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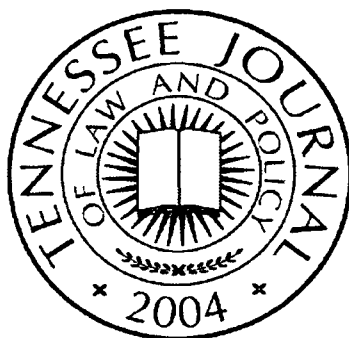
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ARTICLE

JURISPRUDENTIAL UNDERPINNINGS OF LAW, ESPECIALLY
INTERNATIONAL LAW: THE BASIS FOR TRUE PROGRESS &
REFORM

Morse Hyun-Myung Tan

ESSAY

TOWARD EQUAL ACCESS TO JUSTICE:
RETHINKING THE ROLE OF LAW SCHOOLS

Douglas A. Blaze

COMMENT

EUTHANIZING THE PROFOUNDLY MENTALLY
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NOTE

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STATE COURT POWER IN END OF LIFE MATTERS

Leland C. Abraham

THE TENNESSEE JOURNAL OF LAW & POLICY

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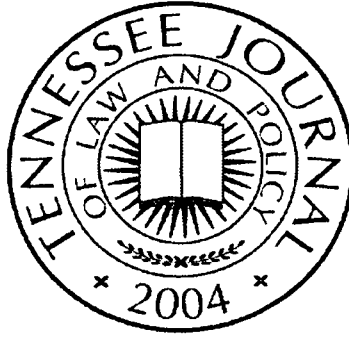
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JURISPRUDENTIAL UNDERPINNINGS OF LAW, ESPECIALLY
INTERNATIONAL LAW:
THE BASIS FOR TRUE PROGRESS & REFORM

*Morse Hyun-Myung Tan**

I. Introduction

Notwithstanding current postmodern² wariness regarding universal, objective norms, an immutable and perennial jurisprudence of international law³ must hold true for all people everywhere.⁴ If it is not for all people everywhere, how truly and rightfully “international” or

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² See GENE EDWARD VEITH, JR., *POSTMODERN TIMES: A CHRISTIAN GUIDE TO CONTEMPORARY THOUGHT AND CULTURE* (Crossway Books 1994) (presenting a trenchant evaluation of postmodernism). Richard Rorty goes so far as to call this culture, sadly enough, “post-metaphysical.” RICHARD RORTY, *CONTINGENCY, IRONY & SOLIDARITY*, intro., ch. 1 (Cambridge Univ. Press 1989). Rorty’s term and work, taken descriptively, accurately takes the pulse of the culture, but does not provide the best prescription for the malady.

³ Conversation with Anthony D’Amato, Judd and Mary Morris Leighton Professor of Law at Northwestern University School of Law (Spring 2001). D’Amato asserted that jurisprudence serves as the proper foundation of international law. This foundation presently remains visible, but perhaps more subtly in its applicability to law in general.

⁴ Harold J. Berman, who held an endowed chair at Harvard Law School, states, “The conventional concept of law as a body of rules derived from statutes and court decisions—reflecting a theory of the ultimate source of law in the will of the lawmaker (‘the state’)—is wholly inadequate to support a study of a transnational legal culture.” HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 11 (Harvard Univ. Press 1983).

“transnational” would it be?⁵

Stale legal thinking, stuck in a relativistic and closed positivism,⁶ lags behind the renewal of scholarship in philosophy and segments of the social sciences that increasingly recognize the realities of justice,⁷ virtue,⁸ and a higher standard, sometimes referred to as “higher law.”⁹ The reputation of the legal profession and the quality of legal systems hinge on the type of response elicited—whether the legal world joins in the renewal found in other

⁵ The father of international law, Hugo Grotius, wrote prodigiously on higher law and justice vis-à-vis international law. *See, e.g.*, HUGO GROTTIUS, *DE IURE PRAEDAE COMMENTARIUS: COMMENTARY ON THE LAW OF PRIZE AND BOOTY* (Gwladys L. Williams & Walker H. Zeydel trans., Oceana Publications 1964) (1604); HUGO GROTTIUS, *ON THE RIGHTS OF WAR & PEACE* (William Whewell, trans. Cambridge Univ. Press 1853).

⁶ *See, e.g.*, JOHN AUSTIN, *LECTURES ON JURISPRUDENCE* (Robert Campbell ed., 5th ed. 1985) (1885); JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832); JOHN CHIPMAN GRAY, *NATURE AND SOURCES OF THE LAW* (2d ed., MacMillan 1948) (1909); HANS KELSEN, *THE PURE THEORY OF LAW* (Max Knight trans., Univ. of Cal. Press 1967) (1923); HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* (Anders Wedberg trans., Harvard Univ. Press 1946). Kelsen and Austin are both deemed leading proponents of legal positivism. Although not as easily recognized as such, Gray also qualifies as a type of legal positivist of a different mold from Kelsen and Austin.

⁷ *See* ANALYTIC JURISPRUDENCE ANTHOLOGY 249-89 (Anthony D’Amato ed., Anderson Publishing Co. 1996) (discussing justice); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS*, ch. 7, 12 (Oxford Univ. Press 1980) (same).

⁸ *See e.g.*, PETER KREEFT, *BACK TO VIRTUE* (Ignatius Press 1992) (bringing back classical understandings of virtue); ALASDAIR MACINTYRE, *AFTER VIRTUE* (Univ. of Notre Dame Press 1984) (laying out the limits of emotivism and discussing moral crisis); ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (Univ. of Notre Dame Press 1988) (critiquing the exclusion of virtue).

⁹ *See* EDWARD CORWIN, *THE “HIGHER LAW” BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (Cornell Univ. Press 1928).

disciplines, or whether it stays in fashionable or trendy ruts.

Principles of justice, higher law, and virtue form the best foundation of any legal system and for the practitioners therein. The need and desirability of such a foundation are even more pronounced when it comes to the international realm. These principles encompass the search for the uniting, universal umbrellas built into the very fabric of the universe, as well as the common ground of humanity across cultures. Put another way, this article proposes the unifying theory of jurisprudence, which I contend provides the best basis for law and legal systems worldwide. Anything less than this common denominator would prove unfit as the groundwork for international legal regimes, because member state cultures can vary considerably.

Harold Koh, the current Dean of Yale Law School, writes:

During the classical period of international law, the causal question of why nations obey was generally conflated with the normative question of why they *should* obey, which was in turn usually answered by “semi-theological” reference to the “higher law”—the “law of nature,” of which international law was but a part. Before the Roman empire, religion served as the paramount source of the law of nations. In Roman law, Gaius defined *jus gentium* in terms of “law common to all men.” The Preface to Justinian's *Institutes*, published in 533 A.D., began with observations about the relationship between the law of nations and natural law. . . . Nor did medieval legal scholars distinguish municipal from international law, instead viewing the law of

nations, understood as *jus naturae et gentium*, as a universal law binding upon all mankind. . . . The law of nations was thought to embrace private as well as public, domestic as well as transborder transactions, and to encompass not simply the “law of states,” such as rules relating to passports and ambassadors, but also the law between states and individuals . . . international and domestic law together constituted a unified legal system, with domestic institutions acting as important interpreters and enforcers of international legal norms.¹⁰

The pedigree of this perspective is extensive over millennia, and still today, it provides a foundation for law in general, and international law especially.

The Nazi Holocaust starkly demonstrates the need for an international jurisprudence based upon higher law, virtue, and justice. Atrocities were done “legally” at times under German law and at the command of German authorities.¹¹ In order for one outside of German society,

¹⁰ Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2604-05 (1997) (citations omitted).

¹¹ The Hart-Fuller debate in the *Harvard Law Review* concerning the jurisprudential implications of the case of the grudge informer places the contrast between higher law and positivism in sharp relief. Lon F. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630, 648-57 (1958); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 90, 616-20 (1958). This case concerns a woman in Nazi Germany, who, pursuant to the Nazi Act of 1934, reported insulting remarks about Hitler made by her husband as a pretext for getting rid of him. The husband received a death sentence, which was commuted to a military assignment at the front. Later, a West German court convicted her pursuant to the German Criminal Code of 1871 for illegally depriving a person of his freedom. Most notably, the court of appeals called the statute the woman used as her pretext “contrary to the sound conscience and sense

such as the Nuremberg Court, to decry these murders and other abuses, there had to be some basis independent of German positive¹² law.¹³ There seems to be no better grounding than higher law and justice.¹⁴

Cicero, for example, advanced a higher law, virtue, and justice position. Among many passages, Cicero wrote:

But if Justice is conformity to written laws and national customs, and if, as the same persons claim, everything is to be tested by the standard of utility, then anyone who thinks it will be profitable to him will, if he is able, disregard and violate the laws. It follows that Justice does not exist at all, if it

of justice of all decent human beings.” Hart, *supra* note 11, at 619.

