002).

[61] Roe v. Wade, 410 U.S. 113, 153–54 (1973) (concluding that the personal right of privacy includes the decision to have an abortion).

perform abortions.[62] With the advancements in technology and the creation of new pills (that is, emergency contraceptives), the issue of the right of conscience is once again before the nation and health care providers.

For three years, Illinois pharmacists experienced uncertainty regarding whether they had a right to conscientiously object to filling emergency contraceptives; several pharmacists were placed on leave or lost their jobs for objecting to fill a request.[63] Did the Final Rule take precedence over past law, thereby disallowing pharmacists a right of conscientious objection, or was the Final Rule void? The Final Rule, as enacted by the JCAR, violated two Illinois laws. Specifically, the Final Rule violated the Illinois Health Care Right of Conscience Act, and the Illinois Religious Freedom Restoration Act.[64] By violating just one of these laws, the Final Rule should have been determined void and unenforceable. While the Amended Rule clears up some of the confusion by noting that a pharmacist may object to filling a request, the Final Rule still violated the pharmacist's rights during the time that it applied. The question still remains: whose rights will ultimately prevail? Analyzing the Illinois law (Final Rule and Amended Rule), the precedent that the Final Rule violated for three years, and the consequences from both rules, is important for other states so that they can see the potential consequences resulting from the enactment of similar rules.[65]

A. Illinois Health Care Right of Conscience Act

Requiring a pharmacist to fill a prescription for the morning-after pill without regard to the pharmacist's conscientious objection directly violated the Illinois Health Care Right of Conscience Act. The Act states:

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[62] Cicconi, *supra* note 6, at 713–14 (citing 42 U.S.C. § 300a-7 (2000) (amending the Public Health Service Act, 42 U.S.C. §§ 201–300iii-4 (2002)); CATHERINE WEISS et. al, RELIGIOUS REFUSALS AND REPRODUCTIVE RIGHTS: ACLU REPRODUCTIVE FREEDOM PROJECT (2002), http://www.aclu.org/FilesPDFs/ACF911.pdf; Rachel Benson Gold & Adam Sonfield, *Refusing to Participate in Health Care: A Continuing Debate*, 3 GUTTMACHER REP. ON PUB. POL'Y, 8, 8 (Feb. 2000), http://www.guttmacher.org/pubs/tgr/03/1/gr030108.pdf; *Refusing To Provide Health Services*, 2008 GUTTMACHER INST. ST. POLICIES IN BRIEF, http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf). Today, the term "healthcare professionals" is defined broadly enough to include pharmacists. *See infra* notes 67–68, 90.

[63] *See* Vandersand v. Wal-Mart Stores, 525 F. Supp. 2d 1052, 1055 (C.D. Ill. 2007), *dismissed per stipulation*, No. 06-3292, 2008 WL 2774915 (C.D. Ill. May 29, 2008); Menges v. Blagojevich, 451 F. Supp. 2d 992, 995, 998 (C.D. Ill. 2006), *dismissed*, No. 05-3307 (C.D. Ill. May 13, 2008).

[64] *See infra* Part III.A–B.

[65] *See* Marc Kaufman, *Plan B Battles Embroil States*, WASH. POST, Feb. 27, 2006, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/02/26/AR2006022601380.html; Ed Susman, *ACOG: Plan B Availability Varies from State to State*, MEDPAGE TODAY, May 9, 2007, http://www.medpagetoday.com/MeetingCoverage/ACOG/5603.

> It is the public policy of the State of Illinois to respect and protect the right of conscience of *all* persons . . . who are engaged in, the delivery of . . . health care services and medical care . . . and to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability upon such persons or entities by reason of their refusing to act contrary to their conscience or conscientious convictions in refusing to . . . deliver . . . medical care.[66]

The Act defines "health care" as "any phase of patient care, including but not limited to . . . family planning, counseling, referrals, or any other advice in connection with the use or procurement of contraceptives and sterilization or abortion procedures; [or] medication."[67] It further defines "health care personnel" as "any . . . person who furnishes, or assists in the furnishing of, health care services."[68] "Conscience," the focal point of the issue, is defined as "a sincerely held set of moral convictions arising from belief in and relation to God, or which, though not so derived, arises from a place in the life of its possessor parallel to that filled by God among adherents to religious faiths."[69]

Not only did the Final Rule ignore the fact that the law explicitly permits a pharmacist to make a conscientious objection, but it further ignored the fact that the Health Care Right of Conscience Act holds that it is unlawful for any public official to discriminate against any person on that basis—including discrimination in licensing.[70] The Act takes any violation of this rule seriously by permitting "[a]ny person . . . injured by any public . . . agency . . . by reason of any action prohibited by this Act [to] commence a suit . . . and . . . recover *threefold* the actual damages . . . sustained by such person."[71]

As previously noted, both pharmacists in *Morr-Fitz, Inc. v. Blagojevich* have firmly held beliefs that a baby is human at conception; therefore, filling a request for the morning-after pill would violate their consciences.[72] Understandably, problems arise if this Rule applies to someone who often changes religious beliefs, or even someone who used

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[66] 745 ILL. COMP. STAT. ANN. 70/2 (West 2002) (emphasis added).

[67] *Id.* at 70/3(a).

[68] *Id.* at 70/3(c).

[69] *Id.* at 70/3(e).

[70] *Id.* at 70/5. The statute reads:

> It shall be unlawful for any . . . public official to discriminate against any person in any manner, including but not limited to, licensing . . . or any other privileges, because of such person's conscientious refusal to . . . participate in any way in any particular form of health care services contrary to his or her conscience.

Id.

[71] *Id.* at 70/12 (emphasis added).

[72] Complaint, *supra* note 36, ¶¶ 22, 41.

the Final Rule as a way to avoid working. But the definition of conscience itself states that it must be a "sincerely held set of moral convictions,"[73] and that is the case for many pharmacists who bring these suits. They are not merely beliefs that pharmacists adopt one week and drop the next.[74] The Final Rule disregarded this Act and the pharmacists' consciences when it stated that a pharmacist *must* dispense the emergency contraceptive without delay.[75]

Two Illinois cases affecting Illinois pharmacists and the Final Rule came before the United States District Court in the Central District of Illinois. Both cases were settled outside of court, with the settlement agreement in the second case resulting in the Amended Rule.[76] While federal district court decisions are not binding on the Illinois Supreme Court, they can be persuasive authority as the court faces the difficult task of determining what law should apply.[77]

Ethan Vandersand, the pharmacist in *Vandersand v. Wal-Mart Stores*, worked in the pharmacy at an Illinois Wal-Mart.[78] While working on February 2, 2006, he received a phone call at 10:30 a.m. from a nurse practitioner asking if he would dispense emergency contraceptives, to which he replied that he would not.[79] He provided the nurse practitioner with the name and number of another pharmacy in town.[80] The nurse practitioner then told Vandersand that her patient might be coming to his pharmacy and to have the patient call her upon arrival.[81] Thereafter, the nurse practitioner's patient called the pharmacy, and though Vandersand did not talk with the patient, the pharmacist's technician gave her the nurse practitioner's number.[82] The patient did not come into the store or submit a prescription or ask for emergency contraceptives.[83]

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[73] 745 ILL. COMP. STAT. ANN. 70/3(e) (West 2002).

[74] Complaint, *supra* note 36, ¶¶ 24, 26, 43, 45.

[75] ILL. ADMIN. CODE tit. 68, § 1330.91(j)(1) (2005) (amended 2008).

[76] Vandersand v. Wal-Mart Stores, 525 F. Supp. 2d 1052 (C.D. Ill. 2007), *dismissed per stipulation*, No. 06-3292, 2008 WL 2774915 (C.D. Ill. May 29, 2008); Menges v. Blagojevich, 451 F. Supp. 2d 992 (C.D. Ill. 2006), *dismissed*, No. 05-3307 (C.D. Ill. May 13, 2008).

[77] Nat'l Commercial Banking Corp. of Austl. v. Harris, 532 N.E.2d 812, 816 (Ill. 1988) ("'[T]he general rule is that decisions of the United States district and circuit courts are not binding upon Illinois courts.' Our court has never meant by this proposition that we will ignore or negate the persuasive authority that a Federal decision may provide when it concerns a similar issue." (quoting City of Chicago v. Groffman, 368 N.E.2d 891, 894 (Ill. 1977))).

[78] *Vandersand*, 525 F. Supp. 2d at 1053 (C.D. Ill. 2007), *dismissed per stipulation*, No. 06-3292, 2008 WL 2774915 (C.D. Ill. May 29, 2008).

[79] *Id.* at 1054.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

Shortly thereafter, Vandersand informed his supervisor of the incident.[84] Vandersand believed that the nurse practitioner filed a complaint against him with the Illinois Department of Financial and Professional Regulation for violating the Final Rule.[85] Wal-Mart was notified of the official filing of the complaint with the Department.[86] Wal-Mart gave Vandersand only two options: "be terminated immediately or . . . be placed on an unpaid leave of absence."[87] Vandersand chose the unpaid leave of absence and later alleged that he was placed on the unpaid leave because of his conscientious objection to filling a morning-after pill prescription.[88] In this situation, like the pharmacists in *Morr-Fitz*, Vandersand had a sincerely held moral conviction against filling a morning-after pill prescription. Vandersand believes the drugs "act with a significant abortifacient mechanism in a manner and to a degree that ordinary birth control drugs do not"; therefore, his religious faith forbids him "from directly or indirectly participating in causing the death of an innocent human life."[89]

On a Motion to Dismiss the Complaint or Stay Proceedings by Wal-Mart, the federal district court concluded that pharmacists were protected by the Illinois Health Care Right of Conscience Act and denied the Motion.[90] Vandersand claimed that Wal-Mart violated Title VII of the Civil Rights Act of 1964, as well as the Illinois Health Care Right of Conscience Act.[91] Wal-Mart claimed that it was complying with the Final Rule by placing him on leave, and further argued that Vandersand could not bring his claim because he was "not covered by the [Illinois] Right of Conscience Act."[92] The court ruled that a private employer "may not discriminate against any person because, as a matter of conscience, the person refuses to participate in any way in a form of health care services," and therefore "[t]he Right of Conscience Act prohibit[ed] Wal-

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84 *Id.* at 1055.

85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.* at 1055, 1057.

89 *Id.* at 1054–55.

90 *Id.* at 1057–58.

91 *Id.* at 1055. While the Title VII claim is a legitimate claim, it will not be addressed in this Note. Should a pharmacist bring the religious discrimination argument before a court, however, he must show that

> (1) he engages in . . . a religious observance or practice that conflicts with an employment requirement; (2) he called the religious observance or practice to the attention of his employer; and (3) the religious observance or practice was the basis for the employer's adverse employment action against him.

Id. (citing Equal Employment Opportunity Comm'n v. Ilona of Hungary, Inc., 108 F.3d 1569, 1575 (7th Cir. 1997)).

92 *Id.* at 1053.

Mart from discriminating against him for his refusal to participate in the dispensing of medication because of his beliefs."[93] The court further ruled that the Right of Conscience Act applied to pharmacists, and therefore "[a]ny person . . . who refuses to participate in any way in providing medication because of his conscience is protected by the Right of Conscience Act."[94] After the court denied the Motion, the case proceeded until the parties filed a Stipulation to Voluntary Dismissal on May 29, 2008, with the Final Order granting dismissal issued on May 30, 2008.[95]

Similarly, the pharmacists in *Menges v. Blagojevich* faced unpaid, indefinite suspension or "substantially burdened" religious exercise because they would not comply with the Final Rule.[96] Before the Final Rule's promulgation, Walgreens had a nationwide policy that permitted its pharmacists to object on moral or religious grounds to filling a prescription as long as the prescription could be filled by that store or a nearby pharmacy.[97] After the Final Rule, however, Walgreens changed its policy in Illinois and required its pharmacists to fill prescriptions even if doing so violated their religious beliefs.[98] Walgreens specifically required its pharmacists to either sign the new policy requiring them to dispense the emergency contraception or face unpaid indefinite suspension.[99] The plaintiffs alleged that the Final Rule violated Title VII because it "require[d] employers to engage in religious discrimination."[100] Walgreens sought a declaratory judgment that the Final Rule violated Title VII of the Civil Rights Act of 1964.[101] In addition, Walgreens claimed that because of its attempt to comply with the Final Rule, it faced several civil actions claiming that it violated the Illinois Health Care Right of Conscience Act.[102] While the court ruled that Walgreens had in fact stated a claim,[103] the case was closed on May 13, 2008, due to a settlement agreement between Governor Blagojevich and Walgreens that resulted in the Amended Rule.[104] The pharmacists did not join in

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93 *Id.* at 1057.

94 *Id.*

95 Stipulation to Voluntary Dismissal by Plaintiff, Vandersand v. Wal-Mart Stores, No. 06-3292 (C.D. Ill. May 29, 2008), 2008 WL 2774915.

96 451 F. Supp. 2d 992, 998 (C.D. Ill. 2006).

97 *Id.* Walgreens previously sought to intervene in this action, which the court allowed. Menges v. Blagojevich, No. 05-3307, 2006 WL 1582461, at *1 (C.D. Ill. June 8, 2006).

98 *Menges*, 451 F. Supp. 2d at 998.

99 *Id.*

100 *Id.* at 999.

101 *Id.*

102 *Id.*

103 *Id.* at 1004.

104 Menges v. Blagojevich, No. 05-3307 (C.D. Ill. dismissed May 13, 2008); *see also* Agreed Joint Motion of Plaintiff Walgreen Co. & Defendants to Stay Case, Menges v.

the settlement agreement that resulted in the Amended Rule, but had a separate agreement with the state and all plaintiffs dismissed their claims against Governor Blagojevich.[105]

As previously mentioned, a federal district court decision is not binding on the Illinois Supreme Court; however, it may be persuasive.[106] In both *Vandersand* and *Menges*, pharmacists either lost their jobs or were substantially burdened by being required to comply with the Final Rule. The *Vandersand* court decision on the Motion shows that a pharmacist can have a right of conscience to object to filling a prescription under Illinois precedent.[107] Therefore, the Final Rule should be void. The effect of the Final Rule was harsh—follow your conscience and face severe consequences. Because the Final Rule required a pharmacist to choose either violation of his conscience or the possible revocation of his license, the Final Rule should have been determined void under the Illinois Health Care Right of Conscience Act.

While the Amended Rule noted that a situation might occur where a pharmacist objects to filling a prescription, neither the Amended Rule nor a court decision unequivocally permits a pharmacist to step aside without facing adverse consequences. This resolution remains important to the present case of *Morr-Fitz*, as well as future cases which might involve a controversial drug that conflicts with a pharmacist's conscience.

B. Illinois Religious Freedom Restoration Act

The Final Rule's requirement that a pharmacist face consequences—such as losing his license—to maintain his sincerely held religious beliefs violated the Illinois Religious Freedom Restoration Act ("IRFRA").[108] IRFRA echoes the Founders' desire that the free exercise of

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Blagojevich, No. 05-3307 (C.D. Ill. Oct. 5, 2007), 2007 WL 3358899 (explaining that as a result of mediation efforts, Walgreens and the defendants were able to enter into a Mutual Agreement and Understanding).

[105] *See* Agreed Joint Motion of Plaintiff Walgreen Co. & Defendants to Stay Case, Menges v. Blagojevich, No. 05-3307 (C.D. Ill. Oct. 5, 2007), 2007 WL 3358899; *see also* Associated Press, *Accord Reached on Dispensing Morning-After Pill*, DAILY HERALD, Oct. 11, 2007, http://www.dailyherald.com/story/print/?id=54972 ("Francis Manion, an attorney for those pharmacists, said the settlement is technically an agreement between Walgreens and the state. Although his clients are dropping their lawsuit, they aren't part of the compromise to let a remote pharmacist oversee filling the prescription."); Editorial, *Fair Compromise on Morning-After Pill*, CHI. DAILY HERALD, Oct. 15, 2007, at 12 ("The American Center for Law and Justice, which is representing [the] pharmacists, agreed to drop the lawsuits but did not agree to be part of the compromise (it is between the state and Walgreens) because it still requires pharmacies to sell the morning-after pill . . . .").

[106] *Supra* note 77.

[107] Vandersand v. Wal-Mart Stores, 525 F. Supp. 2d 1052, 1057 (C.D. Ill. 2007), *dismissed per stipulation*, No. 06-3292, 2008 WL 2774915 (C.D. Ill. May 29, 2008).

[108] Religious Freedom Restoration Act, 775 ILL. COMP. STAT. ANN. 35/1–35/99 (2001).

religion be readily available to every citizen of the United States.[109] The states, in their own power, have also sought to promote the freedom of religion by including a free exercise of religion clause in each of their Constitutions.[110]

The General Assembly of Illinois has found that "[t]he free exercise of religion is an inherent, fundamental, and inalienable right secured by Article I, Section 3 of the Constitution of the State of Illinois."[111] Because it is an inherent right, the legislature of Illinois mandates that the

> [g]overnment may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling governmental interest.[112]

If a person's religious freedom is substantially burdened by the government in violation of IRFRA, he has a claim or defense against the government and can "obtain appropriate relief against [the] government."[113] IRFRA specifically "state[s] that the [*Wisconsin v.*] *Yoder* 'compelling interest' test [is] to be applied" where the free exercise of religion[114] is "substantially burdened" by government action.[115] "[T]he hallmark of a substantial burden on one's free exercise of religion is the presentation of a coercive choice of either abandoning one's religious convictions or complying with the governmental regulation."[116]

The Final Rule substantially burdened pharmacists because it did not permit pharmacists to exercise their religious convictions.[117]

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[109] Letter from George Washington, *supra* note 59; Letter from Thomas Jefferson to the Danbury Baptist Ass'n (Jan. 1, 1802), *in* THE AMERICAN REPUBLIC: PRIMARY SOURCES 88 (Bruce Frohnen ed., 2002).

[110] *See, e.g.*, ALA. CONST. art. I, § 3.01; MISS. CONST. art. III, § 18; MONT. CONST. art. II, § 5; NEV. CONST. art. I, § 4; N.J. CONST. art. I, ¶ 3; VT. CONST. ch. I, art. 3; VA. CONST. art. I, § 16.

[111] 775 ILL. COMP. STAT. ANN. 35/10(a)(1). The Illinois Constitution states, "The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed, and no person shall be denied any civil or political right, privilege or capacity, on account of his religious opinions . . . ." ILL. CONST. art. I, § 3.

[112] 775 ILL. COMP. STAT. ANN. 35/15.

[113] *Id.* at 35/20; *see also id.* at 35/10(b)(2) (stating that one of the purposes of the Act is "[t]o provide a claim or defense to persons whose exercise of religion is substantially burdened by government.").

[114] *Id.* at 35/5. The "exercise of religion" is defined by IRFRA as "an act or refusal to act that is substantially motivated by religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief." *Id.*

[115] Diggs v. Snyder, 775 N.E.2d 40, 44 (Ill. App. Ct. 2002) (citing 775 ILL. COMP. STAT. ANN. 35/10(a)(6)(b)(1); *see also* Wisconsin v. Yoder, 406 U.S. 205, 214–15 (1972)).

[116] *Diggs*, 775 N.E.2d at 45 (citing *Yoder*, 406 U.S. at 217–18).

[117] *See id.* ("To constitute a showing of a substantial burden on religious practice, a plaintiff must demonstrate that the governmental action 'prevents him from engaging in

Vandersand v. Wal-Mart Stores and *Menges v. Blagojevich* exemplify the effects of this burden on pharmacists. In both cases, the pharmacists were placed on leave and not permitted to work.[118]

Because the Final Rule substantially burdened the religious beliefs of pharmacists, the *Yoder* "compelling interest" test must be applied.[119] In order for the government to place this substantial burden on its citizens, it must first have a compelling government interest.[120] To determine whether a government's interest is compelling, the court will have to look to the specific facts of the case.[121] There is no compelling governmental interest, however, in forcing a pharmacist to deny his conscience and dispense an emergency contraceptive. The government interest is narrow and focused only on a woman's access to a drug—a drug that is surrounded by controversy. Secondly, the method must be the least restrictive means of furthering the compelling government interest.[122] Forcing a pharmacist to choose between filling a prescription and losing his job is not the least restrictive means. There are many ways to fill a request for the morning-after pill. For example, the government could require that the prescription be transferred to another pharmacy, or that the address and phone number of another pharmacy be given. The effect on the customer would be the same if the pill was not in stock. The customer would have to wait to be contacted by that pharmacy when the new stock arrived, or go to another pharmacy. In addition, the present pill just needs to be used within seventy-two hours.[123] Filling the prescription within this seventy-two hour window constitutes immediately filling the prescription, regardless of how the customer obtains the pill.

Not only does the Final Rule fail the compelling state interest and least restrictive means test, but the freedom to act according to firmly held religious beliefs should not come at such a high cost.[124] Under the

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conduct or having a religious experience that his faith mandates.'" (quoting Stefanow v. McFadden, 103 F.3d 1466, 1471 (9th Cir. 1996), *superseded by statute*, Religious Land Use and Institutionalized Persons Act, Pub. L. No. 106-274, § 8, 114 Stat. 806, 807 (2000) (codified as amended at 42 U.S.C. § 2000cc-5 (Supp. 2003))).

[118] Vandersand v. Wal-Mart Stores, 525 F. Supp. 2d 1052, 1053 (C.D. Ill. 2007), *dismissed per stipulation*, No. 06-3292, 2008 WL 2774915 (C.D. Ill. May 29, 2008); Menges v. Blagojevich, 451 F. Supp. 2d 992, 998 (C.D. Ill. 2006), *dismissed*, No. 05-3307 (C.D. Ill. May 13, 2008).

[119] *Diggs*, 755 N.E.2d at 44–45.

[120] 775 ILL. COMP. STAT. ANN. 35/15.

[121] *Diggs*, 755 N.E.2d at 45 (citing Abierta v. City of Chicago, 949 F. Supp. 637, 643 (N.D. Ill. 1996)).

[122] 755 ILL. COMP. STAT. ANN. 35/15.

[123] FDA, *supra* note 10.

[124] Nead v. Bd. of Trs. of E. Ill. Univ., No. 05-2137, 2006 WL 1582454, at *597 (C.D. Ill. 2006) ("'Free exercise of religion does not mean costless exercise of religion, but the

Final Rule, the cost was extremely high—lose your job and financial income or violate your conscience. It was a lose-lose situation for any pharmacist who had an objection to filling an order for the morning-after pill, and the Final Rule violated the state's proper use of power.

The Amended Rule took a step in the right direction by noting that a pharmacist can object to filling a prescription, and by putting protocols in place that are not restrictive on the objecting pharmacist.[125] In fact, the protocols permit another nonobjecting pharmacist or technician to handle the request so that the objecting pharmacist is able to step aside without any further involvement.[126] Thus, the Amended Rule does not substantially burden a pharmacist or violate IRFRA, but rather enables pharmacists to exercise their religious convictions.

If the Final Rule had been left in place, then what was to stop the government from forcing a pharmacist to fill a prescription for RU-486, commonly known as the abortion pill, or a new pill comparable to RU-486?[127] If the government protected every citizen who wanted to obtain a controversial drug from hearing the word "no," where would the cycle end? Would the government erase the line protecting a pharmacist's conscience and let patients make any demand, thus denying a pharmacist his fundamentally protected right? Because courts have not yet decided this issue and the Amended Rule merely notes that the situation may occur, the question remains. Can pharmacists follow their consciences or must they fill a prescription for a controversial drug that is contradictory to their sincerely held beliefs?

Within the boundaries of contraception exist many different beliefs on the value of human life. When does it begin? What does religion say about it? Does the baby really become a baby at conception? If people—be it pharmacists or patients—are not allowed to form and live by their own beliefs on these issues, then their freedom is severely impaired. A pharmacist should have the liberty to form and follow his own beliefs. If the Final Rule had remained as it were prior to amendment, Illinois would be permitted to force pharmacists to fill morning-after pill prescriptions without delay and without regard to religious objection. What then would have been left of people's belief systems? They would have been nothing more than blank slates upon which the state could

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state may not make the exercise of religion unreasonably costly.'" (quoting Menora v. Ill. High Sch. Ass'n, 683 F.2d 1030, 1033 (7th Cir. 1982))).

[125] ILL. ADMIN. CODE tit. 68, §1330.91(j)(3) (2008).

[126] *Id.* § 1330.91(j)(3)(A).