¹² The Nazis used the positive pronouncements of Oliver Wendell Holmes to justify the neutering of the mentally handicapped in Germany. *Buck v. Bell*, 274 U.S. 200, 207 (1927) (“Three generations of imbeciles are enough.”). Given Holmes’ positivism there exist few resources in his jurisprudence to criticize such eugenic practices. *See, e.g.*, Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40 (1918) (elucidating Holmes’s positivism and rejecting natural law); Oliver Wendell Holmes, *The Path of the Law* 10 HARV. L. REV. 457 (1897) (same).

¹³ The Nuremberg Trials marked the first instance in history where international war crimes were tried in a court. The Chief Prosecutor, U.S. Supreme Court Justice Robert Jackson, explicitly grounded the prosecution in higher law.

¹⁴ If there does *not* exist an objective, just basis from which to say the Holocaust was wrong, would it not be intensely problematic then to try the Germans on an *ex post facto* basis in an unprecedented, international tribunal? On what basis was there legitimate, actual notice that the Germans who legally obeyed orders from legitimate authorities to gas their victims were guilty of a crime if not that these Germans also have the higher law and a sense of justice within them? Conscience is a beacon of the higher law and justice, and every person has a conscience. Granted, conscience can become dulled, seared, tainted, or skewed, but it does exist in every human being, a classic notion accepted by most of Western Civilization during the past two millennia.

does not exist in Nature, and if that form of it which is based on utility can be overthrown by that very utility itself. And if Nature is not to be considered the foundation of Justice, that will mean the destruction [of the virtues on which human society depends]. For where then will there be a place for generosity.¹⁵

Thus Cicero, widely hailed as the greatest legal mind of his time, directly repudiates legal positivism and selfish utilitarianism, and vouches for higher law, virtue, and justice as the soundest basis for law, including international law.

This article does not attempt to delineate and demarcate all the contours of higher law, virtue, and justice because such a task extends beyond its scope. It merely seeks to establish the existence of higher law, virtue, and justice so that those who have categorically excluded such notions, especially those who have done so without much thought, would at least have the opportunity to consider or reconsider these notions.

Ironically enough, even those who categorically exclude virtue, justice, and higher law typically hold to them nonetheless in some way, shape, or form. For example, the murder of innocent human beings is held to be an injustice that violates higher law and virtue by practically all people everywhere. This simple observation reflects that we humans, of whatever society, bear the imprint of a conscience, the faculty of perceiving the virtue, justice, and higher law.¹⁶

¹⁵ CICERO, LAWS §§ I, XV, *reprinted in* THE GREAT LEGAL PHILOSOPHERS 48 (Clarence Morris ed., Univ. of Penn. Press 1997).

¹⁶ As Berman writes:

[T]he underlying legal principles had not only a logical aspect,

The jurisprudential view this article asserts does not belong exclusively to any political party or government; it remains the common inheritance of all humans everywhere. It refuses to wear the Emperor's new clothes¹⁷ particular to every age and place.

Intentionally, I do not focus on applying the foundation herein to any particular legal, political, or social issue,¹⁸ except in passing or as a brief example, lest the reader's position in one direction or another obfuscate the desirability of this framework in general. Also, a foundation does not form an entire edifice, and certain portions of the edifice may directly touch on the foundation more than others. Similarly, one can analyze where this jurisprudential foundation touches more or less directly on variegated aspects of the entire edifice of law.¹⁹ Such

being subject to reason, but also a moral aspect, being subject to conscience. Therefore, not only an analytical or logical systematization was required, which would strive for consistency in the law, but also a moral systematization, which would strive for equity The logical, moral and political aspects of basic legal principles were summarized in the concept of natural law. This was a substantially different concept for that held by the Greeks and the Romans. The earlier natural law had been defined as the right of every man—as it was put in the first title of Justinian's Digest—to receive what was his due; natural law was justice, equity, what was right; it was an ideal law, the law not of the state but of nature itself, to which the law of the state might or might not conform.

Berman, *supra* note 4 at 253-54.

¹⁷ This refers to the well-known Hans Christian Anderson story of an Emperor, who is cleverly persuaded that wearing only his undergarments is in vogue.

¹⁸ For such application to various issues and policies, see NATURAL LAW AND CONTEMPORARY PUBLIC POLICY (David F. Forte ed., Georgetown Univ. Press 1998).

¹⁹ For example, this paper would have more direct relevance to the common law idea of *malum in se*, than *malum prohibitum* in criminal

analysis, however, lies largely outside the scope of this article.

Though higher law can be used as a pretext for assorted forms of mischief, its abuse should not lead to a denial of its existence. Indeed, these ideas of virtue, justice, and higher law themselves would seek to bring a corrective to such abuse. This article simply attempts to show the existence and helpfulness of higher law, virtue, and justice employed correctly, so that at least a few more glimmers may emerge from its relative eclipse in both modern and postmodern legal scholarship.²⁰

A. Relevance

The most important and foundational relevance for this framework is that it proposes the unifying, universal foundation of jurisprudence, which itself is the proper foundation for law. Such relevance is more striking in international law,²¹ which cuts across national cultures. To state it differently, not a single facet of law can live completely independent of justice, virtue, and higher law and still flourish in good health.²² The convocation of

law. Another example is the differing notions of viciousness, as opposed to virtue, found in adjusting the requisite *mens rea* proportionately with the punishment levels in criminal law. The relegation of this example to a footnote perhaps helps accentuate the idea that specific applications of this jurisprudential foundation would fall to other writings besides this one.

²⁰ See Peter Kreeft, *Darkness at Noon: The Eclipse of Permanent Things*, July 1990, available at

www.ewtn.com/library/THEOLOGY/FR91102.HTM (last visited Jan. 18, 2006).

²¹ This relevance emerges time and again for this legal academic, who has taught courses such as Public International Law, International Organizations, and Human Rights.

²² For example, even a seemingly unrelated legal provision, such as stop signs at a crowded intersection, still has virtuous and just goals—as well as principles touching on higher law. Trying to prevent injury

sources in this article primarily seeks to establish the existence of justice, virtue, and higher law that can serve as an efficacious filter and a perspicuous lens through which to interpret, analyze, synthesize, and critique not only transnational and international law, but also positive law as a whole.

The widespread convergence of this recognition by some of the most enduring thinkers from both the East and the West,²³ which I trace below, gives tremendous credibility to the common reality and truths that they present. Taken as a group, they do not speak from the same cultural, temporal, or professional prejudices, biases, and patches of ignorance particular to any specific slice of society.²⁴

If such truth is immutable, how recently these people acknowledged this reality is irrelevant. If anything, the range of scholarship helps to assure us that they are not speaking from the same cultural, temporal, and professional prejudices, biases, provincialities, or patches of ignorance particular to any specific group, including twenty-first

or death to innocent human beings would be one. The benefits of order instead of chaos or anarchy constitute another. Fairness is implicated in that the first to arrive has the right of way. Moreover, recklessly rushing through a stop sign without stopping and causing an accident would violate the virtue of prudence.

²³ As an example, the work of Mencius, Mo Tzu, Plato, Aristotle, and others will be discussed below.

²⁴ It can broaden us beyond our particular time and place with its myopic focus on the recent, while providing needed correctives. Chronological, geographical, ethnic, or other types of snobbery or narrowness have no place in the academy, jurisprudence, law, or anywhere else for that matter. Therefore, what these classic Western and Eastern sources say should not receive summary dismissal by anyone. See C.S. Lewis, *Introduction to ATHANASIUS, DE INCARNATIONE* (1945); see also C.S. LEWIS, *THE ABOLITION OF MAN* (7th ed., Macmillan 1962), which some consider the best book of the 20th Century on this topic.

century legal scholars.²⁵

The present legal academic world regularly celebrates some of the dimensions of justice, virtue, and higher law, even if these ideals sometimes fall under different rubrics. After all, cases such as *Brown v. Board of Education*,²⁶ clearly did not follow the then existing line of positive law or certain elements of the then current, broader culture of its time. Yet, cases such as *Brown* are widely celebrated today as a paragon of justice and higher law—a case virtuously brought and justly decided. The existence of transcultural justice, virtue, and higher law is relevant everywhere and forms, where necessary, the basis for legal reform.²⁷

Similarly, we find massive corroboration in these virtuoso thinkers and writers of sound, even outstanding, intellect and sense of justice themselves. Therefore, these classic Western and Eastern sources should not receive deprecation, be ignored, or be dismissed. Indeed, the more erudite one is, the more likely one will have a familiarity with such major thinkers. This article mines from major veins, although the Eastern sources are generally not well-known or appreciated in the West.

Basic metaphysical questions not only are addressed by, but also arise from, this article.²⁸ However, merely a few questions among the many that may be raised

²⁵ See LEWIS, *supra* note 24.

²⁶ 349 U.S. 294 (1955).

²⁷ One need only look at whatever legal reform movement that one champions in order to realize that a relativistic positivism (law as it currently exists and finds enforcement by those with power) would foreclose the possibility of reform. If one touts the notion of “progress,” such progress must be based upon some standard toward which society is progressing. To the extent a society violated justice, virtue, and higher law, it would regress proportionately.

²⁸ Questions of ontology, epistemology, and ethics abound in this area and cannot possibly receive comprehensive treatment in a single essay of this length.

will be singled out for treatment hereinafter to clear some of the detritus that can obscure the view of justice, higher law, and virtue—realities that impact all of mankind, whether consciously or not.

B. Relevant Objections and Other Challenges

1. Epistemological Issues

The scientific method, including empirical methodologies, has proven a fruitful and useful *modus operandi* for many things. It can be used productively, especially in the so-called natural sciences, but also to a lesser extent in the so-called social sciences or humanities including law. Some of the greatest gifts that the Enlightenment and modernism periods have bequeathed upon us derive from knowledge garnered through the sound and rigorous application of these methods. An epistemology that limits itself to scientific methodologies *alone*, however, necessarily impoverishes itself and proves impractical, unwittingly self-contradictory, or both.

As the leading philosopher, Arthur F. Holmes,²⁹ philosopher of science, Delvin Ratzsch,³⁰ and other contemporary and historical sources point out, even so-called “neutral” applications of scientific methodologies necessarily predicate themselves on principles unprovable solely by scientific methodologies.³¹ Otherwise, it becomes tautological, self-contradictory, or at best, begs

²⁹ See, e.g., ARTHUR HOLMES, *ETHICS* (Inter-varsity Press 1984).

³⁰ DELVIN RATZSCH, *SCIENCE AND ITS LIMITS: THE NATURAL SCIENCES IN CHRISTIAN PERSPECTIVE* 101 (2d ed., Inter-varsity Press 2000).

³¹ For example, scientific assumptions unprovable by science include: (a) that the senses, sometimes with instrumental aid, can access reality; (b) that the human mind can then inductively ascertain truths from what the senses apprehended; (c) that there exist knowable truths about the reality of the physical world.

the questions: why exalt scientific methodologies above all others and why exclude other methodologies and frameworks?

One may respond—because it works. But then, why must pragmatic, practical, or utilitarian considerations be deemed foundational?³² Something may be pragmatic yet brutal, practical but vicious, utilitarian yet unjust. For example, it may be pragmatic for the purpose of retaining power for a dictator to relegate conscientious dissidents who are neither treasonous nor treacherous to heavy labor, torture, and execution in concentration camps. Such pragmatism collides directly with virtue, justice, and higher law. At the same time, pragmatic or utilitarian³³ considerations, rationales, or justifications do not necessarily a priori exclude all other methodologies and frameworks.

Another may say—because it comports with reality and facts. Herein lies a better response, but one that also contains some untenable dichotomies such as the fact-value split. Since knowledge, including the scientific kind, should accord with truth, which conforms to reality, scientific methods can provide valuable tools.

Yet, they are not the only tools that can access objective reality. As a matter of fact, just and virtuous realities are not best established by scientific methodologies. Just as scientific methodologies function through direct sensory or instrumental apprehension, the work of a healthy conscience,³⁴ especially a well-cultivated and developed one, can directly apprehend just and

³² CORWIN, *supra* note 8, at 4-5. These philosophies cannot justify themselves by themselves; otherwise, they are reduced to tautologies.

³³ See JEREMY BENTHAM, *THE UTILITARIANS: AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (Columbia Univ. Press 1946); JOHN STUART MILL, *UTILITARIANISM* (2d ed., Hackett Publishing 2001) (1863).

³⁴ See J. BUDZISZEWSKI, *THE REVENGE OF CONSCIENCE: POLITICS AND THE FALL OF MAN* (Spence Publishing Co. 2004).

virtuous realities comporting with higher law better than the best scanning electron microscope. Excruciating torture of a child for no other reason than the torturers' sadism is readily apprehended as being unjust by those who possess even a half-decent conscience.³⁵ It is possible, however, for a conscience to be clouded, seared, calloused or twisted, just as different physical pathologies can hinder proper body function. The acknowledgment of conscience, which can apprehend justice, higher law, and virtue, should be no more impugned than the existence of DNA.

2. The Basis for This Basis

A healthy conscience is the standard by which one judges normality in the moral sense. That is why ignorance of the law is generally no excuse in Anglo-American criminal law. In other words, the conscience engraved into a person, regardless of whether the person has ever even heard of the handiwork of the legislatures, judiciaries, or executives, should prevent the occurrence of crime. Various higher law theories, which are the mainstreams of the common law tradition,³⁶ establish this point.³⁷

³⁵ This counterexample refutes utilitarian calculus. To put it another way, if you have a large enough crowd of sadists torturing an innocent child, who derive massive amounts of pleasure that exceed the pain of the lone child, then such behavior would be allowed under utilitarianism because the total pleasure would outweigh the total pain. That such an approach is morally reprehensible is readily apparent to those with even a half-functioning conscience. Thus, such actions are correctly deemed unconscionable, as violative of justice, virtue, and higher law.

³⁶ See ROBERT D. STACEY, *SIR WILLIAM BLACKSTONE AND THE COMMON LAW: BLACKSTONE'S LEGACY TO AMERICA* (ACW Press 1989). In Anglo-American history, Blackstone's writings constituted a standard part of legal education. His works formerly graced the desks of law offices throughout the United States and England.

³⁷ The present McCormick Chair at Princeton, Robert George, writes cogently from this school of thought in several works. See, e.g.,

Some would claim that justice is simply defined socially. Such a stance undermines individual responsibility.³⁸ For a physician at Ravensbruck or Auschwitz to *refuse* to perform crude experimentation on an unwilling patient that severely injures and eventually kills the innocent concentration camp prisoner would be to exercise virtue in accordance with justice and higher law—a law higher than Nazi dictates, no matter how legitimate or exalted the government or military source within German society. Nazi judges who refused to condemn innocent people in spite of formalistic or positivistic pressures, such as the Nuremberg Code, would be exercising virtue in accordance with justice and higher law. If such virtue, justice, and higher law did not exist, on what basis could one critique, redress, or reform atrocities carried out during the Holocaust, or in places such as the former Yugoslavia, Rwanda, or East Timor?³⁹

This view necessarily undermines various forms of

ROBERT GEORGE, *THE CLASH OF ORTHODOXIES: LAW, RELIGION, AND MORALITY IN CRISIS* (ISI Books 2001); ROBERT GEORGE, *IN DEFENSE OF NATURAL LAW* (Oxford Univ. Press 1999); ROBERT GEORGE, *NATURAL LAW AND MORAL INQUIRY* (Georgetown Univ. Press 1998).

³⁷ See, e.g., Nuremberg Code, available at <http://www.hhs.gov/ohrp/references/nurcode.htm> (last visited Feb. 25, 2006).