[127] RU486Facts.org, What is RU-486?, http://www.ru486facts.org/index.cfm?page=whatis (last visited Nov. 29, 2008). The pill works by blocking the hormone needed to continue the pregnancy. *Id.*

write whatever it wanted.[128] Thus, there would be no line drawn to guide a person to live his life in compliance with both his religious beliefs and the law of the land. The Illinois Supreme Court should firmly hold the line that the Illinois Legislature previously drew with IRFRA, and again with the Amended Rule—protecting a pharmacist's right of conscience regardless of the drug or patient. The Final Rule directly violated a pharmacist's right to exercise his religious beliefs in the workplace under the Illinois Religious Freedom Restoration Act without being substantially burdened by the government.

IV. THE EFFECT OF THE AMENDED RULE

On April 16, 2008, the Amended Rule became effective, stating that a pharmacist might conscientiously object to filling an emergency contraceptive prescription and outlining the protocol for dispensing the drug.[129] Although the amendment specifically provides steps for when a pharmacist objects to a request for an emergency contraceptive, pharmacies are now required to use their best efforts in maintaining stock of and in dispensing emergency contraceptives merely because they stock a *general* contraceptive.[130] Nonetheless, the amendment is a step in the right direction because it no longer directly violates a pharmacist's rights.[131]

Pharmacists can now safely object to filling a prescription without fear of revocation of their license as long as their actions are in compliance with the requirements of the Illinois Health Care Right of Conscience Act.[132] But, the fact still remains that the Final Rule violated the pharmacist's rights during the three years that it was in force. While it is uncertain what the Illinois Supreme Court will rule in *Morr-Fitz v. Blagojevich* in determining the consequences for the Final Rule's violation of precedent, the court has the following options:

> Strike down the current Illinois rule that requires pharmacies to dispense emergency contraception[; a]gree with [the] lower courts in ruling against the pharmacy owners because the owners haven't yet been harmed by the rule[; or d]ecide that the owners have legitimate

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[128] *See* ALDOUS HUXLEY, BRAVE NEW WORLD 13–15, 19–22 (1st Harper Perennial Modern Classics ed. 2006). If the state is allowed to have this power over pharmacists it is akin to a state having autocratic power as demonstrated in *Brave New World*. *Id.*

[129] ILL. ADMIN. CODE tit. 68, §1330.91(j)(3) (2008).

[130] *Id.* § 1330(j)(2).

[131] *See supra* Part III. However, as noted previously, the Amended Rule raises concerns of potential discrimination in the hiring process or that an objecting pharmacist's hours will be cut back so that pharmacies can comply with the Amended Rule. *See supra* note 54.

[132] *See supra* analysis in Part III.A.

arguments and send the case back to Sangamon County Circuit Court to rule on those arguments.[133]

The Illinois Supreme Court should hold that the Final Rule was void and unenforceable prior to its amendment, and that any discrimination against a pharmacist during its time on the books violated state law as outlined above. In addition, the supreme court should rule that the Amended Rule needs further amendment to permit a pharmacy to choose whether to stock emergency contraceptives even if they stock contraceptives in general.[134]

Since the Amended Rule is now in effect, the Illinois Supreme Court does not need to require the legislature to amend the Final Rule to protect a pharmacist's right to conscientious objections, unless the court ruled that the Amended Rule did not provide enough protection of a pharmacist's rights. Regarding the Amended Rule's effect on the patients, customers can feel safe with the new protocols in place that steps will be taken to ensure that their request is filled, if not by the pharmacy they entered, then by another pharmacy.[135]

CONCLUSION

Under any of the above rules, the Illinois Supreme Court and state legislature should have held the Final Rule unenforceable *before* its amendment three years later because it directly violated Illinois law. Governor Blagojevich and the Illinois Legislature coerced and imposed a substantial burden upon pharmacists by making them choose between maintaining their religious beliefs and keeping their jobs. As evidenced from the controversy over abortion, many people hold different convictions on this issue. Historically, some situations required the law to protect women's rights—the right to fair wages, the right to obtain an inheritance, and so on. Governor Blagojevich's Machiavellian contraception solution, however, is not one of these situations. It has created more controversy than it has provided assistance. His view that a woman should have the right to get what she wants, when she wants it, caused the government to coerce pharmacists into acting in direct conflict with valid law and their consciences for three years.

Just like a doctor or nurse who can abstain from performing certain medical procedures, a pharmacist should have a remedy; a pharmacist should not be forced simply to dispense whatever someone wants.[136]

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133 Olsen, *supra* note 50.

134 As mentioned previously, the focus of this Note is on pharmacists; however, due to the adverse effect the Amended Rule has on pharmacies, the Amended Rule should be further amended to protect the pharmacies' choice in a free market.

135 ILL. ADMIN. CODE tit. 68, §1330.91(j)(3) (2008).

136 *See supra* note 62 and accompanying text (explaining that legislatures passed laws to protect doctors and nurses who refused to perform abortions).

Pharmacists are not robots, expected to do whatever they are told. They are real people, doing real work. Just because someone holds a conviction and draws a line differently than another person does not mean that the government can inhibit a person's legally protected rights. Before the Amended Rule was implemented three years after the struggle began, Illinois should have followed the precedent established by state law and permitted a pharmacist to refrain from filling a morning-after pill request if it was in clear violation of his or her conscience. Thus, "emergency" should not trump conscience and cause a new line to be drawn in the sand.

Amanda K. Freeman

A DIFFERENT KIND OF LIFE ESTATE: THE LAWS, RIGHTS, AND LIABILITIES ASSOCIATED WITH DONATED EMBRYOS

"[N]arrow is the way, which leadeth unto life . . . ."[1]

"For if a law had been given that could impart life, then righteousness would certainly have come by the law."[2]

Sex was not working. Mr. and Mrs. Jones, like many other couples, had difficulty getting pregnant.[3] Their struggle to achieve pregnancy was a painful experience that occasionally strained their otherwise blissful marriage. Mrs. Jones's cousin, Mr. Peterson, also had difficulty with his wife in achieving pregnancy. Sharing this struggle with each other brought courage and comfort to both couples. The Petersons eventually were successful in achieving pregnancy through *in vitro* fertilization treatments.[4] The embryos that the Petersons used for their pregnancy were created by using Mr. Peterson's sperm and eggs that were donated by an anonymous egg donor. At the time of their treatment, the Petersons signed an egg donor agreement as the "Intended Mother" and the "Intended Father." They did not use all of the embryos that resulted from their treatment, so the remaining embryos were cryopreserved.[5]

After much consideration and because of Mr. and Mrs. Jones's difficulty in getting pregnant, the Petersons donated five cryopreserved embryos to Mr. and Mrs. Jones to assist them in the pregnancy process. The Petersons and the Joneses executed a written donation document; no money was given for the embryos, making it a true donative transfer. After thawing the five embryos, Mr. and Mrs. Jones learned that three of the five embryos were viable, and all three viable embryos were

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1 *Matthew* 7:14 (King James).

2 *Galatians* 3:21 (New International).

3 The people and their stories in this Note are based on a hypothetical situation posed by the Embryo Adoption Awareness Campaign, Problem Presented for Essay Response, http://www.embryolaw.org/winners.asp (last visited Nov. 21, 2008).

4 *In vitro* fertilization is the medical procedure by which egg cells are extracted from a woman's ovaries and fertilized with sperm cells. The fertilization takes place outside of the body; thus it is also known as test-tube conception. After fertilization, the zygote (or embryo, depending on whether the cell division process has advanced to that stage) is inserted into the woman's uterus. If cell division continues and the embryo implants into the uterine wall, pregnancy is achieved. 6 THE NEW ENCYCLOPÆDIA BRITANNICA 276 (15th ed. 2007).

5 Cryopreservation is the "preservation (as of cells) by subjection to extremely low temperatures." Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/cryopreservation (last visited Nov. 21, 2008).

transferred to Mrs. Jones by a licensed fertility clinic. Implantation was a success, and pregnancy was achieved. Mrs. Jones is now six months into the pregnancy.

Mrs. Peterson recently found a copy of the egg donor agreement that she and Mr. Peterson had signed when she received *in vitro* fertilization treatments. The agreement had been arranged three and a half years earlier by an egg donation facility between the Petersons and the anonymous egg donor. Contact between the Petersons and the anonymous egg donor never occurred, and the egg donation facility subsequently went out of business. The following two clauses in the agreement—which the Petersons did not notice at the time of execution of the agreement—likely surprised them in light of their recent embryo donation to Mr. and Mrs. Jones and the resulting pregnancy:

> Egg donor understands that as of the date of the ova retrieval, Intended Mother and Intended Father [Petersons] shall be the owners of the ova and any resulting embryos as joint tenants with rights of survivorship. They shall have complete control and authority over the disposition of the ova and resulting embryos . . . [.]
>
> Notwithstanding the foregoing, the Intended Parents [Petersons] shall not donate, sell or otherwise transfer any donated ova, pre-embryos, or embryos that result from the Procedure to another person or couple (other than a gestational surrogate working with the Intended Parents) for the purpose of conception.[6]

The Petersons' donation of the five cryopreserved embryos to Mr. and Mrs. Jones for the purpose of conception is clearly a violation of the second clause. The second clause limits the Petersons' options in regard to their use of the embryos: the Petersons may (1) personally use the embryos at a later time for conception; (2) donate the embryos for research purposes; or (3) thaw the embryos and have them destroyed. The clause forbids the Petersons from transferring the embryos to any other person or couple for the purpose of conception, whereas the first clause grants to the Petersons unfettered, complete control and authority over the disposition of the embryos as joint tenants with rights of survivorship.

This contradiction between the first clause and the second establishes the foundation for this Note. With the number of cryopreserved embryos in the hundreds of thousands and continually increasing,[7] there is a need for germane guidance that the courts may follow in determining the rights and liabilities associated with embryo

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[6] *Supra* note 3.

[7] David I. Hoffman et al., *Cryopreserved Embryos in the United States and Their Availability for Research*, 79 FERTILITY & STERILITY 1063, 1063–68 (2003); *see also* Liza Mundy, *Souls on Ice: America's Human Embryo Glut and the Unbearable Lightness of Almost Being*, MOTHER JONES, July–Aug. 2006, at 38, 39–40.

donation. Part I of this Note lays out the existing laws that pertain specifically to embryo donation. Part II focuses on existing laws that provide guidance to the courts in interpreting egg donor agreements as they relate to embryo donation. Part III discusses the rights, liabilities, and remedies associated with donated embryos as they relate to the parties under the egg donor agreement.

I. EXISTING EMBRYO DONATION LAWS

Regulations governing the issues involved specifically with embryo donation have arisen both statutorily and judicially. Twelve states have legislatively regulated the issues surrounding embryo donation,[8] and seven states have judicially addressed questions relating to assisted reproduction.[9]

A. Statutory Law

State legislatures in twelve states have specifically regulated aspects of embryo donation.[10] These statutory codes should serve as a model for other states that have not yet adopted such statutory provisions.

Of the twelve states that have specifically regulated embryo donation, six of them have nearly identical provisions.[11] These states have provided that "'[a]ssisted reproduction' means a method of causing pregnancy other than sexual intercourse. The term includes . . . [the] donation of eggs . . . [and the] donation of embryos . . . ."[12] In explicating the parental status—and thus also the parental rights and liabilities—of donors, these states have determined that "[a] donor is not a parent of a

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8 *See* DEL. CODE ANN. tit. 13, §§ 8-102, 8-702 to -703 (Supp. 2006); FLA. STAT. ANN. §§ 742.11, .13–.14, .17 (West 2005); LA. REV. STAT. ANN. §§ 9:121–122, :124, :126–127, :129–130, :132 (2008); N.H. REV. STAT. ANN. §§ 168-B:13, :15 (LexisNexis 2001); N.D. CENT. CODE §§ 14-20-02, 14-20-60 to -61 (Supp. 2007); OHIO REV. CODE ANN. § 3111.97 (LexisNexis Supp. 2008); OKLA. STAT. ANN. tit. 10, § 556 (West 2007); TEX. FAM. CODE ANN. §§ 160.102, .702–.703, .7031 (Vernon 2002 & Supp. 2008); UTAH CODE ANN. §§ 78B-15-102, -702–703 (West 2008); VA. CODE ANN. §§ 20-156, -158 (Supp. 2008); WASH. REV. CODE ANN. §§ 26.26.011, .705, .710 (West 2005); WYO. STAT. ANN. §§ 14-2-402, -902–903 (2007).

9 *See* York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989); Del Zio v. Presbyterian Hosp., No. 74 Civ. 3588, 1978 U.S. Dist. LEXIS 14450 (S.D.N.Y. Nov. 9, 1978); Jaycee B. v. Superior Court, 49 Cal. Rptr. 2d 694 (Ct. App. 1996); A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000); J.B. v. M.B., 783 A.2d 707 (N.J. 2001); Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998); Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992); Litowitz v. Litowitz, 48 P.3d 261 (Wash. 2002).

10 *See supra* note 8.

11 The six states with nearly identical provisions are Delaware, North Dakota, Texas, Utah, Washington, and Wyoming.

12 *See, e.g.*, UTAH CODE ANN. § 78B-15-102 (West 2008). For the five other states' similar statutory section defining assisted reproduction, see *supra* notes 8 and 11.

child conceived by means of assisted reproduction."[13] Thus, any donor of eggs or embryos in these states is restricted from asserting any parental rights, interests, or authority in connection with any child resulting from assisted reproduction. Conversely, any donor of eggs or embryos in these states is not liable to pay child support or assist in the upbringing of any child resulting from assisted reproduction.

These six states also provide regulation establishing the paternity of children resulting from assisted reproduction.[14] Washington's statutory language provides that "[i]f a husband provides sperm for, or consents to, assisted reproduction by his wife . . . he is the father of a resulting child born to his wife."[15] The words "husband" and "wife" are used in Washington, Texas, and Utah's statutes because of each state's preference for the traditional family and marriage being between a man and a woman.[16] Delaware, North Dakota, and Wyoming statutorily establish paternity outside of the marriage context, establishing that "[a] man who provides sperm for, or consents to, assisted reproduction by a woman . . . with the intent to be the parent of her child, is the parent of the resulting child."[17] With paternity being statutorily established, the father in such a case is liable to assist in all parental responsibilities, and he is also granted all the parental rights, interests, and authority in conjunction with the resulting child.

Maternity is established in all six of these states by the same method: "[t]he mother-child relationship is established between a woman and a child by . . . the woman giving birth to the child."[18] Except as provided otherwise in surrogacy cases,[19] the woman who gives birth to the child is considered the mother of the child. She is granted all the parental rights, interests, and authority in connection with the child.[20]

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13 *See, e.g.*, DEL. CODE ANN. tit. 13, § 8-702 (Supp. 2006). For the five other states' similar statutory section restricting a donor's parental status, see *supra* notes 8 and 11.

14 *See* DEL. CODE ANN. tit. 13, § 8-703 (Supp. 2006); N.D. CENT. CODE § 14-20-61 (Supp. 2007); TEX. FAM. CODE ANN. § 160.703 (Vernon 2002); UTAH CODE ANN. § 78B-15-703 (West 2008); WASH. REV. CODE ANN. § 26.26.710 (West 2005); WYO. STAT. ANN. § 14-2-903 (2007).

15 WASH. REV. CODE ANN. § 26.26.710 (West 2005); *see also* TEX. FAM. CODE ANN. § 160.703 (Vernon 2002); UTAH CODE ANN. § 78B-15-703 (West 2008).

16 *Compare supra* note 15, *with supra* note 17.

17 DEL. CODE ANN. tit. 13, § 8-703 (Supp. 2006); N.D. CENT. CODE § 14-20-61 (Supp. 2007); WYO. STAT. ANN. § 14-2-903 (2007). Texas also has a separate statute establishing paternity outside of the marriage context. TEX. FAM. CODE ANN. § 160.7031 (Vernon Supp. 2008).

18 TEX. FAM. CODE ANN. § 160.201 (Vernon 2002); *see also* DEL. CODE ANN. tit. 13, § 8-201 (Supp. 2006); N.D. CENT. CODE § 14-20-07 (Supp. 2007); UTAH CODE ANN. § 78B-15-201 (West 2008); WASH. REV. CODE ANN. § 26.26.101 (West 2005); WYO. STAT. ANN. § 14-2-501 (2007).

19 Consideration of surrogacy cases is beyond the scope of this Note.

20 *See supra* note 18.

The other six states[21] that have statutorily regulated aspects of embryo donation have done so through statutory provisions that are substantially similar to the provisions just discussed. These states include the donation of embryos as a legitimate form of assisted reproduction.[22] They statutorily declare that donors in the context of assisted reproduction are not parents of the resulting child and thus have no parental rights or liabilities in connection with the resulting child.[23] They also statutorily grant the gestating mother and her consenting husband parentage of the child conceived by assisted reproduction, which necessarily includes the rights and liabilities of such parentage.[24]

Of these six states, Louisiana grants to embryos the greatest status and protection. Louisiana's statute grants to the embryo (as a juridical person[25]) certain rights:[26] the embryo can only be used for "the complete development of [a] human";[27] it cannot be sold;[28] it is entitled to identification;[29] it can sue or be sued;[30] if the intended parents are not identified, then the physician acting as an agent of fertilization will be its temporary guardian;[31] if viable, it may not be intentionally destroyed;[32] and it cannot be owned and is owed a high duty of care.[33] These protections are far reaching for the embryo.

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[21] The other six states that have substantially similar statutory provisions regulating aspects of embryo donation are Florida, Louisiana, New Hampshire, Ohio, Oklahoma, and Virginia.

[22] *See* FLA. STAT. ANN. §§ 742.11, .13–.14, .17 (West 2005); LA. REV. STAT. ANN. §§ 9:121–:122, :124, :126–:127, :129–:130, :132 (2008); N.H. REV. STAT. ANN. §§ 168-B:13, :15 (LexisNexis 2001); OHIO REV. CODE ANN. § 3111.97 (LexisNexis Supp. 2008); OKLA. STAT. ANN. tit. 10, § 556 (West 2007); VA. CODE ANN. §§ 20-156, -158 (Supp. 2008).

[23] *See id.* New Hampshire, however, does not statutorily address parentage of donors specifically in embryo donation cases. *See* N.H. REV. STAT. ANN. § 168-B:13 (LexisNexis 2001).

[24] *See supra* note 22. New Hampshire provides for women who do not have a husband to participate in assisted reproduction. *See* N.H. REV. STAT. ANN. § 168-B:13 (LexisNexis 2001).

[25] LA. REV. STAT. ANN. § 9:124 (2008). A juridical person is "a being, real or imaginary, who for the purpose of legal reasoning is treated more or less as a human being." BLACK'S LAW DICTIONARY 1178 (8th ed. 2004).

[26] LA. REV. STAT. ANN. § 9:121 (2008).

[27] *Id.* § 9:122.

[28] *Id.*

[29] *Id.* § 9:124.

[30] *Id.*

[31] *Id.* § 9:126.

[32] *Id.* § 9:129.

[33] *Id.* § 9:130.

As a result of the collection and corroboration of the existing statutes in the above-mentioned twelve states,[34] the rights and liabilities of donors, men, women, fathers, and mothers are established in the context of embryo donation.

B. Case Law

Courts in seven states have addressed questions in relation to the disposition of embryos.[35] These judicial decisions explicate the policies of the states; but of these seven states, only two of them have statutorily regulated embryo donation.[36]

1. New York—*Del Zio v. Presbyterian Hospital*

The court in *Del Zio v. Presbyterian Hospital* shed some light on considerations pertaining to embryos.[37] Mr. and Mrs. Del Zio desired to have a child together.[38] Because of medical problems, Mrs. Del Zio could not achieve pregnancy, so she underwent three operations.[39] The operations did not cure the problem and the Del Zios could not naturally become pregnant.[40] Their physician, Dr. Sweeney, recommended an innovative procedure—*in vitro* fertilization.[41] After obtaining consent from the Del Zios and undergoing much preparation, Dr. Sweeney performed the procedure with the help of Dr. Shettles, a physician at the defendant hospital.[42] Mrs. Del Zio's egg was withdrawn, and Mr. Del Zio's semen was obtained; the two materials were prepared in a culture and placed in an incubator at the defendant hospital, where it was to remain for four days.[43]

Dr. Vande Wiele, an employee of the hospital and supervisor of Dr. Shettles, discovered the culture and its purpose the day after the test-tube was placed in the incubator.[44] He felt it was his ethical duty to destroy the culture, and after consulting with hospital officials, he "effectively terminated the procedure and destroyed the culture."[45] Dr. Vande Wiele informed Dr. Shettles, who in turn notified Dr. Sweeney

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[34] *See supra* notes 10–33 and accompanying text.

[35] *See supra* note 9.

[36] The two states are Virginia and Washington. *See* VA. CODE ANN. §§ 20-156, -158 (Supp. 2008); WASH. REV. CODE ANN. §§ 26.26.011, .705, .710 (West 2005).

[37] No. 74 Civ. 3588, 1978 U.S. Dist. LEXIS 14450 (S.D.N.Y. Nov. 9, 1978).

[38] *See id.* at *1.

[39] *Id.* at *1–2.

[40] *Id.* at *2.

[41] *Id.*

[42] *Id.* at *2–3.

[43] *Id.* at *3.

[44] *Id.*

[45] *Id.* at *3.

that the procedure and culture had been destroyed.[46] Dr. Sweeney reported to the Del Zios that the hospital had destroyed their culture and that he believed that this procedure was their last chance to become pregnant.[47] Evidence showed that as a result of the hospital's actions and the loss of opportunity to become pregnant, the Del Zios suffered severe emotional distress.[48] They brought a tort action for intentional infliction of emotional distress and wrongful conversion against the hospital and Dr. Vande Wiele.[49] The jury found for the Del Zios on the intentional infliction of emotional distress claim, but found for the defendants on the wrongful conversion claim.[50]

Presumably, the jury in the *Del Zio* case found for the Del Zios on the emotional distress claim because they viewed the embryo as the only opportunity for the Del Zios to become pregnant and hopefully give birth to a child. Viewing the embryo as the potential for human life is also consistent with the jury's finding for the defendants on the wrongful conversion claim, a claim where it must be proven that "one who, without authority, intentionally exercis[ed] control over the *property* of another and thereby interfere[d] with the other's right of possession . . . ."[51] Presumably, the jury considered the embryo to be human life or the potential for human life, rather than property. Therefore, the jury denied the Del Zios' *property* claim of wrongful conversion.[52]

2. New York—*Kass v. Kass*

Twenty years later, the Court of Appeals of New York, in the case of *Kass v. Kass*, determined that embryos are not considered "persons" for constitutional purposes and that the disposition of embryos is controlled by the contractual agreements of the parties.[53] In *Kass*, the appellant and the respondent were married in 1988 and almost immediately tried to become pregnant.[54] After unsuccessful attempts at natural pregnancy, they decided to attempt to have a child through *in vitro* fertilization procedures.[55]

After several unsuccessful *in vitro* attempts, the couple tried a final procedure, this time involving cryopreservation of any excess embryos

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46 *Id.* at *4.
47 *Id.*
48 *Id.* at *4–5.
49 *Id.* at *1.
50 *Id.* at *11.
51 *Id.* at *10–11 (emphasis added).
52 *Id.* at *11.
53 Kass v. Kass, 696 N.E.2d 174, 179 (N.Y. 1998).
54 *Id.* at 175.
55 *Id.* at 175–76.

that were not transferred in an attempt to achieve pregnancy.[56] Prior to the procedure, the couple signed a number of consent forms determining the disposition of any excess embryos not transferred.[57] The signed consent forms determined that excess eggs would be inseminated and cryopreserved; ownership of the embryos would be determined in a property settlement if a divorce occurred; and if the couple no longer desired pregnancy or could not decide on the disposition, the frozen embryos would be donated to research.[58] After the final attempted procedure was unsuccessful, frozen embryos remained and the couple initiated a divorce proceeding.[59]

The appellant wife typed an uncontested divorce agreement that included a provision that the wife and husband would not claim custody of the embryos.[60] Shortly thereafter, the wife commenced an action to claim sole custody of the embryos in hopes of future implantation and birth of a child.[61] The husband opposed and counterclaimed for specific performance of the parties' agreement found in the consent forms—donating the embryos to research.[62]

In determining the outcome of the case, the court stated that the relevant inquiry was who had dispositional authority over the embryos.[63] The court said that "[b]ecause that question is answered in this case by the parties' agreement, for purposes of resolving the present appeal we have no cause to decide whether the [embryos] are entitled to 'special respect.'"[64] The court determined that honoring the parties' agreement as set forth in the consent forms would most closely effectuate the bargained for intentions of the parties.[65] The consent forms signed by the wife and husband controlled the disposition of the embryos—they were donated to research.[66]

Because human life cannot be exchanged or disposed of through contractual agreements, the court, in effect, leaned away from a life or potential for life view of embryos and toward a view of embryos as property. The court did not attempt to discuss the possibility that

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[56] *Id.* at 176–77.
[57] *Id.* at 176.
[58] *Id.* at 176–77.
[59] *Id.* at 177.
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.* at 179.
[64] *Id.* (citations omitted).
[65] *Id.* at 180–81.
[66] *Id.* at 182.

embryos could be something other than property entitled to "'special respect.'"[67]

3. Virginia—*York v. Jones*

Property interests in an embryo were considered in *York v. Jones*.[68] Mr. and Mrs. York were married in 1983 and soon thereafter attempted to become pregnant.[69] Because of problems with Mrs. York's fallopian tubes, they were unable to achieve pregnancy.[70] They underwent the *in vitro* fertilization process after doctors at the Jones Institute in Virginia advised that the procedure would be their best option for achieving pregnancy.[71] They attempted the procedure with the Jones Institute on four separate occasions.[72] All four attempts failed to produce a pregnancy, but before the last attempt, the Yorks consented that if more than five embryos were produced for immediate transfer, any excess embryos would be cryopreserved for future attempts at pregnancy.[73]

Six embryos resulted from the final procedure.[74] Five of the embryos were immediately transferred to Mrs. York, but pregnancy was not achieved.[75] The one extra embryo was cryopreserved for the Yorks to use later to attempt pregnancy.[76] In their contract with the Jones Institute, the Yorks agreed that:

> Should we for any reason no longer wish to attempt to initiate a pregnancy, we understand we may choose one of three fates for our pre-zygotes that remain in frozen storage. Our pre-zygotes may be: 1) donated to another infertile couple (who will remain unknown to us) 2) donated for approved research investigation 3) thawed but not allowed to undergo further development.[77]

One year after the embryo was cryopreserved, the Yorks requested that their embryo be transferred from the Jones Institute to a Los Angeles clinic where the embryo would be thawed and transferred to Mrs. York through *in vitro* fertilization.[78] After the Yorks' request to transfer the embryo was rejected by the Jones Institute, their doctor also

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67 *Id.* at 179 (citation omitted).