³⁸ Long-time Harvard University Professor Lawrence Kohlberg deems this level of moral development to be the highest of the six that he proposes. See Lawrence Kohlberg, *The Development of Modes of Moral Thinking & Choice in the Years 10 to 16* (December 1958) (unpublished Ph.D. dissertation, University of Chicago); LAWRENCE KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE* (1st ed., Harper & Row 1981).

³⁹ Other examples of international infamy along these lines include the former Yugoslavia and Rwanda, for which the U.N. established special tribunals; East Timor, for which a separate country was recently formed; and Colombia and Peru, which often have come under the judgment of both the Inter-American Commission of Human Rights, as well as the Inter-American Court of Human Rights.

determinism,⁴⁰ whether biological, social, socio-biological, or otherwise, which seek to eliminate the existence of volition and responsibility.⁴¹ Such determinisms presumably attract their adherents by eradicating culpability, a convenient, but incorrect way to deal with guilt and shame. It should be noted that removing culpability negates responsibility, which pushes society towards anarchy, anomie,⁴² and antinomianism,⁴³ conditions that adherence to virtue, justice, and higher law prevent.

A common, albeit irresponsible, escape attempt is an agnostic skepticism, which is a position in and of itself. If seeking logical consistency, why not be skeptical or agnostic about skepticism and agnosticism?⁴⁴

Another error lies in embracing contradictory, relativistic pluralism.⁴⁵ While recognizing that common

⁴⁰ For a discussion of this point, *see* the philosophy of science works of Oxford Professor Alister McGrath, who holds a Ph.D. in microbiology, *available at* <http://users.ox.ac.uk/~mcgrath/> (last visited Feb. 25, 2006).

⁴¹ FYODOR DOSTOEVSKY, *NOTES FROM UNDERGROUND* (Mirra Ginsburg trans., Bantam Books 1974). Dostoevsky satirizes rationalistic, empirical determinism extensively.

⁴² The term is used particularly in the sociological sense as employed by scholars such as Emile Durkheim.

⁴³ A term indicating lawlessness—not a condition favorable to the existence of legal systems, institutions, or legal professionals to say the least.

⁴⁴ No one could function with a thoroughgoing skepticism or agnosticism. If I did not firmly believe in the existence of this computer on which I am typing this article or in the law journal member who will read it, I would not be typing it right now. If I did not believe in the existence of the chair I am sitting in, I would not attempt to sit in it for the many hours I have in preparing this article. Even functionally, thoroughgoing skepticism and agnosticism fail. I am skeptical of the soundness of skepticism, yet *not* agnostic about existing pitfalls in agnosticism. Most honest and sensible people could not correctly claim to hold a thoroughgoing skepticism or agnosticism; those who do, paralyze themselves.

⁴⁵ *See* LESSLIE NEWBIGIN, *TRUTH TO TELL: THE GOSPEL AND PUBLIC*

ground often exists between various worldviews, this view plainly violates the law of noncontradiction when particular worldviews adhere to mutually exclusive positions. Either an objective standard of justice exists, or an objective standard of justice does not exist. Both statements cannot be true and concomitantly comport with reality.

This does not impugn true paradoxes or antinomies, which only *seem* to contradict, but in reality do not.⁴⁶ Rather, I am talking about clear-cut *A* and *not A* instances which cannot both be true and also correspond with reality, according to this basic axiom of logic, philosophy, and mathematics. To give another example, a person cannot both have biological children and *not* have biological children at the same time in any unified, literal sense. To say otherwise would fly in the face of common sense.

As a leading Hindu philosopher acknowledged, epistemological arms that embrace all views lead to self-strangulation. As stated by G.K. Chesterton, the open mind, like the open mouth, is intended to close down upon something.⁴⁷ That something includes the truths of justice, virtue, and higher law that accord with the highest design of human nature.⁴⁸ This position is cohesive and comports

TRUTH (W.B. Eerdmans 1991) (providing a sound treatment of pluralism).

⁴⁶ For example, I do not presently deny such paradoxes as the wave or particle duality of light, the way certain sub-atomic particles seem to behave, elements of both genders existing in hermaphrodites, the Trinity, or all three states of H₂O (water vapor, liquid water, and solid ice) existing at the triple point.

⁴⁷ This epigram comes from the British author G.K. Chesterton. *See, e.g.,* G.K. CHESTERTON, *ALL IS GRIST: A BOOK OF ESSAYS* (Books for Libraries Press 1931); G.K. CHESTERTON, *ALL THINGS CONSIDERED* (Sheet & Ward 1956); G.K. CHESTERTON, *AS I WAS SAYING* (Books for Libraries Press 1966).

⁴⁸ *See, e.g.,* American Declaration of the Rights and Duties of Man, Nov. 22, 1969, *available at* <http://www.cidh.oas.org/Basicos/-basic2.htm> (last visited Feb. 25, 2006) (basing its pronouncements on this premise).

with objective reality.

3. Lesser Alternatives

Historically, it was recognized that the common law permits the correction of errors.⁴⁹ Formalistic or positivistic cowardice should not prevent those with authority to modify positive law from abandoning unjust ruts.⁵⁰ Thus, we should not believe that human lawmakers, adjudicators, or executors are so constrained to maintain unjust laws—unless they unduly bind themselves with formalist or positivistic shackles.⁵¹ Nothing contained herein, however, should be construed as necessarily violative of constitutional order, as far as the allocation and separation of powers are concerned. Nor should it be employed as a pretext for judicial usurpation of legislative or executive power—or any other usurpation of authority.

⁴⁹ See JEFFREY A. BRAUCH, *IS HIGHER LAW COMMON LAW? READINGS ON THE INFLUENCE OF CHRISTIAN THOUGHT IN ANGLO-AMERICAN LAW* (F.B. Rothman 1999).

⁵⁰ See ANTHONY D'AMATO, *JURISPRUDENCE: A DESCRIPTIVE & NORMATIVE ANALYSIS OF LAW* (Brill Academic Publishers 1984).

⁵¹ The doctrine of stare decisis or custom, as convenient and helpful as it may be as an approach to procedure and order, should not be exalted over justice. The common law does not advocate such a stance, and international law should not embrace it. Yet, such a stance is not rare de facto. Instead, virtue, justice, and higher law should reign above slavish devotion to stare decisis or custom. See *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (“*Stare decisis* is not an inexorable command; rather it is a principle of policy and not a mechanical formula of adherence to the latest decision.”); see also Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 87 (2001) (“The American commitment to stare decisis gradually strengthened during the nineteenth century, due mainly to the emergence of reliable law reports and a positivist conception of law.”). *Contra id.* at 71 (“Precedent, though it be Evidence of law, is not Law itself, much less the whole of the Law.”). Eschewing an overly rigid application of stare decisis allows the overturning of cases such as *Scott v. Sandford*, 60 U.S. 393 (1857).

In other words, it accords, rather than clashes with, respect for duly constituted authority including the legislative powers of Congress.⁵²

Rabelais satirizes formalist insufficiencies in *Gargantua & Pantagruel*.⁵³ In this satire, the judge has an elaborate array of formalities and procedures, but in the end decides to make a random decision. This satire implies that procedural integrity ipso facto is not enough to ensure substantive justice.

Rather, substantive justice, as the dominant goal, should be served by fair procedures.⁵⁴ Harold J. Berman notes:

⁵² Berman writes of an approach that “should bring the three traditional schools of jurisprudence – the political school (positivism), the moral school (natural-law theory), and the historical school (historical jurisprudence) – together in an *integrative* jurisprudence.” Berman *supra* note 4, at 44. Such an approach acknowledges the descriptive, structural, and social order roles of positivism, the prescriptive function of higher law, and the benefit of historical study to bring correctives to bear as well as expose blind spots and provincialities of this time and place. The more these three schools of thought can be harmonized, applied, and integrated in a way that reflects the strength of each, the better.

⁵³ RABELAIS, *GARGANTUA & PANTAGRUEL* (Jacque Le Clerq trans., Random House 1963).

First I view and review, read and re-read, ponder, weigh, thumb and digest the bills of complaint, subpoenas, appearances by proxy, reports of hearings, investigations, instruments of deposition, petitions, articles of evidence, allegations, rejoinders, rebuttals, requests, inquests, surrejoinders, surrebuttals, confirmation of former testimony, acts, writs, bulls, exceptions taken, grievances, objections, counter-objections . . . I decided in favor of the party who won at the judiciary, tribonian and praetorial throw of the dice.

Id. at 440-41.

⁵⁴ Attorneys and judges sometimes look for procedural pretexts to advance substantive concerns.

The system of procedure was said to be designed "to inform the conscience of the judge"—a phrase later used in the equitable procedure of the English chancery. . . . Indeed, the principles of reason and conscience were proclaimed by the ecclesiastical jurists as weapons against the formalism and magic of Germanic law.⁵⁵

The fictional Justice Keen is a prototypical positivist, who can excel in the description of the particular law in a given society.⁵⁶ Positivism also does well to acknowledge and give due deference to the formulations of legitimate authority, a primary position that the higher law acknowledges, yet does not treat as an absolute guide to substantive justice. On the negative side, however, positivism often adopts a false dichotomy between facts and values.⁵⁷ According to this position, facts are public and objective while values are only private and presumably subjective.⁵⁸ If higher law and justice do in fact exist, why should they find themselves relegated to private life alone?⁵⁹ Such a view leads to hypocrisy, undermining the integrity of the unitary, whole person in society.⁶⁰

⁵⁵ Berman, *supra* note 4, at 251.

⁵⁶ Lon Fuller, *Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949) (making each of the fictional judges prototypical of a school of jurisprudential thought).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See NEWBIGIN, *supra* note 46, at 63.

⁶⁰ See VIRTUES: CONTEMPORARY ESSAYS ON MORAL CHARACTER (Robert B. Kruschwitz & Robert C. Roberts eds., 1987). It impoverishes public life and leads to the double lives of those who put on the façade of a public *persona* that masks an execrable life outside the public eye. Those in the legal or political realm cannot excuse themselves from this in saying that though they consider something an injustice as a "private citizen," they must mechanically maintain the

The question stares us in the face—do international law and other law have their basis in higher law and justice? Or is it nothing more than a product of the politics of professionals, politicians, diplomats, and other power brokers, who may or may not have a firm, objective basis, and who alone have sovereignty to decide the norms and structures of society?⁶¹

If no justice or higher law exists, then every reform and every critique would fall into the morass of merely subjective opinion. If all that exists is each person's subjective opinion, then no grounds from which one could say that one opinion is better than another exist. If not, then on what permanent foundation would law stand or toward what would it progress? If one removes the cleansing cascade of higher law, virtue, and justice, then a raw, cynical calculus of so-called *Realpolitik* would remain like a crusted stain.

If objective bases in higher law and justice do not exist, then ideological and *Weltanschauung*⁶² chaos, conflict, and confusion follow. Epistemic despondence and narrowness then tend to rear their ugly heads. Rather than having no better grounds than the instability of relativism or uneasy, but logically incompatible pluralism, many authors aver a justice, virtue, and higher law foundation for

present law in their public capacities when it is manifestly unjust albeit politically inexpedient for their own self-interested considerations. While failure is common, it should not deny the goal of a virtuously integrated person, virtuous, including just, and moral in private as well as public life. Legislators, legal practitioners, judges, and other professionals often have public dimensions to their lives that should be no less moral or virtuous than their private lives. This applies to the domestic realms and international spheres, as well as the interactions between the domestic and international systems.

⁶¹ See MACHIAVELLI, *THE PRINCE AND OTHER WRITINGS* (Wayne Rebhorn trans., Barnes and Noble Classics 2003); Alexander Obolsky, *Law & Psychiatry Lecture at Northwestern University School of Law* (Fall 1999).

⁶² This is the German term for worldview.

the super-structures of law. This convergence and confluence of great scholars bears witness to the fact that virtue, justice, and higher law do, in fact, exist independently of the vagaries of any mortal individual or group.⁶³ They serve as the best basis for law, especially international law.

When this reality is ignored and a society allows oppressive laws to reign, the results can be nothing short of catastrophic. Nazi Germany, Maoist China, and Stalinist Russia are but three twentieth century examples of totalitarian regimes that abused law and used it as a weapon for oppression and repression.⁶⁴ Mass executions, gulags, cruel human experimentation, and concentration camps resulted.⁶⁵

As a positive contrast, by way of contemporary introduction and treatment, it is fitting to include one shining example of courageous communication of these unpopular, yet no less just, realities: Nobel Laureate Aleksandr Isayevich Solzhenitsyn. Few, if any, people in the twentieth century had more effectively borne eloquent witness to higher law, virtue, and justice in reference to such horrendous regimes, especially the brutal oppression that Solzhenitsyn himself suffered. His writings and addresses give hope that the truth of sound virtue, justice,

⁶³ Various passages in Sophocle's *Antigone* bring this point out lyrically. See SOPHOCLES, *THE OEDIPUS PLAYS OF SOPHOCLES* (Paul Roche trans., Mentor 1958) [hereinafter *OEDIPUS PLAYS*].

⁶⁴ RANDALL L. BYTWERK, *BENDING SPINES: THE PROPAGANDAS OF NAZI GERMANY AND THE GERMAN DEMOCRATIC REPUBLIC* (Michigan State Univ. Press 2004); RHOADS MURPHEY, *HISTORY OF ASIA* 351-54, 379-82 (Addison-Wesley 1992).

⁶⁵ While this response does not purport to provide a historical survey of the practices of such regimes, even a cursory scan would reveal that many such historical treatments have well-documented the inhumane and barbarous acts done in the name of law, or at least with the permission of, including improper application or enforcement of decent laws that were violated. The primary documents in the Nuremberg trials are a case in point.

and higher law can and will triumph over miswielded force.⁶⁶ In this way, Solzhenitsyn addresses the larger questions of law with its best metaphysical moorings. For these attainments, he has been heralded widely as a great voice in an ethical and legal wilderness.

These questions are often ignored to our peril. The accumulated experience and wise interpretation of history make it not too sweeping a statement to claim that all people in all places and times, contrary to socialized or other ethical relativisms, must heed justice, virtue, and higher law in order to thrive, whether in domestic or international spheres.

As one acknowledges such ethical virtuosos as Solzhenitsyn in our time, one can also remove oneself from chronological snobbery and geographic provincialism in order to stand on the broad shoulders of giants from both the East and the West. Mencius, Mo Tzu, Plato, and Aristotle allow one to see further and more clearly than the constraints of ethical relativism or legal positivism or formalism would allow.⁶⁷ A truly international jurisprudence should be founded on that which is common to the East and the West for all time. The fixation with the recent and contemporary must make room for the wisdom of the ages, which does not change with the shifting sands

⁶⁶ As a singular contrast in the midst of the Soviet oppression, Nobel Laureate Aleksandr Isayevich Solzhenitsyn powerfully conveys the ideals of higher law. From his bombshell Commencement Address at Harvard University in 1978 to the Hoover Institute at Stanford University, from the *Gulag Archipelago* to *The Oak and the Calf*, Solzhenitsyn stunningly asseverates higher law. See, e.g., Aleksandr Isayevich Solzhenitsyn, Address at Harvard University (1978); ALEKSANDR ISAYEVICH SOLZHENITSYN, *THE OAK AND THE CALF* (Harry Willetts trans., Harper & Row 1980); ALEKSANDR ISAYEVICH SOLZHENITSYN, *GULAG ARCHIPELAGO* (1st ed. 1985).

⁶⁷ To borrow and modify a modest disclaimer by Sir Isaac Newton, "If I have seen further, it is because I have stood on the shoulders of giants." Letter from Sir Isaac Newton to Robert Hooke (Feb. 5, 1676).

of time.⁶⁸

Helping to dig a truly transnational and international jurisprudential foundation toward a more widespread recognition of the existence of objective justice, virtue, and higher law is an important foundation to consider before asking questions about any particular legal system, international and domestic alike. These first sections have introduced this topic, demonstrated its relevance, and addressed objections that exist to justice, virtue, and higher law as a jurisprudential basis. This treatment now extends to a constructive case with a view from the East, in conjunction with classical sources from the West.

II. A View From the East

Classical Eastern philosophers, often ignored or given scant treatment in the West, have much to teach us about the necessity of adhering to justice and higher law in order for law and the *polis* to flourish, domestically or internationally. They write much of virtue, which merges with broader notions of justice—indeed justice itself is a classic, linchpin virtue. Virtue also always comports with the higher law. In order to regain a more adequate adherence to virtue, justice, and higher law, most notably for transnational or international law, one must delve into the relevant portions of Eastern philosophies.