68 717 F. Supp. 421 (E.D. Va. 1989).

69 *Id.* at 423.

70 *Id.*

71 *Id.*

72 *Id.* at 423–24.

73 *Id.* at 424.

74 *Id.*

75 *Id.*

76 *Id.*

77 *Id.*

78 *Id.*

requested the transfer.[79] Again, the Jones Institute refused to transfer the embryo to a different clinic.[80]

Because of the Jones Institute's refusal to transfer the embryo to the Los Angeles clinic, the Yorks called upon the court to provide declaratory, injunctive, and compensatory relief.[81] The court focused on the contractual and bailor-bailee relationship that existed between the Yorks and the Jones Institute to determine the disposition of the embryo.[82] The court reasoned that a bailment was created between the parties by their cryopreservation agreement.[83] The court explained:

> [A]ll that is needed [to create a bailment] "is the element of lawful possession . . . and duty to account for the thing as the property of another . . . ." [A] bailment relationship imposes on the bailee, when the purpose of the bailment has terminated, an absolute obligation to return the subject matter of the bailment to the bailor. . . . [O]bligation to return the property is implied from the fact of lawful possession of the personal property of another.[84]

Though not explicitly mentioning a bailment, the Jones Institute acknowledged the bailor-bailee relationship through its references in the agreement to the embryos as the property of the Yorks and its duty to account for the embryos.[85] In such a relationship, the Yorks, not the Jones Institute, had the principal responsibility of deciding the disposition of the embryo.[86]

The Jones Institute argued that the Yorks were limited to the three fates described in the agreement, which did not include transferring the embryo to a different facility.[87] Their argument, however, ignored the limiting condition on the three fates: the three-fate limitation applied only if the Yorks no longer desired pregnancy.[88] This limiting condition was not present; the Yorks wanted the embryo transferred to the Los Angeles clinic in order to attempt pregnancy.[89]

In light of the bailor-bailee relationship, the court easily determined that the Yorks, the bailor biological parents, had dispositional authority that trumped the possessory interest of the Jones Institute, the bailee

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[79] *Id.*

[80] *Id.*

[81] *Id.* at 423.

[82] *Id.* at 425–27.

[83] *Id.* at 425.

[84] *Id.* (quoting Crandall v. Woodard, 143 S.E.2d 923, 927 (Va. 1965)) (citing 8 AM. JUR. 2d *Bailments* § 178 (1980)).

[85] *Id.* at 425.

[86] *Id.* at 426.

[87] *Id.* at 427.

[88] *Id.*

[89] *Id.* at 424.

storage facility.[90] The court denied all of the Jones Institute's motions to dismiss the Yorks' claims.[91]

Under the bailor-bailee analysis, the court essentially considered the embryo as property that could be subject to a simple property dispute with resolution borrowing from principles of property and contract law.

4. Tennessee — *Davis v. Davis*

The case of *Davis v. Davis* is similar to *Kass v. Kass* in that the parties were a husband and wife who divorced and could not agree on the disposition of their remaining cryopreserved embryos.[92] The important difference between the cases is that, unlike in *Kass*, a contract did not exist between Mr. and Mrs. Davis regarding the disposition of any excess cryopreserved embryos.[93] Because the parties did not execute a written agreement, the court had to consider alternative legal doctrines to determine the rights of the parties regarding the disposition of the embryos. The court declined to rely on implied contractual obligations to determine the outcome of the case.[94] Instead, the court considered principles of constitutional law, existing state public policy regarding unborn life, scientific knowledge in relation to reproductive technology, and ethical considerations in response to such scientific knowledge.[95]

The Davises were married in 1980 and shortly thereafter became pregnant.[96] Their pregnancy did not result in the birth of a child because the pregnancy was tubal,[97] thus resulting in the removal of Mrs. Davis's right fallopian tube.[98] After four subsequent tubal pregnancies, she was unable to become pregnant naturally.[99] Mr. and Mrs. Davis attempted to adopt a child, but the birth mother withdrew her consent to the adoption.[100] Other options for adoption were too expensive, so the Davises turned to *in vitro* fertilization as a final attempt to become parents.[101]

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90 *Id.* at 426–27.

91 *Id.* at 427.

92 Davis v. Davis, 842 S.W.2d 588, 589 (Tenn. 1992).

93 *Id.* at 590.

94 *Id.* at 598.

95 *Id.* at 591.

96 *Id.*

97 A tubal pregnancy is an "ectopic pregnancy in a fallopian tube." Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/tubal%20 pregnancy (last visited Nov. 21, 2008).

98 *Davis*, 842 S.W.2d at 591.

99 *Id.*

100 *Id.*

101 *Id.*

After six failed attempts to achieve pregnancy by means of *in vitro* fertilization, the Davises decided to wait to go through the procedure again until the clinic was prepared to cryopreserve any excess embryos.[102]

Once the clinic was prepared to cryopreserve any excess embryos, the Davises moved forward with another *in vitro* fertilization cycle.[103] They did not sign any consent forms, and there was "no discussion, let alone an agreement, concerning the disposition [of the embryos] in the event of a contingency such as divorce."[104] Nine embryos were produced from this cycle; some of them were immediately transferred to Mrs. Davis, while others were cryopreserved for future use.[105] Again, pregnancy was not achieved through this cycle.[106] Two months later, Mr. Davis filed for divorce.[107]

Throughout their separation and divorce, Mrs. Davis sought dispositional control of the couple's cryopreserved embryos.[108] She initially wanted the embryos in order to attempt pregnancy again.[109] Later, she sought the embryos so that she could donate them to another childless, infertile couple.[110] Mr. Davis was not sure that he wanted to become a parent outside the marriage relationship, but he was sure he did not want to donate the embryos to another couple.[111] His preference was to have the embryos discarded.[112]

The trial court considered the embryos persons, and thus, the only option was to permit the embryos to be implanted and potentially develop into children.[113] In turn, the trial court awarded custody to Mrs. Davis because she was the party seeking this outcome for the embryos.[114] The appellate court rejected the finding that embryos are persons.[115] While not explicitly holding that embryos are property, the appellate court nonetheless gave the Davises a shared interest in the embryos, implying that "it is in the nature of a property interest."[116] Recognizing

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[102] *Id.* at 591–92.
[103] *Id.* at 592.
[104] *Id.* at 592 & n.9.
[105] *Id.* at 592.
[106] *Id.*
[107] *Id.*
[108] *Id.* at 589–90.
[109] *Id.* at 589.
[110] *Id.* at 590.
[111] *Id.* at 589–90.
[112] *Id.* at 590.
[113] *Id.* at 589.
[114] *Id.* at 594.
[115] *Id.*
[116] *Id.* at 595–96.

that Mr. Davis had a constitutional right not to become a parent, the appellate court remanded the case for entry of an order giving the Davises joint control over the disposition of the embryos.[117] Ultimately, the Supreme Court of Tennessee held that embryos "are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life."[118]

The Supreme Court of Tennessee cited many state statutes and cases to explain the state's policy that because of the lack of personhood, protection of the embryos was not a state interest that could justify overriding the dispositional control of the Davises.[119] In great detail, the court explained the state and federal constitutional rights of privacy, which include individual, parental, and procreational autonomy.[120] While explaining the right of procreational autonomy, the court recognized "two rights of equal significance—the right to procreate and the right to avoid procreation."[121]

Because no prior agreement existed regarding the disposition of the embryos, the court weighed the competing interests of Mr. and Mrs. Davis.[122] On the one hand, Mr. Davis did not want to become the father of a child who would not live with both parents.[123] If Mrs. Davis was allowed to donate the embryos to another couple to bear a child, it would impose upon Mr. Davis unwanted genetic parenthood and the accompanying psychological and financial obligations.[124] On the other hand, Mrs. Davis wanted her previous efforts in producing the embryos to be of value.[125] She wanted to donate the embryos to another couple and enable them to achieve pregnancy so that the difficulties of the *in vitro* fertilization procedures she experienced would not be futile.[126] The court conceded that permitting Mr. Davis to destroy the embryos to avoid unwanted parenthood would not be "an insubstantial emotional burden" on Mrs. Davis, but the court determined that Mr. Davis's interest in avoiding unwanted parenthood outweighed the interest of

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[117] *Id.* at 589.

[118] *Id.* at 597.

[119] *Id.* at 594–95, 597, 602 (citations omitted). "[Tennessee]'s interest in potential human life is insufficient to justify an infringement on the gamete-providers' procreational autonomy." *Id.* at 602.

[120] *Id.* at 598–603.

[121] *Id.* at 601.

[122] *Id.* at 604.

[123] *Id.*

[124] *Id.* at 603.

[125] *Id.* at 604.

[126] *Id.*

Mrs.[127] Davis in donating the embryos to help another infertile couple become pregnant.[128] Thus, Mr. Davis's desire to avoid parenthood was honored.

While introducing the facts and history of the dispute, the court made mention of important factors, or the lack thereof, in relation to the disposition of cryopreserved embryos:

> [I]t is important to note the absence of two critical factors that might otherwise influence or control the result of this litigation: When the Davises signed up for the [*in vitro* fertilization] program . . . they did not execute a written agreement specifying what disposition should be made of any unused embryos that might result from the cryopreservation process. Moreover, there was at that time no Tennessee statute governing such disposition, nor has one been enacted in the meantime.[129]

The court recognized the controlling influence that either state statutes or contractual agreements would have on the dispositional outcome of cryopreserved embryos, thus reducing the burden of litigation and the number of unanswered questions in such cases.

5. Other Cases

The Massachusetts case of *A.Z. v. B.Z.* was a dispute over the disposition of embryos between a husband and wife that were separated and then divorced.[130] After determining that the parties' written instruments were unenforceable, the court used constitutional and public policy rationale similar to that used in *Davis* to determine the disposition of the embryos, affirming the issuance of a permanent injunction prohibiting the wife from using the embryos was deemed necessary to protect the husband's overriding procreative right to avoid parenthood.[131] In summary, the court stated, "[a]s a matter of public policy, we conclude that forced procreation is not an area amenable to judicial enforcement."[132]

The case of *J.B. v. M.B.* from New Jersey is markedly similar to *A.Z. v. B.Z.*[133] The dispute in *J.B.* was between a divorced couple who could not agree on the disposition of their cryopreserved embryos.[134] The court resorted to constitutional and public policy grounds for determining the

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[127] *Id.*

[128] *Id.*

[129] *Id.* at 590.

[130] 725 N.E.2d 1051, 1053 (Mass. 2000).

[131] *Id.* at 1052, 1056–59.

[132] *Id.* at 1057–58.

[133] J.B. v. M.B., 783 A.2d 707 (N.J. 2001).

[134] *Id.* at 710.

disposition of the embryos.[135] After balancing the wife's right to avoid parenthood against the husband's right to father children, and in light of the husband's fertility and ability to procreate, the court found that the wife's interest was more deserving of protection and granted her wish that the embryos be destroyed.[136] The court, citing *Davis*, agreed that "the scales '[o]rdinarily' would tip in favor of the right not to procreate if the opposing party could become a parent through other reasonable means."[137]

Washington's Supreme Court was also called upon to determine the disposition of the cryopreserved embryos of a divorced couple who had a cryopreservation agreement in the case of *Litowitz v. Litowitz*.[138] The Litowitzes entered into a cryopreservation agreement with a storage clinic, which provided in part that if their embryos had been maintained at the clinic for five years after the initial date of cryopreservation and the Litowitzes did not request a storage extension period, the embryos would be thawed but would not undergo further development.[139] In other words, after five years of storage, absent a storage extension request, the embryos would be destroyed and discarded.

In their divorce action, the Litowitzes could not reach an agreement regarding the disposition of the embryos.[140] Mr. Litowitz wanted to put the embryos up for adoption.[141] Mrs. Litowitz wanted to implant the embryos in a surrogate mother so that she could personally raise any resulting child as her own.[142] The court based its decision "solely upon the contractual rights of the parties under the . . . cryopreservation [agreement]."[143] The court determined that the five-year storage period had expired and that if the embryos had not already been destroyed by the clinic, thawing and discarding the embryos would be proper under the terms of the cryopreservation agreement.[144] In the absence of any factual determination whether the embryos still existed, the court declined to disturb the clinic's contractual dispositional authority over the embryos despite the contrary desires of the intended parents.[145]

In the California case of *Jaycee B. v. Superior Court*, the intended father under a gestational surrogacy contract tried to avoid paying child

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[135] *Id.* at 715–19.

[136] *Id.* at 716–20.

[137] *Id.* at 716 (citing Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992)).

[138] 48 P.3d 261 (Wash. 2002).

[139] *Id.* at 263–64.

[140] *Id.* at 270–71.

[141] *Id.* at 264.

[142] *Id.*

[143] *Id.* at 271.

[144] *Id.*

[145] *Id.* at 269, 271.

support to the intended mother of the resulting child.[146] In a usual surrogacy agreement, the intended parents provide the eggs and sperm, and thus are also the genetic parents.[147] Their resulting embryos are then implanted in a surrogate mother who carries and delivers the child.[148] After birth, the child is turned over to the genetic, intended parents, and the surrogate mother has no rights or liabilities to the child.[149] In this case, the intended parents entered into a written contract with a surrogate mother and her husband.[150] The surrogate mother had implanted within her an embryo that resulted from *in vitro* fertilization of an egg and sperm from anonymous donors, not from the intended parents.[151] The procedure successfully resulted in the birth of a child, and the child was released from the hospital to the intended mother under the contract.[152]

Approximately one month prior to the birth of the child, the intended parents separated and a divorce proceeding commenced.[153] The wife sought temporary child support from the husband until a final adjudication of the divorce proceeding could be reached.[154] "The husband was willing to stipulate that he had signed the contract," but he claimed that the family law court lacked jurisdiction to award temporary child support.[155] The appellate court explained that "the most likely *legal* result based on the undisputed fact of [the husband]'s signing the surrogacy agreement is that [the husband] will be held to be Jaycee's father."[156] Further, the court stated, "it is enough that [the husband] admits he signed the surrogacy agreement which, for all practical purposes, *caused* Jaycee's conception every bit as much as if he had caused her birth the old fashioned way."[157] Because of the existence of the surrogacy contract and the husband's stipulation that he had signed it, the wife was able to make a sufficient showing that the husband would be found to be the father of the child.[158] As a result the appellate court affirmed the family court's jurisdiction to award temporary child

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[146] 49 Cal. Rptr. 2d 694, 696 (Ct. App. 1996).

[147] *Id.* at 695.

[148] *Id.*

[149] *See, e.g.*, Johnson v. Calvert, 851 P.2d 776, 785–87 (Cal. 1993) (holding that surrogate mother had no parental rights under either California or constitutional law).

[150] *Jaycee B.*, 49 Cal. Rptr. 2d at 696.

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.* at 702.

[157] *Id.*

[158] *Id.* at 696, 702.

support to the wife until final adjudication could be reached regarding the husband's parenthood.[159]

6. Summary of Case Law

Resulting from the case law in these seven states are a number of approaches to determine the rights and liabilities of the parties. These approaches fall generally within two categories: first, where no contract exists or an existing contract is unenforceable as repugnant to public policy, constitutional interests of the parties are balanced generally in favor of the party seeking to avoid parenthood; second, written contracts between the parties that manifest the parties' previous intent will control the rights and liabilities of the parties.

II. LAWS THAT ASSIST IN INTERPRETING AGREEMENTS AS THEY RELATE TO EMBRYO DONATION

Where statutes regulating embryo rights have not been enacted, courts can look to other states' statutory regulations and case law, as well as legal principles from other areas of law, to interpret egg donor agreements in relation to embryo donation. In the Petersons' case,[160] principles from property, contract, and constitutional law can shed light on the rights and liabilities of the parties implicated in the egg donor agreement.

A. Property Law

Laws regarding bailment are germane to the Petersons' contract with the anonymous egg donor and the egg donation facility. The bailment relationship requires that the bailee exercise due care when in possession of the bailor's property; when the bailor requests that the property be returned, the bailee must return the property.[161] The bailor, the true owner of the property, has dispositional control of the property.[162] The Petersons, as the true and full owners of the embryos under the egg donor agreement, should have full dispositional authority over the embryos.

Secondly, the principle of free alienation of property can be of help in determining the parties' rights and liabilities. John Gray, in his treatise *Restraints on the Alienation of Property*, stated, "A condition or conditional limitation on alienation attached to a transfer of the entire

[159] *Id.* at 696–97.

[160] Embryo Adoption Awareness Campaign, *supra* note 3.

[161] *See* discussion *supra* Part I.B.3.

[162] *See id.*

interest in personalty, is as void as if attached to a fee simple in land."[163] More directly to the point, Gray stated, "[A]n absolute interest in personalty cannot have a condition against alienation attached to it."[164] Further, "the right of transfer is a right of property, and if another has the arbitrary power to forbid a transfer of property by the owner, that amounts to an annihilation of property."[165] Central, then, to the bundle of property rights is the right of alienation.

The Petersons contracted with the egg donor, and the egg donor facility conveyed the eggs to the Petersons as "the owners of the ova and any resulting embryos," giving them "complete control and authority over the disposition of the ova and resulting embryos."[166] But the second clause put a restraint on the alienation rights of the Petersons despite their "complete control and authority"; they were not to "donate, sell or otherwise transfer any donated ova . . . or embryos . . . to another person . . . for the purpose of conception."[167] Such a restraint is repugnant to the principle of free alienation of property and thus should be held invalid. The Petersons should be permitted to freely donate the resulting embryos to another couple for the purpose of conception.

B. Contract Law

Generally, contracts that are freely entered into will be enforceable between the parties to the contract. But courts will not enforce the agreements of private contracting individuals when those agreements are violative of public policy or constitutional rights.[168] Contracts that create or terminate familial relationships, or place unreasonable restraints on trade, are often found to violate public policy or constitutional rights and thus are unenforceable.[169]

The Supreme Judicial Court of Massachusetts declared, "As a matter of public policy, we conclude that forced procreation is not an area amenable to judicial enforcement. It is well established that courts will not enforce contracts that violate public policy."[170] The Supreme

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[163] JOHN CHIPMAN GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY 15 (Boston, University Press 1883).

[164] *Id.* at 16.

[165] Penthouse Props., Inc. v. 1158 Fifth Ave., Inc., 11 N.Y.S.2d 417, 422 (App. Div. 1939) (quotation omitted).

[166] Embryo Adoption Awareness Campaign, *supra* note 3.

[167] *Id.*

[168] *See* A.Z. v. B.Z, 725 N.E.2d 1051 (Mass. 2000); *see also* J.B. v. M.B., 783 A.2d 707 (N.J. 2001).

[169] *See, e.g.*, *A.Z.*, 725 N.E.2d at 1057–58; *J.B.*, 783 A.2d at 717–20; *see also* Sherman Act, 15 U.S.C. §§ 1–7 (2000 & Supp. V 2006); Clayton Act, 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53 (2000).

[170] *A.Z.*, 725 N.E.2d at 1057–58.

Court of New Jersey added, "[T]he laws of New Jersey also evince a policy against enforcing private contracts to enter into *or terminate familial relationships*."[171] The restrictive clause in the Petersons' egg donor agreement would effectively require Mrs. Jones to terminate her pregnancy that resulted from the Petersons' donation of embryos. Such a result is repugnant to public policy, and as such, the restrictive clause of the agreement should be unenforceable as violative of public policy.

"A bargain in restraint of trade is illegal if the restraint is unreasonable."[172] In effect, the egg donor agreement's restrictive clause is an unreasonable restraint of trade as an unreasonable non-competition clause benefiting the egg donation facility. The only party to benefit from the restrictive clause is the facility. The anonymous egg donor has been compensated for her services, and her rights and liabilities to the eggs and any resulting embryos or children have been terminated by the agreement. Reserving any rights, liabilities, or benefits for the anonymous egg donor would "burden her with 'responsibilities' she never contemplated and [would be] directly 'contrary to her expectations.'"[173] The restrictive clause does not benefit the Petersons because it places limitations on their ability to transfer any embryos.

In effect, the clause requires that services and the resulting payment for embryo transfer and conception must be solely performed and collected by the egg donation facility, similar to what the Jones Institute was forbidden to do in *York v. Jones*.[174] By limiting the restriction to the prohibition of transferring the embryos to another couple *for conception*, the facility's intent to deprive any other of receiving a benefit is made clear. By coupling this restriction against transferring for the purpose of conception with the restriction against *donating* the embryos, the restrictive clause becomes unreasonable. If the Petersons were prohibited only from *selling* the embryos for the purpose of conception, such a restriction might be found reasonable and thus enforceable. But because the restriction includes a prohibition against donation, the restrictive clause is unreasonable and unenforceable.

Even if such a restraint of trade was found to be reasonable and enforceable, the purpose of the restraint no longer existed when the egg donation facility went out of business. At such time, the restrictive clause against transferability should have become void.

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[171] *J.B.*, 783 A.2d at 717 (emphasis added).

[172] RESTATEMENT (FIRST) OF CONTRACTS § 514 (1932).

[173] Jaycee B. v. Superior Court, 49 Cal. Rptr. 2d 694, 701 (Ct. App. 1996) (quoting Johnson v. Calvert, 851 P.2d 776, 783 (Cal. 1993)).

[174] *See* discussion *supra* Part I.B.3.

Additionally, because the egg donation facility has subsequently gone out of business since the time the agreement was executed, the Petersons should be discharged from performing the terms of the contract. The circumstances have changed dramatically, causing an unanticipated termination of the relationship between the Petersons and the egg donation facility; and because the egg donor was anonymous and already compensated, continued performance of the agreement should not be required of the Petersons.

C. Constitutional Law

While constitutional protections are not directly at issue in the Petersons' situation because an egg donation facility, not a governmental agency, is attempting to restrict them, some constitutional principles are helpful in understanding the relationship of the parties. The privacy rights of individuals, specifically procreational autonomy, were extensively discussed in *J.B. v. M.B.*[175] Individuals have the right to make personal, intimate decisions regarding whether to marry and have children; the choice of parenthood is reserved for the individual.[176]

This privacy right is codified in New Hampshire in the context of surrogacy contracts: "There shall be no specific performance for a breach by the surrogate of a surrogacy contract term that . . . [r]equires her to become impregnated . . . [r]equires her to have an abortion[] or . . . [f]orbids her to have an abortion."[177]

Whereas the Petersons have already donated their embryos to Mr. and Mrs. Jones, and Mrs. Jones is now pregnant as a result of implanting the donated embryos, compelling the termination of the pregnancy against the will of Mrs. Jones is impermissible. Requiring such would be an unconscionable violation of her privacy rights.