Around 1122 BC, the Chou Empire conquered the Shang people. Instructions issued by a Chou ruler to one of his vassals said, “I will explain to you how virtue should control the use of punishments. . . . Make your judgments

⁶⁸ If international law and other law do not more fully regain their moorings in just reality, virtue, and higher law, then we will reap much bitter fruit in the future of the world. Much positive law begging for conscientious objections may then increase.

justly and sincerely.”⁶⁹ Even a ruler of these marauding conquerors not only referred to, but also exhorted, the exercise of just judgments. Such just judgments surely rise above the arbitrary and capricious, the inconsistent and unfair. Thus, justice grounded in the higher law is a prized virtue.

Mo Tzu, who was primarily raised on Confucianism, started his own school of thought, comparable to classical Confucianism. About the need for the just administration of law and order, he articulated a theory applicable to both the international and domestic arenas. Tzu writes:

Now all the rulers desire their provinces to be wealthy, their people to be numerous, and their jurisdiction to secure order. But what they obtain is not wealth but poverty, not multitude but scarcity, not order but chaos—this is to lose what they desire and obtain what they abhor. Why is this?

This is because the rulers have failed to exalt the virtuous and to employ the capable in their governments. When the virtuous officers become numerous in a state, order will be stable. Therefore the task of the lords lies no where but in multiplying the virtuous. But what is the way to multiply the virtuous?

Suppose, for example, that one wishes to cause good archers and charioteers to be numerous. In this case one will certainly enrich them, give them rank, respect them, and laud them. Once these things are done,

⁶⁹ THE SHE KING 396-97 (James Legge trans., Trubner & Co. 1875).

good archers and charioteers will become numerous. How much more should this be done in the case of the virtuous and excellent who are rich in virtuous conduct, versed in argumentation, and experienced in the arts of the Way? These are certainly the treasures of the nation and the supports of the state. They too must be enriched, given rank, respected, and lauded; once this is done, they too will be numerous.⁷⁰

The passage quoted above outlines both the wisdom and method of instilling virtue, of which justice is a central one, and installing virtuous leaders.⁷¹ Both results bring greater justice to a society and encourage greater adherence to higher law. Such objectives rise higher than a behaviorism⁷² unattached to magnanimous ends, such as advancing the common good.

Mo Tzu apparently agreed with Confucius that the hereditary rulers should transfer the administration of their governments to men of virtue and capacity.⁷³ At its best, it should not be reduced into a purely pragmatic, behaviorist, or utilitarian calculus—although it can appear that way on its face and can reduce to such calculi in its crasser forms.

⁷⁰ MOTSE, THE ETHICAL AND POLITICAL WORKS OF MOTSE 30-31 (Mei Yi-Pao trans., Probsthian 1929).

⁷¹ See Douglas W. Cassel, Jr., *Somoza's Revenge: A New Judge for the Inter-American Court of Human Rights*, 13 HUM. RTS. L.J., 137 n.4 (1992) (discussing the debate surrounding the moral qualification for a justice on the Inter-American Court of Human Rights).

⁷² See IVAN PAVLOV, EXPERIMENTAL PSYCHOLOGY AND OTHER ESSAYS (Philosophy Library 1957); B.F. SKINNER, CONTINGENCIES OF REINFORCEMENT: A THEORETICAL ANALYSIS (Appleton-Century-Crafts 1969).

⁷³ MOTSE, *supra* note 71, at 19.

A. Mencius

In the midst of a high-water mark for the popularity of Mo Tzu's way of thinking, the so-called "agricultural school" of Mencius emerged.⁷⁴ It maintained that "a wise and virtuous ruler tills the soil together with his people in order to get his food; along with governing, he cooks his own meals morning and night."⁷⁵ Underlying this notion is the principle that those who rule and judge should know the life of the people they rule or judge.

Apparently, Mencius followed the example of Confucius in a number of ways.⁷⁶ Mencius eloquently asserted the claim of the scholar and the man of virtue to a place of honor above that which is conferred by the pomp of princes. Such a man, as expressed by Mencius, should regard worldly success and failure with indifference, secure in the knowledge that, if his character is as it should be and the world fails to acclaim him, the fault lies not with himself but with the world.⁷⁷ That is the sort of virtue that is worthy of notice, and refreshing in an age of hype and celebrity production. Describing the just and virtuously great person, Mencius says:

⁷⁴ Mencius' opinion foreshadows and antedates by millennia the views of this nation's founders such as George Washington, who tilled the soil himself at Mount Vernon, and Thomas Jefferson, who had greater trust in the hard-working, ordinary agrarian than some of his oligarchic contemporaries.

⁷⁵ THE FOUR BOOKS, 3 (2) 10 (James Legge trans., Commercial Press 1966).

⁷⁶ For example, he was as democratic as Confucius in accepting students regardless of their socioeconomic or political standing, demonstrating an unusually egalitarian educational ethic. THE FOUR BOOKS, *supra* note 76, at 19.

⁷⁷ *Id.* at (1) 9.

Dwelling in the wide house of the world, occupying his correct place in the world, walking in the great way of the world; when his desire for office is fulfilled, practicing his principles along with others; when that desire is disappointed, practicing them alone; riches and honors cannot corrupt him, poverty and mean condition cannot change him, authority and power cannot make him bend the knee: such is the truly great man.⁷⁸

Earlier, Confucius told the rulers to transfer the administration of their governments to men of virtue, ability, and education,⁷⁹ which Mencius fully concurs with as the previous quote partially describes.

“One who outrages the human virtues is called a brigand; one who transgresses against righteousness is called a ruffian. I have heard that the fellow called Chou was put to death, but I have not heard that this was killing a sovereign.”⁸⁰ In regards to the regicide of the last Shang ruler, Mencius stated this when asked about it by the King of Ch’i. Evidently, Mencius then placed just and virtuous character above brute power or position, even the position of king. For Mencius, might does not equal right, nor does positional authority by itself necessarily denote the exercise of justice. Hence, the basic postulate of Mencius’ sociopolitical and legal program asserted that virtues such as justice, above all else, breed success in the most

⁷⁸ *Id.* at 3 (2) 2.3. As we shall see later in this study, similar notions also occurred in prominent Western thinkers. We need many more such great and just people, who not only reflect higher law in their jurisprudence, but also in their very lives.

⁷⁹ See CONFUCIUS, *THE ANALECTS* (David Hinton trans., Counterpoint 1998); CONFUCIUS, *THE ANALECTS* (Raymond Dawson trans., Oxford Univ. Press 1993).

⁸⁰ THE FOUR BOOKS, *supra* note 76, at 1 (2) 8.

profound sense of the word.⁸¹

Mencius directly counters a representation of one of Mo Tzu's principal arguments on its face, namely that the necessity of something's utility or profitableness as bedrock. This argument could also be said to counter Western utilitarian arguments advanced by scholars such as John Stuart Mill⁸² and Jeremy Bentham,⁸³ who rehash some of the same hackneyed utilitarianism much later in another part of the world.

The following passage also emphasizes the necessity of going beyond the narrowness of short-term, shortsighted personal utility and profitability. The book of *Mencius* begins:

Mencius *went* to see King Hwuy of Leang. The king said, "Venerable sir, since you have not counted it far to come here, a distance of a thousand li, I presume that you are likewise provided with counsels to profit my kingdom?" Mencius replied, "Why must Your Majesty use the word 'profit'? What I am 'likewise provided with, are *counsels* to benevolence and righteousness, and these are my only topics. If Your Majesty say, 'What is to be done to profit my kingdom?' the great officers will say, 'What is to be done to profit our families?' and the inferior officers and the common people will say, 'What is to be done to profit our persons?' Superiors and inferiors will

⁸¹ The point here is not an advocacy of regicide or other killing of a judge or sovereign. Rather, it dramatically underscores the importance of justice and virtue in any legal and political system.

⁸² MILL, *supra* note 33.