III. THE RIGHTS, LIABILITIES, AND REMEDIES ASSOCIATED WITH DONATED EMBRYOS

Mr. and Mrs. Jones and Mr. and Mrs. Peterson, the parties involved in the egg donor agreement and subsequent transfer of embryos, each have differing rights, liabilities, and remedies at the various stages of the donor and transfer process. When the Petersons executed the initial egg donor agreement, they became the full owners of the eggs and resulting embryos. As such, they enjoyed the rights of ownership, possession, enjoyment, exclusive use, and transfer. They were liable to use reasonable care. These rights and liabilities, which attached to the

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[175] 783 A.2d 707, 715–17 (N.J. 2001).

[176] *See* Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma, 316 U.S. 535 (1942); *J.B.*, 783 A.2d at 715–17.

[177] N.H. REV. STAT. ANN. § 168-B:27 (LexisNexis 2001).

five embryos, transferred to the Joneses as a result of the donative transfer of the embryos. Prior to receiving the embryos from the Petersons, Mr. and Mrs. Jones had no rights or liabilities relating to the embryos or eggs. After the embryos were transferred to Mrs. Jones and implantation occurred, full rights and liabilities vested in her and her husband. They enjoy the rights of ownership, possession, enjoyment, exclusive use, and bodily integrity. They also enjoy the right of privacy. The only liability Mr. and Mrs. Jones should have is that of reasonable treatment of the implanted embryo.

The anonymous egg donor had privacy rights, ownership rights, and the right to bodily integrity in relation to her eggs prior to donating the eggs. In the agreement, the egg donor consented and intended to relinquish all her rights and liabilities as a genetic parent. Being anonymous, she had no intention of having any connection to the eggs or any resulting embryos or children. When she executed the contract, she gave up her rights and liabilities to the eggs in exchange for compensation for her services. In the unusual case that she brings a suit against the Joneses or the Petersons, no remedy will be available to her because specific performance and an injunction are impermissible after the pregnancy has occurred. Further, she has already been reasonably compensated for her services and therefore she may not receive money damages.

The egg donation facility's only rights were monetary compensation for their services and the right of possession until the owner requested the eggs or embryos. The facility is obligated to use reasonable care in storing, preserving, and transferring the eggs and embryos. Similar to the egg donor's remedies, specific performance and an injunction are not available. Expectation, reliance, and restitution damages may not be awarded because the facility has gone out of business and it was already paid for the services that it had previously provided.

In this unique situation, no remedy would be legally sound or equitable, which strengthens the argument that an unlimited restriction against donating the embryos to another couple for conception should be unenforceable.

CONCLUSION

Difficult questions arise when legal disputes involve procreation, marriage, and family relationships. In the case of embryo donation, some states have attempted to settle the dispute by looking at the agreement between the parties and strictly adhering to the dispositional intent found therein. Other states solely consider constitutional and public policy grounds when determining the dispositional outcome of the dispute. Because of the weight of the decisions that control parenthood and embryo donation, parties considering embryo donation or transfer

deserve clarity and uniformity so that they can fully understand their relationships, rights, and liabilities before proceeding. Clarity and uniformity can be provided through the enactment of state statutory regulations that are similar to the few existing state statutes that control embryo donation.[178] The existing state statutes, however, lack regulation concerning the status, rights, and liabilities of donation facilities. With the addition of legislation determining that facilities are only bailees with no dispositional control superseding the intended parents, clarity and uniformity through state statutes would be available to donors, donation facilities, and intended parents.

Jonathan Penn

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[178] *See* discussion *supra* Part I.A.

THE REGENT UNIVERSITY LAW LIBRARY: *THE FIRST THIRTY YEARS*

*Charles H. Oates**

INTRODUCTION

In anticipation of the 30th anniversary of the Regent University Law Library (the "Law Library") in 2009,[1] numerous festivities and commemoratives are planned. It seems fitting that a historical account of its beginnings and continuum should be part of the celebration.

The Law Library's development can be traced through three distinct periods that closely parallel those of the School of Law. The beginning years—from 1979 through 1985—can be characterized as a time of struggle, like the pangs of a prolonged birth.[2] Although it began with adequate facilities and an admirable collection for a new school, the Law Library suffered through fluctuating finances and inadequate staffing.[3] The period from 1986 through 1997 was a time of transition.[4] The most recent period of 1998 through the present can be identified with maturation and stability.[5]

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1 The Law Library had its genesis in 1979 as the O.W. Coburn Law Library in Tulsa, Oklahoma. O.W. Coburn Sch. of Law, Oral Roberts Univ., American Bar Association Self-Study 15–17, 122 (Spring 1984) [hereinafter O.W. Coburn 1984 Self-Study] (on file with the Regent University Law Review).

2 *See infra* Part I.

3 Report from Charles A. Kothe, Dean, O.W. Coburn Sch. of Law, to the Faculty of Oral Roberts Univ. 20–21 (Oct. 1979) [hereinafter Kothe Report] (on file with the Regent University Law Review).

4 *See infra* Part II.

5 *See infra* Part III.

The Law Library has evolved through several name changes. It began as the O.W. Coburn Law Library of the O.W. Coburn School of Law located in Tulsa, Oklahoma.[6] In 1986, after the Oral Roberts University ("ORU") gifted the library to CBN University, located in Virginia Beach, Virginia, it became the CBN University Law Library.[7] It received its current name, the Regent University Law Library, when the university changed its name in 1990.[8] The library began operations when the ORU Law School opened for classes in fall 1979.[9] The two institutions involved have some things in common; both are faith-based with charismatic leaders,[10] and each fought to achieve accreditation from the American Bar Association ("ABA").

During the last thirty years, the American legal system has grown exponentially and the ability to harness new technologies has exploded, which has significantly affected the demands placed upon law libraries, librarians, and legal resources. This brief period has witnessed the transition from books, microforms,[11] and card catalogs to a variety of digital formats[12] and online catalogs that can be accessed from anywhere in the world. Books, however, are still a large and important part of every academic law library collection.[13]

This history is about books, buildings, databases, and a move halfway across the country. But more importantly, it is about the people who bring to life these inanimate objects. It is about the administrators,

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6 The name was in recognition of a $1 million gift to the law school by its benefactor, O.W. Coburn. ORAL ROBERTS, EXPECT A MIRACLE: MY LIFE AND MINISTRY 303 (1995).

7 See *infra* note 116 and accompanying text, discussing the gifting.

8 The name reflects the title of the governing board, Board of Regents, but also is defined as "'one who governs a kingdom in the absence of a sovereign.'" Philip Walzer, *CBNU Changing Name to Regent University*, VIRGINIAN-PILOT, Nov. 9, 1989, at D1 (quoting Pat Robertson, founder and chancellor of Regent University).

9 O.W. Coburn 1984 Self-Study, *supra* note 1, at 122.

10 Oral Roberts and Pat Robertson are both well-known television evangelists who founded universities. ALEC FOEGE, THE EMPIRE GOD BUILT: INSIDE PAT ROBERTSON'S MEDIA MACHINE 11–15 (1996) (containing biographical information of Pat Robertson); ROBERTS, *supra* note 6, at 103, 181–84 (discussing the achievements of Oral Roberts).

11 Microforms are also commonly known as microfiche or microfilm. 13 ACADEMIC AMERICAN ENCYCLOPEDIA 385 (1987).

12 These digital formats include compact discs ("CDs"), digital video discs ("DVDs"), and online legal databases such as LexisNexis and Westlaw.

13 Penny Hazelton, professor of law and law librarian at the Marian Gould Gallagher Law Library at the University of Washington School of Law, followed an analysis of the print collection at Gallagher and concluded that only 13% of their academic law library collection was available online. Penny A. Hazelton, *How Much of Your Print Collection Is Really on WESTLAW or LEXIS-NEXIS?*, LEGAL REFERENCE SERVICES Q., 1999, at 3, 4; *see also* ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS Standard 606 (2008) [hereinafter ABA STANDARDS 2008–2009] (requiring law libraries to maintain a collection of "essential materials" accessible to students).

librarians, paraprofessionals, and student assistants who enable access to a world of legal information.

I. A TIME OF STRUGGLE: 1979–1985

A. Birth Pangs

How does the founder of an unaccredited law school go about creating a law library that will pass muster with the ABA? Oral Roberts faced that question in the 1970s.[14] He resolved it by hiring a consultant, Roy M. Mersky, professor of law and director of legal research at the University of Texas School of Law, and charging him with the monumental task of building from scratch "a first-rate law library, capable of supporting a law school curriculum, while offering adequate resources for in-depth legal research."[15] Oral Roberts probably could not have selected a more qualified individual for this task.[16]

From the beginning, the vision for the Law Library was grandiose. Professor Mersky was engaged as consultant in 1976, and was given less than three years to create a "first-rate law library" from scratch.[17] The law school was scheduled to open in fall 1979.[18] "[M]ost of the major

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[14] The law school received provisional accreditation from the ABA House of Delegates in 1981. Letter from James P. White, Consultant on Legal Educ. to the Am. Bar Ass'n, to Dr. Oral Roberts, President, Oral Roberts Univ., and Charles A. Kothe, Dean, O.W. Coburn Sch. of Law, Oral Roberts Univ. 2 (May 21, 1984) [hereinafter May 1984 Letter from James P. White] (on file with the Regent University Law Review).

[15] Memorandum from Roy M. Mersky, Professor of Law & Dir. of Legal Research, Univ. of Tex. Sch. of Law, to Charles A. Kothe, Dean, O.W. Coburn Sch. of Law, Oral Roberts Univ., and Dr. William W. Jernigan, Vice-President for Learning Res. & Instruction, O.W. Coburn Sch. of Law, Oral Roberts Univ. 2 (Sept. 1978) [hereinafter Mersky Memorandum] (on file with the Regent University Law Review). Professor Mersky compared his task to creating "an intricate mosaic" and proudly proclaimed that the library, when completed, would be "one of the finest in the country and, rightly, a credit to Oral Roberts himself." *Id.*

[16] Yale Law School's Law Library Director, S. Blair Kauffman, once called Professor Mersky "the emperor of world-wide law librarianship" in recognition of his enormous influence in setting the standard for service and professionalism in the field. S. Blair Kauffman, Tribute, *Tribute to Eileen Searls*, 44 ST. LOUIS U. L.J. 803, 803 (2000). Eulogizing Professor Mersky following his death on May 6, 2008, William Powers Jr., former dean of the University of Texas School of Law at Austin, said, "Roy Mersky was a giant figure at our [l]aw [s]chool and in legal education for almost half a century. He built one of the finest law libraries in the world, and helped other law schools and institutions around the world build their own. He was a scholar and teacher." Press Release, The Univ. of Tex. at Austin, In Memoriam: Professor Roy M. Mersky, 1925–2008 (May 7, 2008), http://www.utexas.edu/news/2008/05/07/law_mersky/.

[17] O.W. Coburn Sch. of Law, Oral Roberts Univ., Self-Study for A.B.A. Accreditation Inspection Visit (Aug. 1980) [hereinafter O.W. Coburn 1980 Self-Study] (on file with the Regent University Law Review); Mersky Memorandum, *supra* note 15.

[18] O.W. COBURN SCH. OF LAW, ORAL ROBERTS UNIV., CATALOG 74 (1978–1979) [hereinafter O.W. COBURN 1978–1979 CATALOG].

acquisitions were obtained during the first year . . . ."[19] By the end of the second year, all negotiations with law publishers were concluded on terms favorable to the Law Library.[20]

"A first-class research collection must have a sufficient number of retrospective titles in all disciplines."[21] Obtaining these titles presented some challenges, since many of them had been out of print for quite some time.[22] Toward this end, Professor Mersky and James K. McCue,[23] his assistant, made trips to used law book dealers and law libraries in order to secure over three thousand difficult-to-obtain titles.[24] Within two short years, the two had created "a first[-]rate library, second to none in the entire [s]tate."[25] Professor Mersky even went so far as to say that his

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19 Mersky Memorandum, *supra* note 15, at 4.

20 *Id.* Professor Mersky proudly stated, "As in the past, I always attempted to get the best terms in the three areas of discount, current prices[,] and deferred delivery." *Id.* Professor Mersky's assistant throughout this project, James K. McCue, recalls that Professor Mersky was able to secure the best terms because he had previously dealt with, and knew personally, each of the representatives of every law publisher at the time. E-mail from James K. McCue, Assistant Law Librarian and Onsite Consultant, O.W. Coburn School of Law, to author (Feb. 22, 2008, 06:41 EST) [hereinafter Feb. 22, 2008 McCue E-mail] (on file with author). Terms were very important because the building in which the library was housed, the John D. Messick Learning Resources Center, then under renovation, was not ready to receive the materials, and yet prices had to be locked in and the materials scheduled for delivery when the library was ready for them. *Id.*; *see also* O.W. COBURN 1978–1979 CATALOG, *supra* note 18, at 52. One of McCue's principal duties was to coordinate the receipt of legal materials on order. Feb. 22, 2008 McCue E-mail, *supra*.

21 Mersky Memorandum, *supra* note 15, at 4; *see also* ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS Standard 602(a) (1979) [hereinafter ABA STANDARDS 1979]. The current version is found under Standard 606. ABA STANDARDS 2008–2009, *supra* note 13.

22 Mersky Memorandum, *supra* note 15, at 4.

23 James McCue of technical services and collection development at the University of Texas Tarlton Law Library was in the employ of Professor Mersky at the time. Feb. 22, 2008 McCue E-mail, *supra* note 20. His activities with the ORU project included "assisting [Professor Mersky] with the compilation of the collection, visiting periodically to report on our activity, working with the central library technical services department, and then living on campus for four months bringing to fruition the ordering activity and physically setting up the library." E-mail from James K. McCue, Assistant Law Librarian and Onsite Consultant, O.W. Coburn School of Law, to author (Mar. 25, 2008, 12:13 EST) [hereinafter Mar. 25, 2008 McCue E-mail] (on file with author).

24 Mersky Memorandum, *supra* note 15, at 4. Having a first-rate law library "meant back in those days the very best periodical collection (in hard copy whenever possible) and that meant dealing with a number of second hand out-of-print dealers, such as Rothman, Hein, Claitor, Gaunt and the John Marshall Division of Oceana Publications among others." Feb. 22, 2008 McCue E-mail, *supra* note 20.

25 Mersky Memorandum, *supra* note 15, at 7. Oral Roberts had this to say about the Law Library: "[w]e set ourselves to establish a strong law library, and soon many in the legal community believed it to be equal to any law library in Oklahoma. I knew that although a law school must have a strong faculty, the heart of a law school is its library." ROBERTS, *supra* note 6, at 304.

efforts "create[d] the foundation for one of the best research collections in the Southwest."[26]

B. The Early Years

Like any academic law library, the law library at the O.W. Coburn School of Law was established to support the curriculum.[27] In addition, the library was to encourage extensive legal scholarship by "developing the finest research collection possible."[28] The Law Library occupied some 25,000 square feet of the fifth floor of the John D. Messick Learning Resources Center,[29] which housed the libraries serving each school at ORU, and was part of a unified library system that provided access to various computer databases as well as print materials.[30] The print materials were initially accessed through a "central dictionary card catalog."[31] It was not until circa 1983 that a "'user-friendly' public access, on-line catalog" became operational.[32]

It was assumed initially that "[t]he annual budget [would] insure[] adequate funding to maintain and add to the current collection."[33] The budget also placed "[c]onsiderable emphasis . . . on developing collections in the areas of Medico-Jurisprudence, Comparative, and International Law."[34]

C. Recruiting Staff

As one might expect, recruitment of professional law librarians was made more difficult because of the uniqueness of ORU.[35] The fundamentalist, charismatic, religious nature of the school limited the pool of potential candidates.[36] The first professional law librarian hired

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26 Mersky Memorandum, *supra* note 15, at 8. Seizing on this statement, one of the marketing pieces soliciting memorial-naming gifts boldly proclaimed that the Law Library "will be one of the finest in the South Western United States." O.W. Coburn Sch. of Law, Oral Roberts Univ., Marketing Pamphlet 3 (Dec. 1977) (on file with the Regent University Law Review).

27 O.W. COBURN 1978–1979 CATALOG, *supra* note 18, at 50.

28 *Id.*

29 Kothe Report, *supra* note 3, at 20; O.W. COBURN 1978–1979 CATALOG, *supra* note 18, at 50, 52. Amenities included seating for 100% of the law student body. *Id* at 50.

30 The unified library system would later prove to be problematic with the ABA. May 1984 Letter from James P. White, *supra* note 14, at 5; *see also* ABA STANDARDS 2008–2009, *supra* note 13.

31 O.W. COBURN 1978–1979 CATALOG, *supra* note 18, at 51.

32 O.W. Coburn 1984 Self-Study, *supra* note 1, at 124.

33 O.W. COBURN 1978–1979 CATALOG, *supra* note 18, at 50.

34 *Id.*

35 Mersky Memorandum, *supra* note 15, at 9. According to Professor Mersky, "The lifestyle and environment at [ORU] are unique and this makes recruitment a little more difficult, particularly among those librarians with law library experience." *Id.*

36 *See generally id.*

was Ms. Adrienne deVergie for the position of assistant law librarian for reference.[37] She arrived in December 1977.[38] During the library's startup phase, deVergie and McCue were the key figures in establishing a law library that was ready for operation at the law school's opening in fall 1979.[39] They arranged "the overall layout of the library . . . to ensure effective access to the collection . . . [and] assisted in establishing effective administrative and bibliographic control over the collection."[40]

Other hires did not come so easily, even though advertisements for law librarian and acquisitions librarian were run in the major library journals and in the *New York Times*.[41] On one occasion, Professor Mersky professed keen disappointment when a candidate for acquisitions librarian was turned down by the administration, despite meeting all of the professional qualifications.[42]

Likewise, the cataloger position remained unfilled during 1977–1978.[43] This unfilled position became a source of anxiety because of the accumulating backlog of uncataloged legal materials.[44] The position was finally filled when Mr. Oon-Chor Khoo, an experienced original cataloger, transferred from the ORU Library to the Law Library.[45]

By the time his work was finished, Professor Mersky believed he had achieved a first-class legal research collection, both in quantity and quality.[46] The quantity was impressive, being in excess of 150,000 volumes.[47] But Professor Mersky was proudest of the quality and was confident that "[t]he collection . . . [would] meet the accreditation

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[37] *Id.* (considering this successful recruitment the "high point of the year"). After McCue's work at the ORU Law Library was finished, deVergie continued on and was virtually the acting law librarian until a permanent librarian was hired. Mar. 25, 2008 McCue E-Mail, *supra* note 23.

[38] Mersky Memorandum, *supra* note 15, at 9. Previously, deVergie had worked for Professor Mersky at Tarlton Law Library. *Id.*

[39] O.W. Coburn 1984 Self-Study, *supra* note 1, at 122.

[40] *Id.* According to McCue, "Adrienne continued on at ORU after I left and made great contributions to the program . . . . She eventually went back to the University of Texas." E-mail from James K. McCue, Assistant Law Librarian and Onsite Consultant, O.W. Coburn School of Law, to author (Mar. 6, 2008, 05:06 EST) [hereinafter Mar. 6, 2008 McCue E-Mail] (on file with author).

[41] Mersky Memorandum, *supra* note 15, at 9.

[42] *Id.* In the author's experience, it is not unusual to find candidates who are qualified professionally, but are not compatible with the religious mission of the school. *See generally id.* (noting that in light of ORU's unique environment, it is very important to hire staff who will be "genuinely happy" while employed there).

[43] *Id.*

[44] *Id.*

[45] *Id.* At about the same time, Gretchen Dudley, a paraprofessional in the ORU Library, also transferred to the Law Library to assist Khoo. *Id.*

[46] *Id.* at 4.

[47] *Id.* at 11, 13 (including microforms).

standards of both the [ABA] and the Association of American Law Schools."[48] Knowing that a truly fine collection is almost meaningless without a qualified and competent staff, however, Professor Mersky concluded his report with the admonition that proper staffing was imperative.[49]

In response to Professor Mersky's strong advice, the University "initiated an intensive search" to acquire needed professional librarians.[50] On March 1, 1979, Doris Lasley was hired as reference librarian.[51] But the new law school was still without a head librarian, and classes were scheduled to begin in several months.[52] Finally, on August 1, 1979, William R. Murray was hired as law librarian and assistant professor, merely days before classes began.[53] He held both the J.D. and Master's in Law Librarianship degrees and had formerly served as law librarian at the Universities of Mississippi and Alabama.[54]

No sooner had classes begun than serious cracks began developing in the dike that Professor Mersky had so meticulously constructed. Charles A. Kothe, dean of the law school, in his first formal report following the commencement of classes, painted a rather bleak picture of the Law Library, noting serious deficiencies in the collection, staffing, and equipment needs.[55] Substantial budget cuts during the spring of

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48 *Id.* at 11.

49 *Id.* ("The one major area of concern that I have at present is the lack of staff, both professional and paraprofessional.").

50 O.W. Coburn 1980 Self-Study, *supra* note 17.

51 *Id.* (remaining for only one year).

52 *See generally id.* (noting the different staff members who were hired and subsequently resigned between October 1978 and May 1980).

53 Kothe Report, *supra* note 3, at 2.

54 O.W. Coburn 1980 Self-Study, *supra* note 17. Murray's tenure was also brief, lasting just over nine months. *Id.*

55 Kothe Report, *supra* note 3, at 20–21. Dean Kothe reported that the Law Library was so understaffed that it was "barely able to serve the current student body and faculty." *Id.* at 21. As for the collection, he reported only 120,000 volumes, a figure which was 30,000 volumes less than Professor Mersky had reported in his consultant's report. *Compare id.*, *with* Mersky Memorandum, *supra* note 15, at 11. Grounds exist to speculate that possibly they were unable to pay for many of the books that had been ordered due to budget cuts. Kothe Report, *supra* note 3, at 21 (confirming a disappointing volume count of 120,000 and an inadequate staff precipitated by substantial budget cuts during the spring of 1979). There was also a lack of equipment, as 35,000 volumes on microform could not be used due to a lack of storage cabinets to hold them and readers to view them. *Id.*

> [T]he [L]aw [L]ibrary already shows signs of weakness on account of the Spring 1979 budget cuts. While the library collection was well on its way to becoming an outstanding academic and practice research source, acquisitions have come to a virtual standstill. With an outstanding contractual indebtedness of approximately $150,000, there are not sufficient funds in the 1979–[19]80 budget to keep our present periodical and serial collection up-to-date.

1979 had created an ominous cloud over the Law Library that threatened to nullify much of what Professor Mersky had accomplished.[56] Dean Kothe lamented that these deficiencies, if not corrected with significant additional funding, would fall short of some of the ABA standards governing accreditation.[57]

Apparently Dean Kothe's request for a substantial budget increase was honored because, according to a local newspaper article, an ABA inspection team that visited the ORU campus during 1980 gave the Law Library holdings high marks, reporting that the Law Library had more than 164,000 volumes, ranking it 70th out of 168 ABA approved law schools.[58]

Following Murray's departure a mere nine months after his hire,[59] the position of head law librarian did not remain vacant for long. Less than one month later on June 1, 1980, Professor David W. Dunn was appointed acting law librarian.[60] Professor Dunn held both the J.D. and M.L.S. degrees from the University of Texas.[61] Professor Dunn was an experienced head law librarian, having served in that capacity a total of eight years at Cumberland School of Law and Albany School of Law.[62] During Professor Dunn's tenure, "the [L]aw [L]ibrary's period of initial and rapid growth . . . stabilized and library staff turnover was reduced."[63]

> Moreover, there has been recently discovered a major gap in the Anglo-American materials that must be filled to meet [ABA] accreditation standards.
>
> The [L]aw [L]ibrary staff has also suffered from the Spring 1979 budget cuts. The staff is barely able to serve the current student body and faculty. It is hard-pressed to keep the serial and periodical publications up-to-date and part-time student assistants are being used in some bibliographically complicated work situations. Unless the staff is increased now, the library will fall farther and farther behind in keeping the library materials current and usable.

Id. at 20–21. *See also* ABA STANDARDS 1979, *supra* note 21, at Standards 602, 603 (setting the library requirements).

56 *See generally* Kothe Report, *supra* note 3, at 21 (explaining that the Law Library's deficiencies could result in an ABA accreditation denial).

57 *Id.*

58 Gil Broyles, *Bar Association, ORU Law School Spar Over Religion*, THE OKLAHOMAN, July 15, 1981, at 45.

59 O.W. Coburn 1980 Self-Study, *supra* note 17.

60 *Id.*

61 *Id.*

62 *Id.* McCue recalls that Professor Dunn was "a first[-]rate individual who had worked at UT-Austin before becoming Director at both Samford University and subsequently Albany University. I [k]new him very well; sadly he has passed." Mar. 6, 2008 McCue E-mail, *supra* note 40.