⁸³ BENTHAM, *supra* note 33.

try to snatch this profit the one from the other, and the kingdom will be endangered.”⁸⁴

Clearly, a simplistic profit-seeking and utilitarian perspective fails to reach that just and virtuous height that Mencius advocates. Those who advance justice and higher law typically do not obsess about profit—and may indeed sacrifice in various ways for higher causes.⁸⁵

Continuing this argument, Mencius points out that such a condition will put the king in the precarious position of losing his life to a subordinate who covets his position and his wealth. He continues:

There never has been a man trained to benevolence who neglected his parents. There has never been a man trained to righteousness who made his sovereign an after consideration. Let Your Majesty also say, ‘Benevolence and righteousness, and these shall be the only themes.’ Why must you use that word—‘profit’?⁸⁶

Such a stance undermines reductionistic “bottom line” pursuits of profit to the exclusion of virtue, an approach unworthy of the more exalted calling of justice and higher law.

Similar to Confucius’s and Aristotle’s contentions, Mencius claimed that the good is that which is most fully congruent with human nature.⁸⁷ But, the Legalists of

⁸⁴ THE FOUR BOOKS, *supra* note 76, at 429-31.

⁸⁵ For example, surveys demonstrate that public interest attorneys make the least income, yet have the highest satisfaction in their work of any segment of the legal profession. They often make greater impacts for justice too.

⁸⁶ THE FOUR BOOKS, *supra* note 76, at 432.

⁸⁷ *Id.*

China would contend that Mencius had an unduly optimistic view of human nature.⁸⁸ All of them, however, agreed with the necessity of actions in accordance with sound justice and other virtues, and the necessity of higher law beyond brute force or sheer authority alone.

Returning to Mencius, he vouched for “education” chiefly as a means to cultivate a good sense of justice in accordance with original human nature.⁸⁹ He observes, “That which differentiates men from the birds and beasts is very slight; ordinary men discard it, superior men preserve it.”⁹⁰

B. Tao

A basic principle of Taoism is that one should be in harmony with, not in rebellion against, the foundational laws of the universe.⁹¹ Such a tenet presupposes the existence of foundational laws of the universe—in other words, higher law.⁹²

According to contemplative Taoism, living in accordance with the fundamental laws of the universe includes maintaining insouciance towards power, position, or honors in this world.⁹³ Taoist works speak of various sages who declined the offices of prime ministers and did

⁸⁸ *Id.*

⁸⁹ The argument that education cultivates justice is similar to Platonic “memory” or analogous to a pre-fall state of Edenic innocence in the Judeo-Christian view. See *Genesis* 1:1-3:24.

⁹⁰ THE FOUR BOOKS, *supra* note 76, at 14 (2) 19.1. Mencius’ position implicitly endorses the proposition that one must always act justly and virtuously because everything one does will impact, for good or ill, the development of one’s own character. That statement would necessarily include everything that one does within the legal profession.

⁹¹ *Id.*

⁹² U.S. legal scholars in the present period of history certainly do not hold such an assumption universally, which accentuates the need for its rediscovery.

⁹³ THE FOUR BOOKS, *supra* note 76, at 14 (2) 19.1.

not seize the offer of thrones.⁹⁴ Thus, a Taoist living according to these ideals would live above the vainglory, conceit, and arrogance that often accompany rulership in this life.

The Taoist position is more susceptible to the critique of erring too far towards a phlegmatic, even at times irresponsible, indifference to such matters. For example, it also fails to provide a sufficient notion of resource stewardship in its flight away from materialism, greed, and selfish ambition. If taken too far, Taoism almost crowns apathy as a virtue. It would be no virtue, for example, to be apathetic or phlegmatic to international human rights violations that should be upheld worldwide. Nonetheless, Taoism still adheres to a form of higher law.

C. Hsuntze

The philosopher Hsuntze also notes the self-interested proclivities of humans that Taoism apparently attempts to remedy.⁹⁵ Hsuntze's views contrast with the Taoists in what he considers "natural." While a Taoist considers becoming "natural" as the crux of the answer, Hsuntze sees our "natural" condition as problematic from birth.⁹⁶ He says:

The original nature of man to-day is to seek for gain. If this desire is followed, strife and rapacity results, and courtesy dies. Man originally is envious and naturally hates others . . . Therefore to give rein to man's original nature, to follow man's feelings, inevitably results in strife and rapacity,

⁹⁴ *Id.*

⁹⁵ See XUNZI, THE WORKS OF HSUNTZE (Homer H. Dubs trans., Probstain 1928).

⁹⁶ *Id.*

together with violations of etiquette and confusion in the proper way of doing things, and reverts to a state of violence. Therefore the civilizing influence of teachers and laws, the guidance of the rules of proper conduct (Li) and justice (Yi) is absolutely necessary . . . By this line of reasoning it is evident that the nature of man is evil and his goodness is acquired.⁹⁷

This view not only serves as a counter point to the views of Mencius, but it also impinges upon other perspectives. What some thinkers consider the motivating forces (*e.g.*, *a la* Adam Smith⁹⁸ and other capitalists), others (*e.g.*, Karl Marx and Mao Tse-Tung) see as problems with capitalistic systems. These systems, Hsuntze would likely say, beg for virtues of temperance, justice, and content generosity through the fostering of character, education, and laws consonant with the higher law. Legal systems ideally work as safeguards against the self-interested tendencies of humanity.

To give another example, an extended but selective quote from Hsuntze elaborates on key elements of his vision of justice, especially in regard to virtuous contentment (not to be confused with a smug complacency) contrasted with disgruntled greed. The level of justice, virtue, and accordance with higher law would increase with its application. It contrasts moral laxness with morality, materialism with satisfaction, anxiety with peace, and anhedonia with virtuous pleasure and happiness. It would accord well with Aristotle's notions of *arete* and *eudaimoniam*, which translate to virtue and happiness. Hsuntze writes:

⁹⁷ *Id.* at 301.

⁹⁸ See ADAM SMITH, THE WEALTH OF NATIONS 10 (C.J. Bullock ed., P.F. Collier & Son 1909).

[T]here is no one who in their purpose despises moral principles, who does not value material things; and that there is no one who does not externally value material things and is not inwardly anxious; and that there is no one whose actions deviate from moral principles who is not in dangerous circumstances; and that there is no one who is in dangerous circumstances who is not inwardly fearful. When the mind is anxious and fearful, though the mouth be holding meat, it will not recognize the flavour thereof; though the ears hear bells and drums, they will not recognize the sound thereof . . . though the clothes be light and warm, and he be sitting on a rush or fine bamboo mat, the body will not recognize the comfort thereof; for he may enjoy the goodness of all things, yet he cannot be contented. If he gains a respite and contentment, his anxiety and fear nevertheless do not leave him. For though he be enjoying the goodness of all things, yet he is greatly anxious; though he be absorbing the benefit of all things, yet he gains great injury . . . Although this sort of man be made a marquis and called a prince, he would be no whit different from a common man or a robber; although he were to ride in a nobleman's coach or wear a crown, he would be no whit different from a footless cripple. Then he could well be called one who makes himself the servant of material things. If the heart is tranquil and contented, though the colours be below the

ordinary, they can nourish the eyes; though sounds be below the ordinary, they can nourish the ears; coarse food and vegetable soup can nourish the taste; coarse cotton clothes and coarse hemp sandals can nourish the body; a straw hut for a house, reed screens for doors, straw beds, ancient plain stands and mats can nourish the form. For a person may be without the goodness of all things, yet he can foster his enjoyment; he may be without a position of high rank, but he can foster his fame. If such a man were given the empire, it would mean much for the empire, but it would mean little for his contentment and joy. Thus he could be called one who makes his personality important and makes material things his servants.⁹⁹

Such a passage can serve a salubrious purpose if more faithfully applied by those responsible for legal systems. Indeed, Hsuntze's description may also be a virtuous prescription that falls within higher law and justice for societies and individuals everywhere.

D. Neo-Confucianists From Chu Hsi

We now move to one of the greatest, if not the greatest, of the Neo-Confucianists, Chu Hsi. His interpretations of some of the classics were considered authoritative on the official Chinese government exams for almost six centuries, specifically from 1313 until 1905 when the government abrogated the exams. Addressing the structure of justice and higher law built into the universe, Chu Hsi avers that “[p]rinciples or *li* . . . are without birth

⁹⁹ XUNZI, *supra* note 96, at 298-99.

and indestructible.”¹⁰⁰ Changeless, they are all part of the one great *li*, the Supreme Ultimate, which Chu Hsi equates at times with the *Tao*. He recognized that principles of justice and higher law are both equally applicable in the Western Hemisphere as they have been in the East.