63 O.W. Coburn 1984 Self-Study, *supra* note 1, at 122–23.

Other hires included John Taylor, who was promoted from within as public services librarian on September 3, 1980.[64] Other staffing deficiencies were ameliorated by hiring "part-time student[s] . . . to assist in shelving books, in manning the circulation desk[,] and in other supporting tasks."[65] The budget allowed for hiring up to thirty students because they were far less expensive than librarians.[66] To help lessen the work load, the administration had committed the Central Services staff of the ORU Library, both professional and clerical, to support the Law Library with any special needs it might have.[67]

As the second academic year began (1980–1981), things had improved considerably. Finally fully staffed, the Law Library was prepared to meet the needs of the eight-member law faculty and a student body of eighty-five to ninety.[68] The collection had grown to approximately 150,000 volumes, and "more than adequately support[ed] the school's teaching and research programs at [that] time."[69] The microform collection still lacked adequate housing, however, although the library had acquired a microform reader-printer.[70] The study areas, shelf space, and other physical facilities were considered adequate to accommodate the students and faculty.[71]

The third academic year (1981–1982) reflected continued improvement. The Law Library budget for the 1981–1982 school year was $495,490.[72] This represented an increase in funding over the

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64 O.W. Coburn 1980 Self-Study, *supra* note 17. "Mr. Taylor, a graduate of [ORU] and an M.L.S. candidate at the University of Arizona, worked in the [ORU] law library in 1978–79." *Id.*

65 David W. Dunn & Charles A. Kothe, O.W. Coburn Sch. of Law, Law Library Development Plan 1 (Aug. 25, 1980) [hereinafter Library Development Plan] (on file with the Regent University Law Review).

66 *Id.*

67 *Id.* at 2.

68 O.W. Coburn 1980 Self-Study, *supra* note 17.

69 *Id.* Acting Law Librarian Dunn had documented an even larger collection: more than 160,000 volumes and nearly 70,000 microform volumes, not including duplicate materials or incomplete sets that were not intended to be incorporated into the collection. Library Development Plan, *supra* note 65, at 2. There is no indication of whether microforms were included in the volume count. *Id.*

70 Library Development Plan, *supra* note 65, at 6–7. Among Professor Dunn's priorities, proper care of the microform materials was at the top of the list. Memorandum from David Dunn, Law Librarian, O.W. Coburn Sch. of Law, to Charles A. Kothe, Dean, O.W. Coburn Sch. of Law (June 9, 1980) (on file with the Regent University Law Review) (stating in a handwritten note, "order [ten] cabinets immediately"). Apparently, Dean Kothe was eager to oblige and remove any easy obstacles to accreditation. As the 1980–1981 school year began, there were already on order microfilm and microfiche cabinets sufficient to house existing microforms. Library Development Plan, *supra* note 65, at 6.

71 *Id.* at 7.

72 O.W. Coburn Sch. of Law, Oral Roberts Univ., Regents' Report 39 (Nov. 1981) [hereinafter Regents' Report] (on file with the Regent University Law Review).

previous 1980–1981 year budget of approximately $138,000.[73] As of 1981–1982, expenditures for the Law Library collection had reached a cumulative total of $2,447,457.[74] In his report, Professor Dunn boasted that the Law Library collection had grown to exceed 178,000 volumes under his watch, 11,000 volumes and volume equivalents having been added during the 1981–1982 school year.[75] After stating that "a law library is an expensive thing," he likened a law student's library to a scientist's laboratory or a surgeon's scalpel.[76] He then cautioned:

> We must:
> 1. Keep our present collection up-to-date. Not to do this would be to lose much of the investment which has been made in the library and could jeopardize the continued functioning of the law school.
> 2. Acquire those materials which we do not have (mostly treatises) in areas of the law which are new to our curriculum.
> If we fail to do the above, we may have put our school in a position with grave consequences.[77]

Professor Dunn's immediate concern, however, was about staffing.[78] The number of law library staff had remained static since the Law Library opened more than three years earlier.[79] In particular, he lamented "[t]he lack of a reference librarian able to give legal reference in depth and the lack of a serials librarian knowledgeable about the peculiarities and complexity of law serials," the lack of adequate clerical staff, the over-dependence on part-time student workers, and the absence of a professional librarian on duty at night as required by the ABA.[80]

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[73] See *infra* app. 1 (Annual Law Library Budgets, Volumes, and Titles).

[74] David W. Dunn, Annual Report on the O.W. Coburn Law Library of the O.W. Coburn School of Law 5 (Sept. 15, 1982) [hereinafter Dunn Annual Report] (on file with the Regent University Law Review). Professor Dunn, as law librarian, prepared this report to present to Dean Kothe and the Oral Roberts Board of Trustees. *Id.* at 1.

[75] *Id.* Professor Dunn proudly noted that the Law Library collection had steadily developed from its inception to become "one of the finest library collections in the Southwest." *Id.*

[76] *Id.* This was an apparent reference to Christopher Columbus Langdell's oft-quoted analogy. Langdell, the first dean of Harvard Law School and a strong proponent of law libraries, believed that "the Library was to law students what the lab[]oratory was to scientists, and that its great importance demanded that vigilant improvement be made." History of the Harvard Law School Library, Harvard Law School, http://www.law.harvard.edu/library/about/history/special_history.php (last visited Nov. 24, 2008).

[77] Dunn Annual Report, *supra* note 74, at 8 (sensing the need for continued support for the law library budget).

[78] *Id.* at 11–12.

[79] *Id.* at 11. There were four clerical staff and one professional librarian (other than himself). *Id.*

[80] *Id.* at 13.

D. Storm Clouds Gather

As the fourth school year (1982–1983) was underway, Professor Dunn in his annual report began to reflect pessimism about the future prospects for the Law Library. Discussing law library operations, he began with the following: "It should be clearly stated and understood that we have not kept to the schedule of development originally planned for the Law Library and that we are not likely to be able to get back on track with our original projections."[81] He attributed the negative state of affairs to three distinct causes: "1. Lack of budget growth and even budget *reductions* in the amount of money spent on the law collection[;] 2. Lack of trained and experienced law library personnel[; and] 3. Lack of space."[82] He noted that law library materials would "continue to increase [in price] at a rate above that of inflation," and included a chart showing projected cost increases of approximately 13% to 14% for each year of the subsequent four year period.[83] He then decried a decrease in the 1982–1983 budget of almost one-fourth from the planned figure.[84] He concluded that "budget reduction in the face of rising prices will ultimately result in an actual reduction in the volume count, as more and more material becomes useless due to the failure to update . . . and has to be discarded."[85]

E. Turbulent Times

In a subsequent Special Study on the Law Library addressed to the Dean and Board of Trustees, dated October 29, 1982, Professor Dunn made a surprisingly disparaging remark: "It would appear that the Law Librarian[']s Annual Report of September 15, 1982 has either not been read or is not what the Administration wants."[86] He then sought to justify maintaining the existing collection by pointing out the law school's policy of permitting law students to "do their research in the law of their home jurisdiction, rather than doing it in the law of the jurisdiction in which the law school is located."[87] He argued:

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[81] *Id.* at 3.

[82] *Id.* (emphasis added) (mentioning space for the first time).

[83] *Id.*

[84] *Id.* at 4. The budget decrease was a very substantial 24.2%. *Id.*

[85] *Id.* Once law material is out of date, particularly if it is updated by loose-leaf or pocket-part supplements, it is often economically advantageous to discard the out-of-date materials and buy replacement volumes when money is available, as opposed to later purchasing updates.

[86] David W. Dunn, Special Study on the O.W. Coburn Law Library of the O.W. Coburn School of Law, Oral Roberts University 1 (Oct. 29, 1982) (on file with the Regent University Law Review).

[87] *Id.* at 2.

> This excellent policy has long been featured in the [l]aw [s]chool's Catalogue and may be instrumental in attracting many students to study law at ORU. The policy also demands that we must have [a] reasonably sound collection in the law of about forty (40) jurisdictions. Any reduction in this area of the law collection . . . should be questioned because of the commitment we have made to our students.[88]

He then added that "[i]f we eliminated all state materials except Oklahoma we would save approximately $31,000.00, but we would also have become a marginal law library overnight."[89]

Finally, regarding staffing and other areas of law library operation, he concluded, "These areas are at or below the minimal level necessary for the [L]aw [L]ibrary to successfully operate. No reduction should be considered unless the [L]aw [L]ibrary and the law school are to be abandoned."[90] Several months later, Professor Dunn unexplainably signed his name to the library portion of the ABA Inspection Questionnaire over the title "Acting Law Librarian."[91] Shortly thereafter in July 1983, the position was filled when Edward R. Fishpaw became the law librarian.[92] But financial matters seemed to be worsening for the Law Library.

Dean Kothe took up the financial fight that Professor Dunn had abandoned. In his report to the law school regents, Dean Kothe, after referencing the Law Library budget for 1983–1984 in the reduced amount of $398,000, lamented:

> The [L]aw [L]ibrary budget represents a drastic cut from the $527,000 approved for 1982–[19]83 and seriously jeopardizes the ability of the [L]aw [L]ibrary to meet the curriculum and research needs of the law school. The budget for continuations and books was reduced from approximately $300,000 to $200,000, a 33%[93] cut which, if not restored, will require extensive cancellations in existing

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88 *Id.*

89 *Id.*

90 *Id.* at 9.

91 Library Development Plan, *supra* note 65, at 8, *reprinted in* Oral Roberts Univ., O.W. Coburn School of Law A.B.A. Inspection Questionnaire app. C, pt. V (Mar. 31, 1983) (on file with the Regent University Law Review). Professor Dunn had apparently chosen to resign as law librarian but remain in an interim capacity until his replacement could be found. Unexplainably, half of page five and all of page six are missing from the Law Library archive copy. Inflammatory language was notably lacking in the remainder of that document. *Id.*

92 Regents' Report, *supra* note 72, at 11. Fishpaw was hired with the rank of assistant professor of law. *Id.*

93 *Id.* at 14. Dean Kothe noted that the budget reduction from $300,000 to $200,000 was "real[l]y a 40[%] reduction when one considers that law continuations and books increase approximately 10–15[%] a year in price . . . [and that] [a]pproximately 90[%] of a [L]aw [L]ibrary's collection budget is for continuations, which must be renewed annually to keep legal authorities up to date." *Id.* at 33.

> subscriptions. Such action at this time would most definitely jeopardize accreditation by the [ABA]. The total 1983–84 need for the [L]aw [L]ibrary is $570,000. This includes funding to hire an experienced, professional law librarian as head of reference and research services.[94]

F. The Beginning of the End: 1983–1984

At its meeting in October 1983, the ABA Accreditation Committee confirmed one concern and raised another.[95] The committee concluded that there was (1) an insufficient number of full-time professional librarians and support staff,[96] and (2) a lack of sufficient administrative autonomy by the Law Library created by the shared responsibility of centralized functions with the Regent University Library (the "University Library").[97] In response to these findings, retiring Dean Kothe and incoming Dean John W. Stanford both wrote letters to the Accreditation Committee addressing these issues.[98]

The Accreditation Committee met again in May 1984 and considered the assertions made by retiring Dean Kothe and incoming Dean Stanford.[99] The Committee's concerns regarding adequate staffing were alleviated; however, the Committee members remained concerned that the "shared responsibility" concept produced insufficient autonomy of the Law Library in violation of ABA Standard 604.[100] The Committee's action letter concluded with a notice to the president and dean of the school to appear before the Committee at its meeting in Nashville, Tennessee on November 9, 1984 "to show cause why the [s]chool should not be removed from the list of law schools provisionally approved by the

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94 *Id.* at 14. Dean Kothe reminded the Board that the ABA site team accreditation report had criticized the library for its lack of adequate staffing, stating that the library was "understaffed to perform minimal services." *Id.* at 34.

95 May 1984 Letter from James P. White, *supra* note 14, at 3.

96 This was alleged to be in violation of ABA Standards 601, 604, and 605(b). *Id.* at 7; Letter from James P. White, Consultant on Legal Educ. to the Am. Bar Ass'n, to Dr. Oral Roberts, President, Oral Roberts Univ., and John W. Stanford, Dean, O.W. Coburn Sch. of Law, Oral Roberts Univ. 7 (July 26, 1984) [hereinafter July 1984 Letter from James P. White] (on file with the Regent University Law Review) (verbatim).

97 *Id.* Dean John W. Stanford replaced Dean Kothe, who resigned effective June 1984. *See Nomination of Clarence Thomas To Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 102d Cong. 429 (1991) (statement of Charles A. Kothe, Former Dean, O.W. Coburn School of Law, Oral Roberts University).

98 May 1984 Letter from James P. White, *supra* note 14, at 1. The deans reported the addition of one professional librarian and one paraprofessional to the library staff and asserted there was no conflict between the University Library and the Law Library resulting from the shared control of operations. *Id.* at 8–10.

99 *Id.* at 8.

100 *Id.* at 7, 10–11.

[ABA]."[101] As a result of the action letter, the University administration "agreed to substantial changes in policy for the administration of the Law Library" that would provide the autonomy that the Accreditation Committee required.[102]

G. Musical Chairs: 1984–1985

The 1984–1985 school year witnessed dramatic changes in library staffing. The biggest change was the loss of another head law librarian; Fishpaw's resignation was effective at the end of June 1985.[103] In his stead, Lorin H. Lindsay was appointed acting law librarian.[104] Lindsay provides the following description of personnel turnover:

> The past year has been one of dynamic change. Mrs. Siebert moved to the main circulation desk . . . at the end of January and came back the first of July. Chris Fernandez took over Mrs. Siebert's responsibilities and then went to the TU Law Library at the end of May. Paula Michaels left at the end of March and Nelda Thomas took her place. Then she left in the middle of July.
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> . . . .
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> When Nelda Thomas left, Jan Wadkins started doing the Kardex [a]ssistant and [l]aw [s]erials [a]ssistant jobs.[105]

In the midst of these turnovers, "Mr. Fishpaw left at the end of June."[106]

Just before his departure, Fishpaw summarized the problem areas and concerns that continued to plague the Law Library. The most pressing personnel need was to employ "a professional, experienced law

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[101] July 1984 Letter from James P. White, *supra* note 96, at 14. The ABA Accreditation Committee had additional concerns relating to the law school that are beyond the scope of this Article. Lewis Collens et al., Site Evaluation Report on Oral Roberts University, O.W. Coburn School of Law 3 (Mar. 21–24, 1984) (on file with the Regent University Law Review).

[102] Letter from John W. Stanford, Dean, O.W. Coburn Sch. of Law, to Dean James P. White, Consultant on Legal Educ. to the Am. Bar Ass'n, Ind. Sch. of Law 6 (Sept. 28, 1984) (on file with the Regent University Law Review). The new policy directed "that the Law Library will have substantial autonomy, and that the [d]ean, [l]aw [l]ibrary [d]irector, and the faculty shall be responsible for the policies and activities of the Law Library, without supervision or joint control by administrators of the general University [L]ibrary and the Learning Resources Center." *Id.*

[103] Lorin H. Lindsay, Annual Report of the O.W. Coburn Law Library (Aug. 29, 1985) [hereinafter Lindsay Annual Report] (on file with the Regent University Law Review). Stating that he sincerely regretted the need to leave Oral Roberts University School of Law, Fishpaw indicated that his reason for leaving was to "serve the poor and elderly in Virginia as a poverty attorney." Edward R. Fishpaw, Report on the ORU Law Library 1 (June 19, 1985) [hereinafter Fishpaw Report] (on file with the University Law Review).

[104] *See* Lindsay Annual Report, *supra* note 103.

[105] *Id.*

[106] *Id.*

reference librarian."[107] His second priority for staff hiring was a paraprofessional for circulation.[108] Finally, noting that "[t]he position of law library director is pivotal to the smooth and successful operation of the [L]aw [L]ibrary," he strongly recommended that his replacement be "a law library director with both the J.D. and M.L.S. degrees who has had several years of significant law library administrative experience."[109]

Among other shortcomings in the Law Library, Fishpaw identified the need for stability in the Law Library budget and a predictable cash flow,[110] funds for professional development and training,[111] the addition of two new services at the time that would support law faculty research, Nexis[112] and the Electronic Legislative Search System ("ELSS"),[113] and the cataloging of several parts of the collection that had not yet been cataloged.[114]

It is clear that adequate funds were not being provided to the Law Library sufficient to meet its needs. This is somewhat surprising considering the large financial investment in the Law Library.[115] With provisional accreditation in jeopardy, budget cuts, and long term inadequate staffing, the stage was set for a major announcement.

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[107] Fishpaw Report, *supra* note 103, at 1. This shortcoming was also documented by the ABA Accreditation Committee. July 1984 Letter from James P. White, *supra* note 96, at 7. The Accreditation Committee's concerns regarding adequate staffing, however, were alleviated by the assertions made by retiring Dean Kothe and incoming Dean Stanford that one professional librarian and one paraprofessional had been added to the library staff during 1984. *Id.* at 8, 10–11.

[108] Fishpaw Report, *supra* note 103, at 1.

[109] *Id.* at 2. Fishpaw undoubtedly realized that a fully credentialed and experienced head law librarian was needed at a crucial time to captain a ship that was taking on water and was in danger of sinking.

[110] He bemoaned that in the two years during his tenure, "no new purchases are possible after May 1st," and "[i]n the two years that I have been here we have spent less than $15,000 to add new materials to the collection." *Id.*

[111] *Id.* at 3. Fishpaw added: "During the past year we have not invested any funds for training and development of professional staff." *Id.*

[112] *Id.* Nexis is an extensive database of comprehensive news, business, and legal information sources. Nexis Content, LexisNexis, http://www.lexisnexis.com/businessonline/content.asp (last visited Nov. 24, 2008).

[113] "The ELSS system offered by the Commerce Clearing House provide[d] an on line data base to all bills introduced in the current year for all 50 states." Fishpaw Report, *supra* note 103, at 3.

[114] Several of the loose leaf services, the periodicals, and the administrative law materials, as well as some materials in the state collection, were not cataloged. *Id.* at 5.

[115] Oral Roberts said that, "We originally invested some $12 million in the library, and we kept adding to it as the need arose each year." ROBERTS, *supra* note 6, at 304. It was previously reported, however, that some $3 million was spent establishing the Law Library, whereas an additional half-million dollars was spent each following year on subsequent acquisitions. Emily Couric, *The Cross and the Casebook*, STUDENT LAW., Dec. 1986, at 15, 19.

H. A Generous Gift

On November 1, 1985, ORU's Board of Regents gifted its law school and law library to CBN University in Virginia Beach, Virginia.[116] "The transfer of the law school from ORU to [CBN University] was heralded both by ORU President Oral Roberts and CBN University Chancellor Pat Robertson as a[] historic occasion of cooperation between two educational institutions affiliated with two Christian ministries with compatible missions."[117] Delivery was to be effective on June 1, 1986.[118] This timetable would allow for the books to be packed and moved after

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[116] Sch. of Law, CBN Univ., Transition Feasibility Study 1 (Spring 1986) [hereinafter Transition Study] (on file with the Regent University Law Review). "[P]rior to the announcement of the gift . . . CBN University had included a law school in its long-range plan, and had already begun preparations for the addition of a law school to the existing graduate programs." *Id.* But there is more to the story. At a meeting with Oral Roberts and his Board of Regents just prior to the announcement of the gift, Chancellor Pat Robertson revealed the following:

> Last May our Board of Regents met . . . and voted to start a law school in 1987. I wanted to do it but I thought, *How will we ever be able to afford the library that it takes to do it?* Because it is a monumental task as you know.
>
> But this fall, by faith, we began building a building which is suitable to house a law school and it's going to be completed by August of 1986 . . . . Now that is a miracle. I did not communicate one word of that to you. You knew nothing about it. The Holy Spirit showed you and all that I can say is, all glory to Jesus and my profound thanks to each one of you.

Oral Roberts, *Oral Roberts University Transfers O.W. Coburn Law School to CBN University*, ABUNDANT LIFE, Jan./Feb. 1986, at 7, 8. Oral Roberts responded:

> The Board of Regents . . . and I had the commitment that the Body of Christ must have a fully Christian, Holy Spirit-filled law school. We didn't feel led to close it, and we didn't feel led to sell it. We felt led to Seed-Faith it into a ministry that we believe in . . . .

Id.

[117] Transition Study, *supra* note 116, at 1. One might wonder what prompted Oral Roberts and the Board of Regents to give away such a valuable asset. Oral Roberts provides some insight into his motivation:

> Dean Kothe believed the ABA and the media simply didn't want a healing evangelist starting a law school.
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> In spite of all opposition, in 1982 the [provisionally] accredited ORU Law School graduated its first class, having successfully challenged the most powerful legal association in the nation on the constitutionality of its own rules.
>
> But we discovered the battle wasn't over. In fact, I was afraid that the ABA would never relent, that it would keep us in court over the next ten years at a cost to us of $1 million a year in legal fees. I knew that would wear us down, not in our right or our determination, but in our willingness to pay that outrageous amount of money for the legal defense of our position.

ROBERTS, *supra* note 6, at 307.

[118] Sch. of Law, CBN Univ., Information Supplement to the American Bar Association Law School Inspection Questionnaire Submitted by the O.W. Coburn School of Law, Oral Roberts University 3 (Spring 1986) (on file with the Regent University Law Review).

classes were over in spring 1986, then unpacked and shelved in their new location in time for classes in fall 1986.[119]

Extensive planning both at ORU and CBN University between January and May prepared the way for a smooth relocation of ten truckloads containing books and equipment across 1,300 miles.[120] "Overloading the last two trucks caused a delay in receiving and unloading since both loads were stopped for being overweight."[121] The total cost of the move was $44,663.[122] The moving process was captured on video.[123]

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[119] *Id.* Barbara Baxter, the librarian responsible for the move, recounts the following:

> I worked at the ORU Law Library from Jan[uary] 1986 through May of that year. Basically, I surveyed the collection and determined what was to be moved to CBN. All the microform materials and cabinets[,] as well as most of the print collection[,] were to be shipped to Virginia Beach. I worked closely with Dean Lois Lehman and Dr. Eva Kiewitt at the CBN University Libraries to plan the move . . . how many boxes, how much each box weighed, how to download the data records so each record could be uploaded and integrated into [CBN University] Law Library records. Paul Teja was very helpful in figuring out how these records would be uploaded and merged.
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> . . . .
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> Because of all the planning that had taken place six months prior to the physical move, the unloading and shelving of the books went quickly and smoothly. Overloading the last two trucks caused a delay in receiving and unloading since both loads were stopped for being overweight.

E-mail from Barbara A. Baxter, Law Library Director and Assistant Professor, Liberty University School of Law, to Brent Rowlands, Assistant Research Services Librarian, Regent University Law Library (June 11, 2008, 03:01 EST) (on file with author).

[120] Barbara A. Baxter et al., Law Library Transfer Report II, CBN University Libraries (Nov. 1986) [hereinafter Library Transfer Report II] (on file with the Regent University Law Review); *see also* Memorandum from Ken Zenzel to the Law Sch. Transition Team at CBN Univ. (Feb. 19, 1986) [hereinafter Zenzel Memorandum] (on file with the Regent University Law Review) (providing minutes of a planning meeting). Following a careful comparison of services offered by three movers, Hallett and Sons Movers of Summit, Illinois, were selected to move the Law Library. *See id.* (comparing the three companies). Specializing in moving libraries, Hallett had an efficient system for packing the books in specially constructed boxes, resulting in a minimal disordering of books. Library Transfer Report II, *supra.*

[121] Library Transfer Report II, *supra* note 120.

[122] *Id.* In addition to Hallett's charges of $37,500, a contract worker and student packers and unpackers added another $7,163. *Id.* It is interesting to note that CBN University proceeded with planning the move without any assurances from ORU that it would pay any part of the move. *See generally* Zenzel Memorandum, *supra* note 120, at 1. In late June, it was learned that a CBN donor had given an amount that covered almost the entire cost of moving. Library Transfer Report II, *supra* note 120. Baxter, the newly appointed law librarian, added that

> [i]n late June we knew again the significance of Isaiah 64:24: "It will also come to pass, that before they call, I will answer; and while they are still speaking, I will hear." We learned that a close friend of [CBN University] had given

II. A TIME OF TRANSITION: 1986–1997

A. CBN University

ORU had petitioned the ABA to allow provisional accreditation to be transferred to CBN University.[124] The ABA denied the petition and decided to treat CBN University School of Law as a new law school.[125] Despite this adverse ruling, fourteen third-year and eight second-year law students from ORU followed the law school to its new location to join a first-year class of eighty-three students, none of whom had any assurance of being able to sit for the bar exam in their state of choice.[126]

Once the dust settled, it appeared that the Law Library was the only asset of value transferred because the ABA denied the transfer of provisional accreditation to the new law school.[127] But the Law Library was a very substantial asset consisting of approximately 200,000 hard bound and microform volumes,[128] valued in excess of $9 million.[129]

The Law Library collection was to be housed on part of the first, second, and fourth floors of the University Library building,[130] and was

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> $43,436 to help cover the cost of transferring the Law Library from ORU to [CBN University]. This news was an additional confirmation that what we were about was indeed in God's plans, no matter how difficult and time-consuming the task.

Id.

123 Videotape: Law Library Move 5/86 (CBN University 1986) (on file with the Regent University Law Library), *available at* http://media.regent.edu/lib/LawLibrary_archive.wmv (covering forty minutes of packing, loading, transporting, unloading, and reshelving of books).

124 Sch. of Law, Coll. of Law and Gov't, CBN Univ., Notice of Appeal to the Council of the Section of Legal Education and Admissions to the Bar 1, 4 (Dec. 7, 1987) [hereinafter Dec. 1987 Notice of Appeal] (on file with the Regent University Law Review).

125 *Id.* at 4.

126 *Id.* For the following 1987–1988 academic year, 117 students enrolled, including 6 third-year transfer students from ORU. Letter from James P. White, Consultant on Legal Educ. to the Am. Bar Ass'n, to Bob G. Slosser, President, CBN Univ., and Herbert W. Titus, Dean, Coll. of Law & Gov't, CBN Univ. 8 (Nov. 9, 1987) [hereinafter Nov. 1987 Letter from James P. White] (on file with the Regent University Law Review). There was, however, a 39.8% decrease in the first-year class from eighty-three in 1986 to fifty in 1987. *Id.*

127 *See generally* Nov. 1987 Letter from James P. White, *supra* note 126, at 10–12 (listing reasons for the rejection of provisional accreditation). This statement does not reflect on the value of the students and faculty who transferred.

128 Couric, *supra* note 115, at 17.

129 *Id.* at 20. ORU announced during the transfer that the law school was worth $10 million, and CBN University's own independent appraiser valued the Law Library to be worth in excess of $9 million as an ongoing capital asset. Letter from Mortimer Schwartz, Sch. of Law, Univ. of Cal., to Herbert W. Titus, Professor, CBN Univ. 1 (May 21, 1986) (on file with the Regent University Law Review).

130 Transition Study, *supra* note 116, at 17–18. The law librarian's office and supporting staff were located in the entire south wing of the second floor where the

to consume approximately 15,000 square feet of the library building.[131] This was some 10,000 square feet less than the Law Library had occupied at ORU, and allowed for very little future expansion.[132] The Law Library was to receive technical services support from the University Library, including "computer services, cataloging, circulation, acquisitions and interlibrary loan[s]."[133] The Law Library budget, collection, and staff, however, were to be formulated and administered as part of the law school's overall budget.[134]

B. The Barbara Baxter Era

On January 1, 1986, Barbara A. Baxter was appointed law librarian. As an assistant professor on the law faculty, she taught first year legal research and writing.[135] With both the M.L.S. and J.D. degrees, Baxter was an experienced lawyer and law librarian.[136] It did not take long for her to assemble an able support staff that included Eric Welsh, a professional law reference librarian with ten years experience in a large county law library in Miami, Florida,[137] Joyce Jenkins as law serials supervisor,[138] Christine Carmen as public services assistant, and Jane Fairchild as serials assistant.[139]

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professional law materials most often used in the practice of law were also located. *Id.* at 17. This area also included "ample study carrels and large tables with chairs accommodating 100 people." *Id.* The non-professional microforms and the international law collection were located in the north wing of the same floor. *Id.* Law periodicals and reference materials were located in the north wing of the first floor. *Id.* Also located on the first floor were the main reference desk, the general circulation and reserves desk, and the technical services area responsible for acquisitions, receiving, cataloging, and data processing for the law collection. *Id.* Seldom used materials and some duplicates were housed on the fourth floor. *Id.* at 18.

[131] *Id.* at 17–18.

[132] *Id.* at 16–18; O.W. COBURN 1978–1979 CATALOG, *supra* note 18, at 50.

[133] Penny Hazelton, Draft report about the Law Library and physical facilities at Regent University (July 17, 1990) [hereinafter Hazelton Draft Report] (on file with the Regent University Law Review). This arrangement clearly risked violating ABA Standard 604 regarding separateness and autonomy. May 1984 Letter from James P. White, *supra* note 14, at 7.

[134] Transition Study, *supra* note 116, at 15.

[135] Hazelton Draft Report, *supra* note 133.

[136] *Id.* Baxter began working at ORU in order to become familiar with the Law Library collection prior to the move so as "to ensure a smooth transition of the collection from its location in Tulsa to its new location in Virginia Beach." Transition Study, *supra* note 116, at 14. Prior to coming to the law school, Baxter practiced law in Los Angeles, California, managed a law firm library in Billings, Montana, and performed extensive indexing work for major law book companies. *Id.*

[137] Hazelton Draft Report, *supra* note 133; Eric Welsh, Head of Research Services, Regent Law School, http://www.regent.edu/acad/schlaw/faculty_staff/welsh.cfm (last visited Nov. 24, 2008).

[138] E-mail from Joyce Jenkins, Law Serials Supervisor, Regent University, to author (June 11, 2008, 12:16 EST) (on file with author). Jenkins began in June 1988 as law serials

The following year, CBN University School of Law was denied provisional accreditation.[140] Thirteen deficiencies were identified, five of which related to the Law Library.[141] Among the Library's shortcomings, the Committee noted that the Law Library was closed on Sundays and during chapel hours,[142] and that "it relie[d] heavily on the University [L]ibrary for technical services and support," although it was a separate administrative unit.[143] In the appeal that followed, the Law Library made a commendable showing that many of the Committee's conclusions were erroneous.[144]

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assistant on a three-month trial basis and then was promoted to law serials supervisor. *Id.* She continues in that position to this day, though now part time.

[139] Library Transfer Report II, *supra* note 120. Additionally, student assistants were hired for 200 hours weekly. *Id.* "[T]he [t]echnical [s]ervices division of the [University] [l]ibrary [contributed] an additional half-time serials assistant to service law journals and a catalog assistant to help with the law materials cataloging." *Id.* Baxter opined that "countless hours of work remain[ed] to achieve bibliographic control of all the materials." *Id.* She estimated that the technical services staff would "need two or three years to catalog all the transferred materials . . . and make all areas of the collection readily accessible to library patrons." *Id.*

[140] Nov. 1987 Letter from James P. White, *supra* note 126, at 12. CBN University School of Law had "filed its application for provisional approval with the [ABA] on June 30, 1987." Dec. 1987 Notice of Appeal, *supra* note 124, at 1. "An ABA Site Team visited the [l]aw [s]chool during the week of September 20, 1987 . . . ." *Id.* On November 9, 1987, the ABA Accreditation Committee issued its action letter denying provisional accreditation. Nov. 1987 Letter from James P. White, *supra* note 126, at 12. "[O]n December 8, 1987, the [l]aw [s]chool filed [a] . . . timely Notice of Appeal . . . ." Dec. 1987 Notice of Appeal, *supra* note 124, at 1.

[141] Nov. 1987 Letter from James P. White, *supra* note 126, at 10–12. The Law Library deficiencies noted were two budget deficiencies (ABA Standards 601 and 604), inadequate salaries for professional law librarians (ABA Standards 601 and 605), insufficient hours open for law use and reference availability (ABA Standards 601 and 604), and the sharing of facilities with the University and the Library's large distance from the classrooms and students (ABA Standard 701). *Id.* at 11–12.

[142] *Id.* at 7. This would not change until January 4, 1993, when the Law Library began remaining open during the lunch hour, staffed by students while full-time and professional staff attended chapel. Richard A. Leiter, *From the Director's Pen*, TESTIMONY (The Regent Univ. Law Library, Virginia Beach, Va.), Jan. 1993, at 1, 1.

[143] Nov. 1987 Letter from James P. White, *supra* note 126, at 6.

[144] *See generally* Dec. 1987 Notice of Appeal, *supra* note 124 (rebutting each specific factual finding made by the ABA Accreditation Committee). CBN University began by asserting the following: "The [L]aw [L]ibrary is adequate and responsive to the needs of the law school." Sch. of Law, CBN Univ., Outline Statement for the Meeting of the Council of the Section of Legal Education and Admissions to the Bar 3 (Feb. 7, 1988) (on file with the Regent University Law Review). The University continued on to assert as follows:

> 1. The [L]ibrary's collection is a large one that contains every volume required by the [ABA] Standards.
>   a. The collection is larger than that of all four law libraries of law schools listed as provisionally approved by the ABA in 1986.
>   b. The law school library's collection is larger than that of [forty-six] law schools fully accredited by the ABA as of 1986.

It would be two more years of intense struggle with the ABA before provisional accreditation was received on June 16, 1989.[145] During the intervening time, there were additional site visits, additional denials of accreditation, appeals, and even a lawsuit filed by forty-nine third-year law students in federal court seeking injunctive relief to require the ABA to accelerate the accreditation process in order to allow them to graduate on time and be free to take bar exams without restriction.[146] The issues raised by the ABA dealt mostly with religious matters pertaining to the law school and are beyond the scope of this Article.[147]

By 1990, there were more improvements. Legal periodicals were removed from the first to the third floor to allow better access, and new volumes totaling 2,547 had been added.[148] "The number of patrons (excluding Regent . . . law students) using the [L]aw [L]ibrary tripled between 1988 and 1989[.]"[149] But law student usage was disappointing because of the four-minute walk from the classroom to the library building.[150]

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c. Budget adjustments from last year have been small and have not affected the collection's adequacy; additional funds have been made available for acquisitions.
2. The [L]aw [L]ibrary's association with the University [L]ibrary has provided the law school with a number of specific benefits, including automated record keeping, circulation, and additional staff support.
3. [ABA] Standard 601, which requires a law school to "maintain and administer a library adequate for its program" cannot be read to require the library to be kept open at times when it will not be used. The [L]ibrary's hours are reasonable and consistent with the law school's mission.

Id. at 4 (citations omitted).

145 Annual Report Memorandum from Herbert W. Titus, Dean, Coll. of Law & Gov't, CBN Univ., to Alumni of CBN Univ. Sch. of Law and O.W. Coburn Sch. of Law 1 (Nov. 15, 1989) [hereinafter Titus Annual Report Memorandum] (on file with the Regent University Law Review).

146 *Id.* at 2–3. The injunctive relief was denied and the case was dismissed on the merits. *Id.* at 3. Author's note: CBN University graduates in 1989 achieved "an 84% pass rate on the Virginia bar as compared to a statewide 80% passage rate." *Id.* at 5. Of the law school's 1987 and 1988 graduates, the bar passage rate was a very impressive 95%. *Id.* This prompted a piece in the local newspaper in which the editorial board wrote:

> CBN University's Law School got a bit of poetic justice the other day. . . . [R]ecent CBN law graduates did better on the Virginia bar examination than the statewide average.
>
> That was good news for the school and its graduates and somewhat embarrassing for the [ABA], which tried for three years to discredit the program at CBN.

Passing the Bar, VA. BEACH BEACON, Oct. 31/Nov. 1, 1989, at 6.

147 *See* Titus Annual Report Memorandum, *supra* note 145, at 3.

148 Hazelton Draft Report, *supra* note 133.

149 *Id.* Lawyers, paralegals, students from other institutions, and members of the public had discovered this new resource. *Id.*

150 *See id.*

There were several new additions to the staff during this period. Donna Bausch was hired in January 1990 as senior reference librarian,[151] Jan Beard joined the staff in 1990 as public service supervisor, and Anna Dinkins began in March 1991 as public services assistant.[152]

With the improvements came the need for more space. At the current rate of growth, there would be no available shelf space in 2.8 years.[153] The increased volume of serial materials had further cramped the available work space, and the additional staff had created the need for more office space.[154] Worse still, there was no permanent plan in place regarding an integrated law school facility, particularly with regard to more space for the Law Library.[155]

C. Acting Librarian Donna Bausch

In August of 1990, Baxter resigned and was replaced by Acting Librarian Donna Bausch. Bausch was dual degreed with J.D. and M.S.L.S. degrees and had been a law librarian for the previous seven years.[156] Bausch was "not a member of the law faculty" because of her interim status, but she did serve as "an ex-officio member of the faculty Library Advisory Committee," and coordinated the Legal Research and Writing I course.[157]

Another ABA site inspection occurred in April of 1991. The Site Team Report noted several areas of improvement over the previous year. Particular mention was made of new ten and one-half month librarian contracts, in lieu of the former nine-month contracts, for the reference librarians.[158] This was considered important because it would enable the librarians to be available during much of the summer when their assistance would be most needed by faculty engaged in scholarly

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[151] *Id.*

[152] Frank T. Read et al., Report on Regent University School of Law 41–42 (Apr. 7–10, 1991) [hereinafter Apr. 7–10, 1991 ABA Report] (findings of ABA site evaluation prepared by visitation team members) (on file with the Regent University Law Review).

[153] Hazelton Draft Report, *supra* note 133.

[154] *Id.*

[155] *Id.* These shortcomings threatened noncompliance with ABA Standards 704(a) and 705. *Id.* Other problems were nine-month contracts for the professional librarians (except the director, who was on a twelve-month contract), low salaries for the support staff, and only $704 spent the previous year on professional and staff development. *Id.* Full-year contracts were strongly encouraged in order to assist faculty research for scholarly publications during the summer months and to work on summer projects when more time was available. *See* Apr. 7–10, 1991 ABA Report, *supra* note 152, at 41.

[156] Hazelton Draft Report, *supra* note 133.

[157] Apr. 7–10, 1991 ABA Report, *supra* note 152, at 40.

[158] *Id.* at 41.

research and writing.[159] Other improvements over the previous year included a substantial increase in funding for staff development[160] and approved plans to increase the usable space on the third floor of the library building.[161] An additional reference librarian, Jack Kotvas, was added during this time.[162]

Bausch stepped aside when Richard Leiter was chosen to be director of the Law Library; however, she continued to serve as senior law reference librarian until August 1992, when she left to become director of the Norfolk Law Library.[163]

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[159] *Id.*

[160] *Id.* at 42. The funding more than doubled each year for several years thereafter. *Id.*

[161] *Id.* at 46–47. The plans provided for "an additional 6,323 square feet of contiguous space" to be used for "at least 50 additional seats, new shelving, and expanded staff work areas." *Id.* at 46. It was also noted that plans were underway for a new building adjacent to the library building that would house the law school and possibly the Law Library. *Id.* at 47.

[162] *Id.* at 40. Kotvas was hired in September 1990. *Id.*

[163] E-mail from Donna Bausch, Law Librarian, Norfolk Law Library, to author (June 11, 2008, 09:54 EST) (on file with author). She recalls as follows:

> Some of my fondest memories of the short time I spent as acting law librarian at Regent Law Library were the wonderful colleagues with whom I worked so closely. At the [m]ain [l]ibrary, which, at that time, was located in the same building, Dean of Libraries Lois Lehman and Associate Dean Eva Kiewitt were incredible leaders and role models from whom I learned so much. They were completing lifelong careers in librarianship and they will always represent to me the best of our profession when I remember their standards of excellence, their common sense, their kindness[,] and their generosity. Everyone who had the privilege of knowing them sensed they were in the presence of both goodness and greatness, and I'll always remember them fondly. Their advice and counsel was invaluable at a time when Regent Law School was in its infancy and ABA accreditation teams were nearly in residence, or so it often seemed.
>
> Likewise, at the Law Library, it is the loyal, hard working, dedicated[,] and long-serving colleagues I think of often with affection and respect. For example, paraprofessional Joyce Jenkins has been talking about retirement for many years, but I'm not sure the [L]aw [L]ibrary could operate without her. Joyce has probably touched every book in the collection once and moved most of them [five] or [ten] times over the years. Her spirit of joyful labor was contagious and it was a pleasure to see her smiling face each day as she prepared for whatever tough project needed to be done.
>
> Because I was new to the Tidewater Virginia area, the colleagues with whom I worked at Regent made transition to life here an easy one. When I finally found my professional niche at Norfolk Law Library, I had Regent to thank for providing me a place to temporarily practice librarianship in a region with very few law library positions. Most of all, the people at Regent made it memorable and a positive experience—from Rich Leiter to Barbara Baxter to Eric Welsh, I am grateful to have had the opportunities, challenges[,] and chuckles that working with each of them provided.

E-mail from Donna Bausch, Law Librarian, Norfolk Law Library, to Brent Rowlands, Assistant Research Services Librarian, Regent University Law Library (June 9, 2008,

D. The Richard Leiter Era

Richard A. Leiter, on September 1, 1991, began serving as the new Law Library director with the rank of associate professor of law.[164] Leiter was dual degreed with J.D. and M.L.I.S. degrees, and he had ten years of experience in law librarianship before coming to Regent.[165] His responsibilities included teaching Legal Research and Writing I beginning in fall 1992.[166]

The Law Library's collection at that time had grown to "approximately 275,000 volumes, including microform equivalents."[167] "[C]ollection strengths [were, and] are[,] in legal history, law and religion[,] and Anglo-American constitutional law."[168]

The next few years would be challenging for the Law Library, as it would be growing in staff and collections, consolidating operations to the entire third floor of the library building, migrating to a new online library system,[169] offering new services, and adjusting to newly acquired technology products.[170]

Members of the bar and other outside patrons benefited by some changes made during 1993. These changes included allowing circulation privileges to members of the bar,[171] and making "Westlaw . . . available to library patrons on a contract basis."[172]

18:48:32 EST) (on file with author). Author's note: Donna Bausch is a much loved and respected law librarian who is a leader in her profession and a mentor to many. I am indebted to her for assisting and encouraging me throughout my law library career, and have great admiration for her as a professional colleague and person.

[164] *See infra* app. 1.

[165] Regent Univ. Sch. of Law, Self-Study 71–72 (Mar. 1992) [hereinafter Mar. 1992 Self-Study]. Leiter was active in the American Association of Law Libraries and co-authored *The Spirit of Law Librarianship* with Professor Mersky in 1991. *Id.* at 72–73.

[166] *Id.* at 79.

[167] *Id.* at 76. "According to the Fall 1991 ABA survey[,] Regent's collection size placed it 90th out of 175 ABA-approved law school library collections, a respectable showing for a young program, and more than adequate to serve the needs of our students, faculty[,] and community users." *Id.*

[168] *Id.*

[169] *Id.* at 81–82. INNOPAC library system was selected among several alternatives. *See* Shelia Walker, Professional Staff Meeting Minutes (Feb. 5, 1997) (on file with the Regent University Law Review).

[170] *See* Mar. 1992 Self-Study, *supra* note 165, at 76.

[171] Richard A. Leiter, *From the Director's Pen*, TESTIMONY (The Regent Univ. Law Library, Virginia Beach, Va.), Mar. 1993, at 2 [hereinafter Mar. 1993 TESTIMONY].

[172] *Services for the Regent Regulars: Contract Westlaw Services Are Now Available*, TESTIMONY (The Regent Univ. Law Library, Virginia Beach, Va.), June 1993, at 1. The "cost [was] $35.00 for five minutes of searching." *Id.* Additional time was charged at the rate of $4.00 per minute. *Id.*

The 1993–1994 school year brought profound changes to the law school and library. A record number of 132 students was admitted.[173] This student growth placed new demands on the Law Library. In response, several staff members were added during the school year. The March issue of *Testimony*, the Law Library's newsletter, announced the addition of Kathleen Miller as head of reference.[174] Shortly thereafter, Karen Papasodora, reference librarian, and Rebecca Perry, head of Technical Services, joined the professional staff.[175] Other hirings around that time included Joan Antonucci as Public Services supervisor, Sheri Egress as serials assistant, and Vauna Hyatt as the new secretary for the Law Library.[176]

The Law Library was scheduled to relocate to the entire third floor of the library building during spring 1994, and plans were underway for a separate building for the Law Library to be located between the new Law and Government building and the University Library building.[177] By the time of the ABA site visit in March 1994, a new law school building, named Robertson Hall,[178] had recently been completed, and the Law Library had been relocated, not to a new building, but to the entire third floor of the library building.[179] Remarkably, the work of moving the

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[173] *See* Regent Univ. Sch. of Law, 1993–1994 Self Study, at 93 (Feb. 1994) [hereinafter Feb. 1994 Self Study] (on file with the Regent University Law Review).

[174] Mar. 1993 TESTIMONY, *supra* note 171, at 2. Assuming her duties on March 1, 1993, Miller was "a graduate of the University of Pittsburgh's Library School and Ohio Northern University Law School." *Id.* "She [came] to [the Library] with . . . six years of library experience in the Pittsburgh area." *Id.*

[175] *Welcome Wagon*, TESTIMONY (The Regent Univ. Law Library, Virginia Beach, Va.), Apr. 1994, at 1. Perry, assistant law librarian, had received the M.L.S. degree from the University of Kentucky, and had previously worked as head librarian at the Lloyd Library and Museum in Cincinnati, Ohio for 15 years. *Id.* Papasadora, reference librarian, had received a J.D. degree from Regent University in 1992 and was then pursuing a library degree. Feb. 1994 Self Study, *supra* note 173, at 60.

[176] *Welcome Wagon*, TESTIMONY (The Regent Univ. Law Library, Virginia Beach, Va.), Oct. 1993, at 1 (welcoming Antonucci and Hyatt); Regent Univ. Sch. of Law, 1995–1996 Self Study, at 41 (Oct. 1995) [hereinafter Oct. 1995 Self Study] (documenting the hiring of Egress) (on file with the Regent University Law Review).

[177] Regent Univ. Sch. of Law, 1992–1993 Self Study, at 73 (Feb. 1993) (on file with the Regent University Law Review).

[178] Robertson Hall was named in honor of Pat Robertson's father, A. Willis Robertson, a former U.S. Congressman and U.S. Senator from Virginia. Esther Diskin, *Quayle, Speaking at Regent, Backs Health Care Reform*, VIRGINIAN-PILOT & LEDGER STAR, Oct. 2, 1994, at B2, *available at* 1994 WLNR 1901996.

[179] Arthur R. Gaudio et al., Report on Regent University College of Law 34 (Mar. 20–23, 1994) [hereinafter Mar. 20–23, 1994 ABA Report] (findings of ABA site evaluation prepared by visitation team members) (on file with the Regent University Law Review). Leiter recalls that he "remodeled the [Law] [L]ibrary so that it was independent of the main library. It used to be on three floors without a separate entrance." E-mail from Richard A. Leiter, Director, Schmid Law Library, and Professor, University of Nebraska College of Law, to Brent Rowlands, Assistant Research Services Librarian, Regent

great majority of the Law Library materials was accomplished in two weeks with no budgeted funds, using Law Library staff and other resources.[180] The renovation included new ceilings and comfortable lighting, full carpeting for a quiet study space, and six well-lit study rooms that could be reserved by students with special research needs.[181] "There [were] 140 assignable carrels and 100 . . . reading tables providing seating for more than 250 students . . . ."[182] The usable space more than doubled from some 15,000 square feet to 33,000 square feet.[183] The study rooms located in the University Library were also available to law students. Things seemed to be improving.

But the campus was in turmoil. The law school dean had recently been dismissed and a new administration was installed.[184] Several of the law faculty had filed a complaint for a Rule 34 violation with the ABA,[185] as well as lawsuits against Regent University alleging infringements of tenure, faculty governance[,] and academic freedom. Faculty and student loyalties were divided.[186] Yet, the site team was complimentary of the Law Library.[187]

University Law Library (June 6, 2008, 04:28 EST) [hereinafter June 6, 2008 Leiter E-mail] (on file with author).

[180] *See generally* June 6, 2008 Leiter E-mail, *supra* note 179. Leiter further recalls that the renovations were accomplished solely with 700 Club carpenters, used shelving, and the Law Library staff, which moved all the books and fiche. *Id.*

[181] Mar. 20–23, 1994 ABA Report, *supra* note 179, at 38.

[182] *Id.* According to the April 1994 issue of *Testimony*, the Law Library was closed in 1994 from February 23 until March 7 to accomplish the relocation, which created approximately 25% more shelf space and 50% more floor space. Richard Leiter, *From the Director's Pen*, TESTIMONY (The Regent Univ. Law Library, Virginia Beach, Va.), Apr. 1994, at 2 [hereinafter Apr. 1994 TESTIMONY]; *Winter Update*, TESTIMONY (The Regent Univ. Law Library, Virginia Beach, Va.), Apr. 1994, at 1. Seating capacity more than doubled, and for the first time at Regent, the Law Library had its own circulation desk and reserve room. Apr. 1994 TESTIMONY, *supra*. The reference desk was new, and reference services were enhanced. *Id.*

[183] *Compare* Feb. 1994 Self Study, *supra* note 173, at 144, 146 (describing the floor plan as it existed in 1994, after the move to the third floor), *with* Transition Study, *supra* note 116, at 17–18 (describing the floor plan in 1986, before the move to the third floor).

[184] Mar. 20–23, 1994 ABA Report, *supra* note 179, at 17–18.

[185] Under Rule 34, a faculty member may file with the consultant to the ABA a complaint alleging that a school is not in compliance with the standards of the ABA. ABA RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS R. 34 (1983) (current version at R. 24 (2008–2009)). If the consultant deems that there may be cause for further inquiry, the law school dean is notified and allowed a chance to respond. *Id.* Further investigation and prosecution may occur. *Id.*

[186] *See* Mar. 20–23, 1994 ABA Report, *supra* note 179, at 17–18, 31–32.

[187] *Id.* at 32. The Report included the following:

> The overriding thrust of this report on the [L]aw [L]ibrary, computer resources[,] and physical facilities, all of which are entitled to high marks *per se*, is to emphasize the need for *improved personnel administration* at all levels. Morale at Regent is grim in the face of uncertainty. The muddle over authority

There were now four full-time professional librarians.[188] The three reference librarians participated in teaching the first-year legal research class.[189]

The Law Library housed a computer laboratory capable of accessing Lexis, Westlaw, and the Internet, and would soon have CALI (Computer Assisted Legal Instruction) programs available.[190] There were twelve work stations students could use for word processing.[191] The University computer services department was responsible for the computers and maintenance; the Law Library was responsible for the law applications.[192]

The collection now consisted "of approximately 280,000 volumes, 125,000 in hard copy and 155,000 in microform equivalents."[193] "There [were] three plain paper microfiche reader-printers," two of which had the capability of reading either fiche or film; the other read all types of fiche.[194]

Among Leiter's bibliophilic accomplishments were acquiring several important collections, including the Transylvania Collection,[195] the First

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> as to how the School of Law is managed, how personnel are selected and evaluated (including the [d]ean, faculty[,] and students), the dismissal of the former [d]ean, tenure, the hiring of the new [d]ean, faculty governance, the Rule 34 Complaint, personnel management, salary policy and academic freedom, rulemaking, and a perception, justified or not, that rules change as time goes by and situations demand, must be addressed and solved forthwith if the present malaise is to be cured. Once treated effectively, typical academic activities, regrettably low during the period of inspection, should return to acceptable levels. Thus, utilization of the premier library facilities by students who study and write their papers and briefs at Regent with access to splendid resources should resume at an accelerated pace when the distraction of controversy is diminished and the faculty applies its energies to scholarship.
>
> It is tragic to observe a well-planned and stocked multi-million dollar library lie fallow because of internal strife.

Id. The Report added: "It is heartening to note that intellectual freedom in terms of library acquisitions has not been compromised in favor or support of any dogma or cause and that works representing opposing and supporting views on various issues are part of the library collection." *Id.*

[188] *Id.* at 35.

[189] *Id.* at 36.

[190] *Id.* at 37.

[191] *Id.* at 38. This was one of several computer labs available to law students, but the only one located exclusively in the Law Library.

[192] *Id.* at 37. The Report added: "The entire library is well organized. A modern approach to information retrieval is evident in the integrated library automation system and the computer laboratory. Regent is coping well in the transition period from the time all information was found in books to modern day multi-media sources." *Id.* at 38.

[193] *Id.* at 37.

[194] *Id.*

[195] Section of Legal Educ. & Admissions to the Bar, Am. Bar Ass'n, Fall 1994 Law School Annual Questionnaire 8 (Fall 1994) [hereinafter ABA Annual Questionnaire] (as

Amendment and Civil Rights Collection,[196] and a collection of individually bound Early American Election and Political Sermons that date from 1700 to the mid-1800s.[197] These distinctive additions were nice

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completed by the acting director of the Regent Law Library) (on file with the Regent University Law Review); Telephone Interview with Richard Leiter, Dir. of the Law Library & Professor of Law, Univ. of Neb. Coll. of Law (June 9, 2008) [hereinafter Leiter Telephone Interview]. Also known as the Founders Collection, it "once comprised the library of the first law school west of the Appalachians." Regent Univ. Sch. of Law, Self Study 2005, at 82 [hereinafter Self Study 2005] (on file with the Regent University Law Review).

> This pioneer law school was one of the most renowned of its day, praised by Thomas Jefferson, Justice Story, and John Marshall Harlan. The volumes of its library were used to train many of our young nation's finest lawyers, legislators, and statesmen. Henry Clay was among the first faculty[] and was a strong force in helping to support and expand the library.

Id. at 83. The Founders Collection totals 1,013 volumes and spans four centuries, from Fitzherbert's *La Grande Abridgement*, published in 1577, through early American imprints such as Chitty, Story, and others during the first half of the nineteenth century. Regent Univ. Sch. of Law, The Founders Collection: An Opportunity To Be a Part of History [hereinafter The Founders Collection] (on file with the Regent University Law Library); Charles H. Oates, *Foraging The Transylvania Law Library: A Unique and Valuable Collection*, __ LAW LIBR. J. (forthcoming) (manuscript at 4, 5 & n.9, on file with author). Much of the collection is comprised of early American imprints consisting of treatises, reports, and early state and federal materials such as legislative acts, state papers, journals, and congressional debates. The Founders Collection, *supra*. The remainder consists of British imprints, including many eighteenth-century treatises and compilations. *Id.* Leiter learned about the Transylvania Collection through his mentor, Professor Mersky, who was aware that it was being offered for sale by Phil Cohn of Oceana Publications. Leiter Telephone Interview, *supra*. Leiter entreated Dean Nelson Happy to enable the purchase. *Id.* Dean Happy found a donor to make the purchase a reality, and this unique collection was purchased for $100,000 in 1994. *Id.* Leiter and McCue, who worked for Oceana Publications at the time, packed and drove the collection from New York to Virginia. *Id*; *see also* Oates, *supra* (detailing treatment of the Transylvania Law Department and Law Library). Author's note: McCue, currently a dealer in rare law books and a man of great integrity, continues to send additional volumes from the collection as he finds them. Several newly discovered volumes have been received in recent years.

[196] ABA Annual Questionnaire, *supra* note 195. Acquired from Professor Mersky's personal collection, the more than 300 monographs and government documents in this collection were gathered by a private party with a strong interest in the development of civil rights law and its impact on American life, particularly after World War II. Works in this collection focus on personal freedoms, constitutional rights, or specific events such as the Kent State civil disturbances of 1970 that have implications on how broadly or narrowly constitutional rights should be interpreted. Also included is the text of U.S. Congressional hearings of the House Un-American Activities Committee and the Senate Sub-Committee on Internal Security. These hearings were held during the "Red Scare" period following World War II. These reports give researchers insight into Congress's struggle to balance national security with the civil rights guaranteed by the Constitution.

[197] Receipt from Jack Hamilton to Richard Leiter, Law Library Dir., Regent Univ. Law Sch. Library (Oct. 21, 1991) (on file with the Regent University Law Review). The collection was purchased from Hamilton's Book Store in Williamsburg, Virginia for $1,750 on October 21, 1991. *Id.* A bibliography of the collection can be viewed at http://www.regent.edu/acad/schlaw/library/guests/sermons.cfm.

enhancements to an already fine collection and furthered the mission of the law school.[198]

Notwithstanding Leiter's accomplishments, there were challenges. He recounts that ABA site visits and accreditation issues consumed much of his time and energies while at Regent, stating, "I worked hard to get the [L]aw [L]ibrary in a position to earn accreditation. That was my mission while I was there."[199] Because the ABA accreditation status for the law school was *provisional*, the site checks were an annual occurrence.[200]

The close integration and interaction with the University Library brought additional hardships. When he arrived, the Law Library was spread out over all four floors of the University Library. The Law Library was "subject to the main library's rules and hours of operation."[201] The lack of autonomy caused it to function in many ways as a part of the University Library.[202]

Leiter resigned "effective July 31, 1994, to accept a new position with Howard University School of Law," and a search committee was formed to receive applications for his replacement and conduct interviews.[203]

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[198] *See* Regent University Law Library, Statement of Mission, http://www.regent.edu/acad/schlaw/library/guests/mission.cfm (last visited Nov. 24, 2008).

> The primary mission of the *Law Library* is to *assist the School of Law in fulfilling its mission*, and to anticipate and support the curricular, research, and technological needs of the faculty, students[,] and administration of the School of Law, as well as the entire Regent University community.
>
> The secondary mission is to support the legal research needs of patrons outside the Regent University community, including attorneys, paralegals, *pro se* individuals, and others.

Id. (emphasis added). The mission of the *law school* includes "*the grounding of students in biblical foundations of law, legal institutions, and processes of conflict resolution; recognition of questions of righteousness in the operation of law; and pursuit of true justice through professional legal service.*" Regent University School of Law, Admissions, http://www.regent.edu/acad/schlaw/admissions/abouthome.cfm (last visited Nov. 24, 2008) (emphasis added).

[199] June 6, 2008 Leiter E-mail, *supra* note 179.

[200] Leiter Telephone Interview, *supra* note 195.

[201] June 6, 2008 Leiter E-mail, *supra* note 179.

[202] Leiter Telephone Interview, *supra* note 195. For example, because all new books were processed through University Library cataloging, "any law theology books, sections H, J, or Z were not located with the law books, but were mixed in with the University [L]ibrary collection. In addition, there was a pretty significant history section that was not out on the floor." *Id.* Only the "K" section volumes consisting of law reviews, periodicals, and national reporters, and so on, were under the control of the Law Library. *Id.*

[203] Regent Univ. Sch. of Law, Site Team Report Update 13 (Oct. 25, 1994) (on file with the Regent University Law Review).

E. The Charles Oates Era

Upon Leiter's resignation, Charles H. Oates, an adjunct professor at Regent since 1986, and at the time a practitioner-in-residence, was appointed interim director by Dean J. Nelson Happy.[204] With a J.D. degree and twelve years of law practice, but no experience in librarianship, Professor Oates enrolled in Catholic University of America's M.L.S. program.[205]

The first two years were particularly challenging: adapting to the library environment; taking two library courses at Old Dominion University per semester; commuting to Richmond one semester to take a course not available locally; spending much of the summers commuting to Washington, D.C. to take additional courses; and living on campus at Catholic University two weeks each summer to meet residency requirements—all while managing the Law Library—was quite arduous, particularly given the future uncertainty as to the directorship appointment. Fortunately, Dean Happy was understanding and had waived teaching responsibilities during that period.[206]

The search committee offered the directorship to an experienced law librarian who accepted the offer, then withdrew the acceptance.[207] No other candidate was deemed suitable at that time for a permanent appointment. The search for director was deferred, and Professor Oates was continued in the interim position provided he "diligently pursued a

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[204] Oct. 1995 Self Study, *supra* note 176, at 39.

[205] *Id.* But Professor Oates did have more than six years of experience managing a legal department. Arthur Gaudio et al., Report on Regent University School of Law 21 (Nov. 29–Dec. 2, 1995) [hereinafter Nov. 29, 1995 ABA Report] (findings of ABA site evaluation prepared by visitation team members) (on file with the Regent University Law Review). "To overcome his lack of familiarity with academic law library practices, [Professor Oates] has created a Law Library Advisory Council composed of one academic law library director, three local law librarians[,] and the University Library Director." *Id.* This group provided helpful advice and guidance. As a result of their tutelage, a formal collection development policy was in place the following year. Oct. 1995 Self Study, *supra* note 176, at 42. Professor Oates received his J.D. degree from Stetson University College of Law and practiced law in Jacksonville and St. Petersburg, Florida. *Id.* at 39. Because of a distance education arrangement between Catholic University in Washington, D.C. and Old Dominion University in nearby Norfolk, Virginia, managing the Law Library and attending library classes could be achieved concurrently. The ABA Standards at the time stated that the director of a law library should have a law degree and a degree in library or information science. ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS Standard 605(a) (1983) (current version at Standards 401–04 (2008–2009)). If there was to be any hope of permanency to the position, it would be necessary to have the library degree. *See id.*

[206] Until that time, Professor Oates had taught seven different substantive courses as an adjunct at Regent.

[207] Nov. 29, 1995 ABA Report, *supra* note 205, at 20. The name is withheld to protect confidences.

degree in librarianship."[208] Once the M.L.S. coursework was completed, the position of director was offered to Professor Oates, and Professor Oates accepted.

During academic year 1994–1995, the library added 1,051 titles, totaling 6,842 volumes and volume equivalents, for a grand total of 296,606 volumes.[209] During this period, 82 of the 107 interlibrary loan ("ILL") requests made by the Law Library were filled by other libraries, whereas 1,134 of the 1,315 ILL requests received were filled by the Law Library.[210] "Most of the borrowing was by local academic institutions."[211]

"The Law Library's computer lab [of fifteen workstations] include[d] two dedicated Westlaw and two dedicated Lexis terminals, plus [eleven] non-dedicated computers on the University network, with access to the online databases . . . ."[212] Subscriptions were maintained "to Legaltrac and First Search (nine databases), with access through the University [L]ibrary's gateway."[213]

Early on, challenges were confronted. Budgetary restraints had begun to force cutbacks in acquisitions and cancellations of titles.[214] Four staff members were to resign, some in the face of deficiencies in performance evaluations, creating positions that needed to be filled,[215] while a growing student body was creating a need for additional staffing for which there was insufficient office space.

Several professionals and paraprofessionals joined the Law Library staff during this period, replacing those who had departed and filling other positions.[216] Hermeen Speller was hired as technical services

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208 *Id.* at 21. "Both the original and the renewed appointment were made with the unanimous consent of the law faculty." *Id.* Throughout this process there was a calm assurance that God was in control of the process, and that all things work together for good for those who love God and are called according to His purpose. *See Romans* 8:28 (KJV).

209 Nov. 29, 1995 ABA Report, *supra* note 205, at 23. Of the total 296,606 volumes, 114,241 were hard copy and 182,365 were microform. *Id.* "The major microform holdings include[d] an almost complete CIS collection, the serial set[,] and the Congressional Record." *Id.*

210 *Id.* at 22.

211 *Id.*; *see also id.* at 22–23 (demonstrating how the Law Library, while primarily meeting the needs of its constituents, was also able to meet the needs of the community).

212 *Id.* at 23.

213 *Id.*

214 Oct. 1995 Self Study, *supra* note 176, at 44. The goal was to "'trim fat without sacrificing meat.'" *Id.* They made "significant progress . . . by cancelling excessively redundant titles, materials that [were] rarely requested, and materials that [were] available in the [main] library within the same building and [were] more appropriate to a university library than a[] . . . law library." *Id.*

215 *Id.*

216 *See id.* at 41–42 (documenting the hiring of paraprofessional staff).

assistant in October 1994.[217] Shortly thereafter, she was promoted to cataloger.[218] Julie Adams joined the Law Library staff in August 1995 as assistant reference librarian to fill a vacant position.[219] That same month Margaret Dempsey (Christiansen) transferred from the law school staff to the Law Library as faculty liaison for the Law Library, a newly created position.[220] Shortly thereafter, Tracy Carter was hired as serials assistant,[221] and Shelia Walker became the Law Library secretary, moving Hyatt to the position of circulation supervisor.[222] Stephanie Gehring joined the Law Library staff as serials assistant in September 1997,[223] replacing Carter. Shannon Howard began serving as assistant circulation supervisor in July 1997.[224] Kim Griner joined the Law Library staff as assistant circulation supervisor in January 1998.[225] Marvin Stutzman joined the Law Library staff in June 1998, as law technical services graduate assistant supervisor.[226] Deborah Southerland became the bookkeeper in August 1998.[227]

Realizing that the faculty and staff of the law school and the Law Library were overly dependent on irregular and sometimes unsatisfactory service from the University computer services

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[217] *Id.* at 42. Speller had previously served at CBN and on the Regent University Library staff for ten years. *Id.*

[218] Shelia Walker, Professional Staff Meeting Minutes 2 (May 12, 1998) (on file with the Regent University Law Review).

[219] Oct. 1995 Self Study, *supra* note 176, at 41. Prior to her appointment, Adams "served as [a]ssistant [c]irculation [s]upervisor and as an adjunct reference librarian at Regent Law Library." *Id.* She received a J.D. degree several years earlier from Regent University School of Law. *Id.*

[220] *Id.* Later, Dempsey (Christiansen) assumed additional duties as assistant circulation supervisor. *Id.*

[221] Carter was serials assistant from May 1, 1996 until August 29, 1997. Email from Shelia Walker, Administrative Assistant, Regent University Law Library, to author (Oct. 22, 2008, 10:25 EST) (on file with author).

[222] *See Congratulations*, TESTIMONY (The Regent Univ. Law Library, Virginia Beach, Va.), Feb. 1996, at 3; *Welcome Sheila* [sic], TESTIMONY, *supra*. Thirteen years later, Shelia Walker is still secretary to the law library staff and administrative assistant to the director. Previously, Walker had "fifteen years . . . of professional experience in the CBN and Regent [c]ommunity." *Welcome Sheila* [sic], *supra*. With unparalleled institutional knowledge, she has been of inestimable value to the law library staff and the Director.

[223] Regent Univ. Sch. of Law, Self-Study 1998–1999, at 43 [hereinafter Self-Study 1998–1999] (on file with the Regent University Law Review); *see also* Shelia Walker, Professional Staff Meeting Minutes 2 (July 16, 1997) (on file with the Regent University Law Review). She was later promoted to cataloger. *See Law Library Staff*, TESTIMONY (The Regent Univ. Law Library, Virginia Beach, Va.), Fall 1999, at 4 [hereinafter Fall 1999 TESTIMONY].

[224] Fall 1999 TESTIMONY, *supra* note 223.

[225] Self-Study 1998–1999, *supra* note 223, at 43.

[226] *Id.* As a temporary employee, his duties included overseeing the daily duties and schedule of the graduate assistant staff and performing book repairs. *Id.*

[227] *Id.* at 44. This was a part-time position. *Id.*

department, Professor Oates sought to hire a computer services administrator to be stationed in the Law Library and to be part of the library staff. The position was created, funded, and filled in short order. Robert E. Maxey, Jr., a Novell-certified third-year law student, was hired on an interim basis in May 1997 as acting computer services administrator.[228] Shortly thereafter, Bob Fritz was appointed computer services administrator.[229] When he resigned approximately a year later, Maxey was promoted to computer services administrator following his graduation from law school.[230] Vicki Boggs was hired as deputy computer services administrator in October 1998.[231] Other staffing changes during 1998 included Anna Maciak replacing Hyatt as access services supervisor, then a part-time position.[232]

During this period, further progress was made toward reducing dependence on the main library. "[R]esponsibility for all of the Law Library's technical processing and interlibrary loans [was] . . . transferred from the University [l]ibrary to the Law Library."[233] Shortly thereafter, the position of technical services librarian was created, and later filled when Teresa Parker-Bellamy joined the professional staff in October 1996.[234] Following an extended search for a cataloger, Ann Cannon was hired as catalog librarian in April 2000.[235]

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228 Shelia Walker, Professional Staff Meeting Minutes 1 (May 7, 1997) (on file with the Regent University Law Review).

229 Shelia Walker, Professional Staff Meeting Minutes 1 (June 26, 1997) (on file with the Regent University Law Review).

230 Self-Study 1998–1999, *supra* note 223, at 43.

231 Shelia Walker, Professional Staff Meeting Minutes 2 (Sept. 23, 1998) (on file with the Regent University Law Review). Boggs had both M.B.A. and M.A. in Biblical Studies degrees from Regent University. Self-Study 1998–1999, *supra* note 223, at 43. The Law Library's computer services administrator and staff were readily available to assist faculty, staff, and even law students (as time was available) "with laptop questions, email and network configurations, and many other computer-related issues." Charles H. Oates, *From the Director's Desk*, TESTIMONY (The Regent Univ. Law Library, Virginia Beach, Va.), Fall 1999, at 1. Later, budget constraints, and a new University computer services administration that was much more capable and responsive to requests, eventually reduced—and then eliminated—this service.

232 *See* Shelia Walker, Professional Staff Meeting Minutes 2 (Jan. 27,1998) (on file with the Regent University Law Review). "Prior to this, Ms. Maciak was the [a]ssistant [c]irculation [s]upervisor. She graduated from Regent University with a Master's Degree in Counseling in 1995, and . . . earn[ed] a Ph.D. in Psychology in 2001." Self–Study 1998–1999, *supra* note 223, at 44.

233 Nov. 29, 1995 ABA Report, *supra* note 205, at 20. The libraries continued to share a CD-ROM tower and an internet gateway with twenty ports for accessing subscription databases. *Id.* Half of the ports were assigned to the Law Library. *Id.*

234 Self-Study 1998–1999, *supra* note 223, at 42. For almost fifteen years before being appointed to this position, Parker-Bellamy was the library assistant and ordering supervisor at Old Dominion University Library in the bibliographic services department. *Id.* "She received the M.S.L.S. degree from Catholic University of America in 1995." *Id.*

For three and one-half years, Professor Oates had managed all of the administrative responsibilities of the Law Library, including budgeting, without assistance. Approval to create and fill the position of assistant director was sought from Dean Happy, and happily granted. In December 1997, Christiansen was appointed assistant director.[236]

III. MATURATION AND STABILITY: 1998–2008

In spite of a fluctuating budget during these years, and maybe partly because of it, there has been unprecedented growth and achievement in the Law Library and among the staff. Financial constraints have sometimes been the catalyst for creative solutions. Lack of space has prompted aggressive weeding and creative storage solutions on more than one occasion.

Early in this period, the Law Library was called upon to support three major new law school initiatives: (1) a summer program in International Human Rights to be held in Strasbourg, France; (2) a distance education program offering an LL.M. in International Taxation and a Master's of International Taxation (MIT); and (3) an evening program leading to a law degree for local part-time students. The first two programs involved students living or residing in other parts of the world and required materials to support the curricula and reliable remote access to those materials. The third necessitated extended hours of professional staff availability.

Materials were added to support the summer program in Strasbourg, France in subjects relating to the courses initially being offered: International and Comparative Human Rights, International Comparative Law, and The Origins of the Western Legal Tradition.[237] Civil Liberties and National Security was added later and taught in 2005 by Distinguished Professor John Ashcroft.[238]

Parker-Bellamy was responsible for overseeing "the daily operations of the [t]echnical [s]ervices department, and a staff of [five] employees and [eight] to [ten] students." *Id.*

[235] She resigned in May 2001, and has since filled in on a temporary basis during times when the catalog librarian position was vacant.

[236] Self-Study 1998–1999, *supra* note 223, at 40. Since her appointment two years earlier, Christiansen had been serving faithfully as law faculty liaison, webmaster for the Law Library, assistant librarian, and project coordinator for the Founders Collection. *See id.* at 40–41. Her new administrative duties included supervision of the day-to-day operations of the Law Library and budgeting, as well as any other matters delegated by the Director. *Id.* Christiansen had received her J.D. degree from Regent University in 1994, and later received her M.S.I.S. degree from Florida State University, and also became a member of the Virginia State Bar. *Id*; *see also* Memorandum from J. Nelson Happy, Dean, Regent Univ. Sch. of Law, to Regent Univ. Cmty. (Jan. 6, 1998) (on file with the Regent University Law Review).

[237] Self-Study 1998–1999, *supra* note 223, at 78.

[238] Regent University School of Law, Former Attorney General John Ashcroft, http://www.regent.edu/acad/schlaw/academics/ashcroft.cfm (last visited Nov. 24, 2008). He

The new distance education LL.M. and MIT programs in International Taxation commenced January 1, 1999. Because students and faculty were to be found across countries and continents, curricular materials needed to be accessible online via the Internet. To support this program, the Law Library subscribed to the Commerce Clearing House ("CCH") and Research Institute of America ("RIA") online tax databases.[239] These databases were easily accessible through the Internet. All LL.M. students also had Internet access to Westlaw and Lexis legal research databases under the Law Library's contracts with those companies. Additionally, the Law Library's circulation policy was modified to allow for mailing materials to distance students.[240] The Law Library also cooperated "with the University [L]ibrary to install and implement an electronic reserves system to accommodate distance program needs."[241]

The new evening program leading to a law degree for part-time students required expanded reference hours on evenings and Saturdays.[242] In response to this new demand, a part-time reference position was created. It was filled in July 1998 when Cherie Duggan joined the team of reference librarians.[243] Additional reference hours would be covered by third-year law students, to be trained by Welsh, the head reference librarian. Known as the Honors Reference Program, this was a special way to recognize and honor top research and writing law students and to utilize their abilities to expand our reference services at

served as 79th Attorney General of the United States from 2001 to 2005. Northwest News, *U.S. Attorney General John Ashcroft to Speak at Northwest University*, May 3, 2005, http://www.northwestu.edu/news/05/050503.php.

[239] CCH and RIA were two of the largest tax law information providers in the world.

[240] Self-Study 1998–1999, *supra* note 223, at 49.

[241] *Id.* at 48. The function and purpose of electronic reserves was to "enable distance students to access reserve library materials via the Internet without infringing on copyright." *Id.* at 49.

[242] Laura N. Gasaway, Professor, Univ. of N.C. at Chapel Hill, Law Library, Report on the Proposed LL.M. Program for International Taxation at Regent University School of Law 3 (May 5, 1998) [hereinafter Gasaway LL.M. Report] (findings of ABA site evaluation) (on file with the Regent University Law Review). The evening program was initiated in fall 1998. *Id.* at 2. The evening program would allow students to continue their current employment during the day, and attend law classes at night and on Saturdays.

[243] Self-Study 1998–1999, *supra* note 223, at 42. Duggan's rank was part-time assistant reference librarian, and she was responsible for "provid[ing] reference assistance to students two nights a week and on Saturday." *Id.* Duggan, who received her J.D. from Regent University in 1994, became a member of the Virginia State Bar, and had been employed by the Regent University Law School since 1996, serving as an adjunct law professor for the first-year legal research and writing course. *Id.*

a minimal cost.[244] Marie Hamm and Kaaren Jurack were the first Honors Students selected for the program.[245]

The Honors Reference Program proved to be serendipitous. When Duggan left a year later to follow her husband's employment, she was replaced by Kaaren Jurack. Hamm, who had grown to enjoy the academic Law Library environment, accepted a then newly created third reference librarian position and decided to pursue law librarianship as a career.[246]

To support these new programs, the Law Library had begun a significant collection development initiative, buttressed by a $2.6 million supplement to the materials budget approved by the Board of Trustees.[247] These monies were in addition to the existing materials budget and were specifically designated for the purchase of new materials and the restoration of subscriptions that had been allowed to lapse due to budget constraints of past years. With the planned additions, the collection was deemed adequate for the current and anticipated academic programs. The collection development policy was revised to reflect these changes.[248] Traditional library nomenclature was changed at this time to better reflect contemporary usage and function:

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[244] Shelia Walker, Professional Staff Meeting Minutes 2 (June 3, 1998) (on file with the Regent University Law Review). While conducting the ABA site visit for the proposed LL.M. and MIT programs in May 1998, Professor Laura (Lolly) Gasaway, law library director at the University of North Carolina at Chapel Hill Law Library, suggested that this solution had worked for her.

[245] Shelia Walker, Professional Staff Meeting Minutes 3 (Sept. 8, 1998) (on file with the Regent University Law Review).

[246] Hamm received her J.D. from Regent in May 1999 and was hired on July 1, 1999, as assistant research services librarian. She received her M.L.S. degree from Syracuse University in 2001, and also became a member of the North Carolina Bar. Regent Law School, Marie Summerlin Hamm: Research Services Librarian, http://www.regent.edu/acad/schlaw/faculty_staff/hamm.cfm (last visited Nov. 24, 2008). *See also* Fall 1999 TESTIMONY, *supra* note 223.

[247] Self-Study 1998–1999, *supra* note 223, at 47. The money budgeted for this first year of a planned five-year collection development restoration and enhancement program was $600,000. *Id.* "Initially to be expended over four years, these funds [were actually] spread in steadily declining amounts over a seven-year period. The last $100,000 of this extra funding [was] . . . expended in the 2005–2006 academic year." Self Study 2005, *supra* note 195, at 92.

[248] Shelia Walker, Professional Staff Meeting Minutes 1 (Aug. 14, 1998) [hereinafter Aug. 14, 1998 Staff Meeting Minutes] (on file with the Regent University Law Review). The revision was approved by the professional staff in August 1998, and approved by the Law Faculty Library Committee shortly thereafter. *Id.* The policy addresses the criteria to be used for selecting, as well as eliminating, materials from the collection and sets out the mechanics of material selection, selection criteria, and guidelines for de-selection and weeding.

reference was changed to *research services*, *circulation* became *access services*, and *technical services* morphed into *bibliographic services*.[249]

Chancellor Pat Robertson had announced his expectation that the law school would be among the premier law schools in the country. Premier law schools are supported by premiere law libraries. The Law Library needed to grow exponentially in collection, service, and facilities. Collection growth was well supported by the $2.6 million infusion of materials funding. To provide the professional staffing needed to accommodate the Chancellor's expectations and these new initiatives, the Director sought approval for the following new positions: acquisitions/collection development librarian; full-time reference librarian; international, foreign, and comparative law librarian; intellectual property law librarian and copyright expert; government documents librarian; and archivist.[250]

According to the 1998–1999 ABA Self-Study, the collection had grown to approximately 300,000 volumes, including microform equivalents.[251] "This is approximately 21,000 more volumes than were in the collection as of the 1995 Self-Study."[252] The new $2.6 million boost for materials also allowed for significantly enhanced growth in the collection.

Several special collections were acquired during Professor Oates's tenure. These include the Ken North Collection,[253] the Ken North Canon Law Collection,[254] the John Brabner-Smith Library,[255] the John Brabner-

[249] *Library Services by Any Other Name . . .* , TESTIMONY (The Regent Univ. Law Library, Virginia Beach, Va.), Fall 1999, at 4.

[250] Self-Study1998–1999, *supra* note 223, at 53. To date, two of these positions have been filled: acquisitions/collection development librarian and full-time reference librarian. A reference librarian also provides preservation and conservation assistance in lieu of an archivist.

[251] *Id.* at 46.

[252] *Id.* This placed Regent 111th out of 180 among law schools in volumes and equivalents held. *Id.*

[253] The Ken North Collection was donated by Suzi North in memory of her late husband and a former member of the law faculty. It includes a number of beautifully bound legal classics and works reflecting Professor North's interest in criminal law, constitutional law, and politics.

[254] Another of Professor North's passions was the Canon Law Institute, which he helped found in 1990. The Ken North Canon Law Collection consists of his library of Canon Law Institute materials, which focus on church conflict, conflict resolution, protestant canon law (though some Catholic works are included), and related historical works.

[255] John Brabner-Smith, Wall Street and Washington, D.C. attorney, prosecutor of Al Capone, Law Professor and founding dean of the International School of Law, was a brilliant scholar and expositor of Christian Jurisprudence and Natural Law. The John Brabner-Smith Library consists of books on the foundations of our nation that was created under the "laws of nature and of nature's God," jurisprudence, history, and science. These books were donated to Regent University School of Law without restriction, and are maintained as a special collection in the Law Library.

Smith Professional Papers,[256] the Ralph Johnson Bunche Personal Library,[257] and the Mary Elizabeth Menefee Collection of Law and Film.[258]

During this time of growth, it was anticipated that either "a new [law] library building [would] . . . be constructed" between the law school and the Law Library "or [that] a new University [l]ibrary [would] be built and the Law Library [would] occupy all of the existing library [building]."[259] Either alternative would produce the added space considered necessary to accommodate the expected growth in the student body, the collection, and the staff.[260]

Budget constraints, however, forced a lesser alternative. In 1999, the Law Library was remodeled to maximize the utilization of existing

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[256] The John Brabner-Smith Professional Papers consists of professional papers, correspondence and archives collected by John Brabner-Smith throughout his career. This is a research collection, and may be made available only to attorneys, students, scholars and other persons doing serious research on jurisprudence and the Judeo-Christian foundation of the United States of America, according to a stipulation in the donation agreement.

[257] Dr. Ralph Johnson Bunche served the United States and the world brilliantly, and in countless ways. Credited with many accomplishments in diplomacy and political science, he reached the pinnacle of his career as the recipient of the 1950 Nobel Peace Prize for his armistice negotiation between Israel and four separate Arab nations (Egypt, Jordan, Lebanon, and Syria). Charles H. Oates, *Ralph Bunche: Distinguished Scholar, International Statesman and Equal Rights Activist*, 3 REGENT J. INT'L L. 75, 76 (2005). He was also the first African American recipient of that prize. The Ralph Johnson Bunche Personal Library consists of over 400 items, books, journals, journal articles, newspapers, magazines, news clippings, correspondence, and other miscellaneous documents and personal items dating from the 1930s until the 1960s. These items comprised the personal library of Dr. Bunche at the time of his death. For an article about Ralph Bunche's achievements, see *id.*

[258] The Mary Elizabeth Menefee Collection of Law and Film (the "Menefee Collection") was established in 2001 as a research collection in loving memory of Mary Elizabeth Menefee, infant daughter of Regent Law Professor Samuel Pyeatt Menefee and his wife, Mary. It has since become one of the foremost collections of law and film in the United States. The Menefee Collection focuses on law and lawyers in the visual media and related topics. Though most titles are in contemporary format (DVD or VHS), the films themselves are from every era and genre of filmmaking, and include films about law, lawyers and courts, and films which portray society's view of the same. Dr. Menefee, a confirmed bibliophile, served for several years on the Faculty Law Library Committee and was a true friend of the Law Library. Always on the lookout for a bargain in antiquarian law materials, Sam was instrumental in our purchase of the Ralph Johnson Bunche Personal Library.

[259] Gasaway LL.M. Report, *supra* note 242, at 3.

[260] *Id.* To date, neither alternative has come to fruition. The part-time evening program was reduced to a part-time day program in fall 2003, and the International Taxation program ceased operations in spring 2004. Instead, alterations in existing facilities combined with extensive weeding projects have sufficed to date. *See* Aug. 14, 1998 Staff Meeting Minutes, *supra* note 248, at 3. The technical services area was remodeled to accommodate new staff and enhanced to include extra shelving for additional volumes to be purchased with the new monies. *Id.* at 2.

space and to improve functionality. Partial walls between the study rooms were raised to the ceiling to enhance the study environment, carrel lighting was improved to accommodate modified full-spectrum lighting, and 188 LAN ports were installed throughout the public areas of the Law Library for student laptop access. Research services librarians' offices were moved to the front of the library, immediately adjacent to the reference area and the access services desk. The bibliographic services workroom was significantly enlarged "by transferring paraprofessional staff from enclosed offices to cubicle spaces, and the conference room was expanded to accommodate a [growing] staff."[261]

In response to the 1998 Site Team's recommendation that the Law Library be open longer hours, as well as to student initiatives asking for Sunday hours, during fall 2002, the Law Library began to be open on Sundays from 5:00 p.m. to 11:00 p.m. Beginning in fall 2008, Sunday hours in the Law Library increased, and it is now open from 2:00 p.m. to 12:00 a.m.[262] Professional librarian assistance, previously unavailable on weekends, is now provided on Saturdays from noon until 7:00 p.m.

On June 30, 1999, Dean Happy resigned and was replaced by Interim Dean Jeffrey Brauch.[263] Both of these deans have been highly supportive of the Law Library. Dean Happy persuaded a donor to contribute $100,000 to enable the purchase of the Transylvania Law Collection;[264] he also facilitated the purchase of the Civil Rights Collection[265] and the collection of Early American Political Sermons.[266] Dean Brauch meets with the Law Library staff at least annually, is keenly interested in issues facing the Law Library, and has been cultivating relationships with potential donors over a period of time for the purpose of enhancing the collection and financing current renovations.

In June 2000, Bill Magee was hired to fill the position of assistant research services librarian recently vacated by Adams.[267] As of 2005, the

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261 Self Study 2005, *supra* note 195, at 99.

262 Once the University and Law Libraries were physically connected, it became important that both have the same hours.

263 Regent University School of Law, Jeffrey A. Brauch: Dean, http://www.regent.edu/acad/schlaw/faculty_staff/brauch.cfm (last visited Nov. 24, 2008). Brauch became dean of the law school in September 2000.

264 See *supra* note 195.

265 See *supra* note 196.

266 See *supra* note 197.

267 Regent University School of Law, William E. "Bill" Magee: Research Services Librarian, http://www.regent.edu/acad/schlaw/faculty_staff/magee.cfm (last visited Nov. 24, 2008). Bill Magee was dual-degreed, having received the J.D. degree from Regent in 1999, and the M.S.L.S. degree from Catholic University of America in August 2000. *Id.* Magee

Law Library staff consisted of a team of six professional librarians and six paraprofessionals. The research services department consisted of three full-time, dual-degreed faculty who provided customized liaison services to law faculty. "They assist[ed] with instruction in the Legal Research and Writing [c]lasses, and [had] designed hands-on skills training workshops for students, which correlate[d] with the Legal Research and Writing curriculum. The access services department consist[ed] of one full-time [s]upervisor, one part-time . . . supervisor, and [ten]to [fifteen] [graduate assistants]."[268] The head of bibliographic services supervised "a staff of one catalog librarian, two full-time serials staff, one part-time bookkeeper and five part-time temporary and student staff."[269]

The decision by the law school in 2002 to teach out the LL.M. program, and in 2004 to scale back the part-time program, reduced the need for additional space somewhat and permitted the Law Library to focus on increasing the breadth and depth of services to the faculty and students of the School of Law.

> In the spring of 2005, the School of Law engaged the architect[, Hardwicke Associates, Inc.,] who had designed both the Library Building and Robertson Hall to design a new law library facility. Specifications were drafted and a program was [drawn up] for a four-story building, to be directly attached to Robertson Hall at three levels, with an enclosed courtyard between the two buildings. This 109,000 square-foot facility is designed to house collections, study space, and space for the [L]aw [L]ibrary staff and faculty, as well as classrooms, law review and law journal suites, and a new [U]niversity loading dock and mail distribution center.[270]

While this building was not immediately funded, its footprint remains on the University master plan.

In recent years, there have been several significant staffing changes. After a lengthy search for a cataloger, Leanne Hillery was hired in January 2005. In June 2007, Christiansen was promoted to the position of associate director, and Hamm, research services librarian since 1999, was promoted to assistant director for collection development, thereby relieving Welsh, head research services librarian, of the added responsibility that he had carried for many years. Brent Rowlands joined the professional staff to become assistant research

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also serves as the Law Library's preservationist and conservationist in charge of the Rare Book Room. *Id.*

[268] Self Study 2005, *supra* note 195, at 91.

[269] *Id.*

[270] *Id.* at 99. At the time of this writing three years later, this plan for a highly functional building has not moved beyond the drawing boards.

services librarian,[271] filling the position vacated by Hamm, and Hillery resigned as catalog librarian in June 2007 to take a position as public relations librarian in the University Library.[272] At the time of this writing, the catalog librarian position is still vacant.

The Staff That Prays Together . . .

The new millennium ushered in a period of unprecedented stability in staffing. With little to no turnover, both the professional staff and the paraprofessionals have developed into a cohesive unit that could only have been hoped for in prior years. As we approach the Law Library's 30th anniversary, the librarians are dual-degreed[273] except for one,[274] and function as a highly competent team of professionals, contributing strengths and talents for the common good in a spirit of unity. There is an unusual sense of caring and concern for the well-being of each. Prayer is an integral part. One of our librarians has undergone three brain surgeries over the past several years. She is regularly prayed for by the entire staff. Her indomitable spirit is an inspiration to us all.[275]

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[271] Regent University School of Law, Brent Rowlands: Research Services Librarian, http://www.regent.edu/acad/schlaw/faculty_staff/rowlands.cfm (last visited Nov. 24, 2008). Rowlands received his J.D. degree from Regent in 1990 and LL.M. in Taxation from The College of William and Mary's Marshall-Wythe School of Law in 1991. *Id.* He practiced law in Virginia until 2007, and has served as an adjunct professor, teaching the Federal Income Tax and Partnership Taxation classes at Regent. *Id.*

[272] Professional Staff Meeting Minutes 2, 7 (Sept. 5, 2007) (on file with the Regent University Law Review).

[273] Ten years earlier, only the Director had dual graduate degrees. Self-Study 1998–1999, *supra* note 225, at 52.

[274] Teresa Parker-Bellamy was a first-year law student at Regent when a brain tumor was discovered. To date, she has not completed the requirements for a J.D. degree.

[275] These are her own words (including bold emphasis):

A Law Library that Prays Together Stays Together

The Lord is truly working in the lives of the Law Library staff, and miracles are happening.

I'm Head of the Bibliographic Services Department in the Law Library, and, I have had 3 brain surgeries. The last surgery was in August 2007 and lasted 10 hours. The doctors were sure that I would lose the sight completely in my left eye and possibly have other neurological problems, but God decided otherwise. When God awakened me from the surgery, I was very alert and talkative. The doctors said that they had never seen anything like this. I was in NICU 2 days and in the hospital for a total of 7 days. I left the hospital with my sight and no known neurological problems. God is so awesome! Six weeks outside of the surgery, I was preparing to come back to work and found that I had a serious infection which caused the doctors to have to remove my bone plate to relieve the pressure. I was in the hospital another 10 days. Even after I was sent home, I had to continue antibiotics for a total of 6 weeks. Originally, the doctors told my husband that I would be in the hospital until Christmas, but guess what? God decided otherwise! I came home on October 22, 2007 and went back to work on December 14, 2007. ***No weapon formed against thee shall prosper.*** I have claimed my healing and victory, knowing that my

IV. THE FUTURE OF THE REGENT UNIVERSITY LAW LIBRARY

Several new law school initiatives, such as the LL.M. in American Legal Studies; the summer abroad program in Israel; and exchange programs with Handong University, Oxford University, Universitat Abat Oliba CEU in Barcelona, Spain, Universidad CEU San Pablo in Madrid, Spain, and Universitatea Emanuel din Oradea in Oradea, Romania will require support from the Law Library. With continued growth in the number of law students and these new law school initiatives, as well as the high standard set by Chancellor Robertson, more will be expected from the Law Library and its staff.

To help meet these growing demands, the Law Library is currently undergoing a major renovation to: (1) remove an artificial barrier erected in 1994 that prevented access from the second floor to the third floor in order to emphasize the Law Library's autonomy from the University Library;[276] (2) centralize professional services and make them more accessible; (3) create more and better study space for students and a casual reading area; and (4) recarpet the Law Library. The improvements are being constructed in three stages. At the time of this writing, we are in Phase I. Phase II will begin when funds are available and will consist of nine new individual study rooms, retrofitting the computer lab to accommodate two offices for librarians and relocating PCs to perimeter locations within the Law Library, relocating four additional offices, constructing a new Special Collections Room with controlled temperature and humidity, as well as a gas fire-suppression system, and creating new office space for the Regent Journal of International Law. Phase III will involve retrofitting existing carrels to a fifty-inch width,[277] and replacing current library chairs with fully

journey to complete healing is about to come to a close. I will close the last chapter of this book for good when I have my bone plate replaced this month. Anything is possible when you trust and believe in God! ***[B]y His stripes I am healed.*** The Law Library [staff] was joined together in prayer throughout this process and will continue. We are so blessed to be able to band together and pray whenever we [feel] led to do so.

[276] Regent University School of Law, Stairs to Nowhere, http://www.regent.edu/acad/schlaw/library/images/Stairs%20to%20Nowhere.JPG (last visited Nov. 24, 2008) (photo of the "stairway to nowhere"); *see also* Regent University School of Law, The Jericho Project, http://www.regent.edu/acad/schlaw/library/guests/ renov080509.cfm (last visited Nov. 24, 2008) (displaying additional photos taken during the renovation); Regent University School of Law, http://www.regent.edu/acad/schlaw/ library/Jericho.mov (last visited Nov. 24, 2008) (displaying video footage of the celebration on May 8, 2008 of the "Jericho Project").

[277] The existing carrels were built before the age of laptops and are too small to accommodate books and a laptop.

ergonomic seating.[278] With these improvements and the support of Dean Brauch and the administration, the Regent University Law Library should be well-positioned in the foreseeable future to meet the challenges that lie ahead.

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[278] *See* Margaret L. Christiansen, By Faith the Walls Fell: Law Library Renovations to Commence Soon, Regent University Library Link (Apr./May 2008), http://www.regent.edu/general/library/about_the_library/news_publications/2008_04.cfm#.

APPENDIX ONE: TIMELINE OF SIGNIFICANT EVENTS

1976	Professor Roy M. Mersky of the University of Texas School of Law is engaged as consultant to provide guidance in selecting and acquiring the Law Library collection.
1979–1980	William Murray is the first law librarian. Tenure is less than one year.
Aug. 1979	Classes start at ORU School of Law.
June 1980–1983	David Dunn serves as law librarian.
1980	John Taylor is hired as assistant law librarian.
1981	ABA grants provisional approval to the law school.
Nov. 1983	Lexis computer database is acquired.
Apr. 1984	Westlaw computer database is acquired.
July 1983–1985	Edward Fishpaw serves as law librarian.
July 1, 1985	Lorin Lindsay becomes acting law librarian.
Nov. 1, 1985	Oral Roberts announces gift of Law Library to CBN University, effective June 1, 1986.
Jan. 1986	Barbara Baxter begins as law librarian.
May 19, 1986	First truck arrives with ORU Law Library.
June 2, 1986	Last truck arrives. Total of 200 tons of books and equipment transported.
Sept. 1986	Classes start at CBNU School of Law.
Nov. 1986–current	Eric Welsh serves as law reference librarian.
June 16, 1989	ABA grants provisional approval to the law school.
Nov. 9, 1989	Law school changes name to Regent University School of Law.
Jan. 8, 1990	Donna Bausch hired as senior reference law librarian.
Aug. 1, 1990	Barbara Baxter resigns as law librarian, Donna Bausch becomes acting law librarian.
Aug. 10, 1990	Jack Kotvas hired as law reference librarian.
Oct. 4, 1991	Richard Leiter begins as law librarian.

Feb. 1994	Law Library relocates to the third floor.
1994	Transylvania Law Collection purchased.
July 1994	Richard Leiter resigns as law librarian. Charles H. Oates appointed interim director.
Aug. 1994–current	Charles H. Oates serves as director of the Law Library.
Aug. 6, 1996	ABA grants full accreditation to the law school.
2003	Law Library gets Wi-Fi.
2004	Law Library gets CALI (Computer Assisted Legal Instruction).
2005	Law Library gets new portal website.
2005	Law Library gets new electronic ILL system.
Sept. 2005	First Regent campus celebration of Constitution Day jointly sponsored by University and Law Libraries.
May 8, 2008	Wall dividing the University and Law Libraries comes down (The Jericho Project) and renovations begun.
Aug. 2008	Renovations finished (Phase I).

APPENDIX TWO: ANNUAL LAW LIBRARY BUDGETS, VOLUMES, AND TITLES

ABA Reports	Total Annual Budget	Volumes	Titles
2006–2007	1,805,845	395,655	90,305
2005–2006	1,790,465	392,049	76,658
2004–2005	1,588,680	387,451	66,988
2003–2004	1,606,990	382,759	44,423
2002–2003	1,626,700	374,024	42,989
2001–2002	1,629,712	364,374	42,509
2000–2001	1,635,327	359,059	41,291
1999–2000	1,550,009	354,351	41,726
1998–1999	1,801,209	315,436	41,364
1997–1998	1,217,350	308,355	40,936
1996–1997	1,026,839	302,613	40,807
1995–1996	936,984**	299,151	40,231
1994–1995	1,143,730**	296,606	39,913
1993–1994	1,100,505*	297,475	38,865
1992–1993	649,253	288,427	37,760
1991–1992	505,051	275,000[279]	unavailable
1990–1991	580,021	unavailable	"
1989–1990	548,576	"	"
1988–1989	512,427	"	"
1987–1988	459,350	"	"
1986–1987	421,035	200,000[280]	"
1985–1986	unavailable	unavailable	"†
1984–1985	447,650	"	"
1983–1984	408,587	"	"
1982–1983	515,056	"	"
1981–1982	495,490	178,000[281]	"
1980–1981	359,842	164,000[282]	"‡

All stats from ABA reported data
**decrease FY94–FY95 function of one-time enhancement
† Reported from O.W. Coburn School of Law
‡ Spring 1979 budget cuts – ORU

[279] See *supra* note 166 and accompanying text.
[280] See *supra* note 127 and accompanying text.
[281] See *supra* note 74 and accompanying text.
[282] See *supra* note 57 and accompanying text.