In reference to Mencius, another leading Neo-Confucianist, Tai Chen states, “The ancients who wished to illustrate illustrious virtue throughout the kingdom, first ordered well their own states . . . they first cultivated their persons. Wishing to cultivate their persons, they first rectified their hearts.”¹⁰¹ Chen helped revive the centrality of character development through virtue, a result that flows from the pursuit of justice and higher law.

Chen reinforces these notions by recognizing the place of “virtues as the sense of shame, humility, and the knowledge of right and wrong.”¹⁰² Chen combines both emotivist and intellectual-cognitive dimensions in his conception of virtue. A reduction of virtue to either a emotivist or an intellectual-cognitive dimension alone, however, misses the mark. Chen was not a moral skeptic, but is often mired in the morass of doubt and despair in regards to the epistemology of ethics.

Perhaps his witnessing actual failures of justice, higher law, and virtue helps explain why Yen Fu, who studied at the University of Edinburgh and translated Western philosophical works into Chinese, brought a scathing indictment after the first World War. Yen Fu wrote, “It seems to me that in three centuries of progress the people of the West have achieved four principles: to be selfish, to kill others, to have little integrity, and to feel little shame.”¹⁰³ From one who had formerly admired

¹⁰⁰ H.G. CREEL, CHINESE THOUGHT FROM CONFUCIUS TO MAO TSE-TUNG 207 (The Univ. of Chicago Press 1953).

¹⁰¹ THE FOUR BOOKS, *supra* note 76, at 310-12.

¹⁰² CREEL, *supra* note 101, at 228-29.

¹⁰³ YEN FU, HSUEH HENG, No. 18 6-7 (1923).

Western culture, Yen Fu's words are sobering ones indeed. The four "principles" Fu describes certainly would not lead to a harmonious international or domestic legal system.

This survey identifies an Eastern pattern that recognizes the existence of justice, virtue, and higher law and points to various aspects of these principles—whether indicated in "right living," *Li*, morality, *Tao*, or other comparable terms. This reality, whichever appellation one chooses to give it, forms the best foundation for law, especially international law, which must carve out the common inheritance of humanity in the midst of diverse cultures.

III. The Pre-Socratics, Plato and Aristotle on Justice, Higher Law and Virtue

Turning now from Asia to ancient Greece, let us inquire into the Pre-Socratic, Platonic, and Aristotelian conceptions of justice, virtue, and higher law which are necessary to maintain the health of jurisprudence and the law.

A. Pre-Socratics

The Pre-Socratics stress their continuity with the past through the idea of a law-governed universe.¹⁰⁴ They explain that the ordered processes of nature relate to the growing ethical conviction, entrenched in their cultural heritage, that just principles are rooted in reality.¹⁰⁵ This emphasis has no part in the presumption that nature is value-free.¹⁰⁶ Modern meta-ethics, by contrast, puts on a

¹⁰⁴ See Gregory Vlastos, *Equality and Justice in Early Greek Cosmologies*, 42 CLASSICAL PHIL. 156-78 (1947).

¹⁰⁵ See TERENCE IRWIN, CLASSICAL THOUGHT (Oxford Univ. Press 1989).

¹⁰⁶ See *id.*; WERNER JAEGER, PAIDEIA: THE IDEALS OF GREEK CULTURE

façade of just discourse while denying the very existence of a higher law.

An example of a law-governed universe from Pre-Socratic literature is found in Aeschylus's *Oresteia*. Orestes becomes aware of a more rational justice than cruel vindictiveness, a rule of law that seeks to virtuously superintend, rather than further inflame, conflicting interests. In this conception, the rule of reason overcomes blind fate. This movement towards a more virtuous conception of higher law and an eternal, celestial court gives hope for eventual justice in spite of present injustices.

Sophocles puts the following words in heroine Antigone's mouth, which appeal to a higher law than the king's orders. In response to the inquiry of whether she flatly chose to disobey, she exclaims:

Naturally! Since Zeus never promulgated
Such a law. Nor will you find
That Justice publishes such laws to man
below.
I never thought your edicts had such force
They nullified the laws of heaven, which,
Unwritten, not proclaimed, can boast
A currency that everlastingly is valid;
An origin beyond the birth of man.
And I, whom no man's frown can frighten,
Am far from risking Heaven's favor by
flouting these.¹⁰⁷

This lyrical expression of the higher, heavenly law speaks to its pre-historic origin, its eternal applicability, and its binding position of ascendancy over even king-made positive law in a monarchy.

Along similar lines, Heraclitus wrote that human

(Oxford Univ. Press 1939).

¹⁰⁷ OEDIPUS PLAYS, *supra* note 64, at 179.

laws are nourished by one divine law that outlasts them all—the higher law.¹⁰⁸ Heraclitus seeks an enlargement of the rule of law beyond the city-state into a form of cosmic justice.¹⁰⁹ Heraclitus also discusses a harmony of opposites grounded in natural law, called *Logos*, which are somewhat similar to the concept of *yin* and *yang* in some Asian philosophies.¹¹⁰ At times, Heraclitus actually seems to identify *Logos* with the divine. A kind of cosmic justice, so to say, is thus rooted in the *Logos* reality.¹¹¹ This truth is foundational to an international jurisprudence especially, but also to domestic ones.

The Sophists, on the other hand, put forth a position widely held today—rhetoric shapes the appearance, which is what is perceived and which has no grounding in justice, virtue, or higher law. Such a stance can lead to the position, attributed to Thrasymachus, that justice amounts to the advantage of the more powerful, making it relative to whoever wields the power, a positivist position that antedates Hans Kelsen by many centuries.¹¹² No cosmology, no knowledge of a Divine Being, and no cosmic justice enter into this brutish¹¹³ and potentially brutal position.¹¹⁴ Thus, if we extend the logic of the

¹⁰⁸ See, e.g., J.M. ROBINSON, AN INTRODUCTION TO EARLY GREEK PHILOSOPHY (Houghton Mifflin Co. 1968); THE PRE-SOCRATICS (Philip Wheelwright ed., Odyssey Press 1966).

¹⁰⁹ See JONATHAN BARNES, THE PRE-SOCRATIC PHILOSOPHERS (Routledge & Kegan Paul 1979).

¹¹⁰ For an elaboration on the notion of *Logos*, see 1 W.K.C. GUTHRIE, A HISTORY OF GREEK PHILOSOPHY 419-34 (Cambridge Univ. Press 1962).

¹¹¹ See, e.g., ROBINSON, *supra* note 109; THE PRE-SOCRATICS *supra* note 109.

¹¹² PLATO, REPUBLIC (G.R.F. Ferrari ed., Tom Griffith trans., Cambridge Univ. Press 2000).

¹¹³ We would have the Hobbesian condition of “the life of man, solitary, [poor], nasty, brutish, and short” THOMAS HOBBES, LEVIATHAN 104 (E.P. Dutton 1950).

¹¹⁴ See THE PRE-SOCRATICS, *supra* note 109, at 239-50.

proposition that justice amounts only to the dictates of the powerful, oppression can, strangely enough, become “justice.” Such a position contorts itself thereby into a logical contradiction.

The Sophists present the specter of legal positivism and formalism that would preclude “[t]he Moment of Truth for a practicing attorney [which] occurs whenever a prospective client tells a story that seems morally compelling but legally hopeless. . . . Too much injustice persists in the world because tired legal thinking has accepted unjust patterns as inevitable.”¹¹⁵

It fell, then, to the great Socrates to recall Athens to the quest for true knowledge and justice, rather than settling for the superficial appearances and conventions of the Sophist “spin-doctors.” He thereby enabled Plato to re-address the deep conditions of the human soul, and in doing so, to bring into focus the idea of a structure of justice in the universe and its transcendent source, notions desperately needed in law, including international law, whether in the West or in the East.

B. An Account of Socrates

At the trial where his life hung in the balance, Socrates responded to the charge of corrupting the Athenian youth:

I do nothing but go about persuading you all, old and young alike, not to take thought for your persons or your properties, but first and chiefly to care about the greatest improvement of the soul . . . I tell you that virtue is not given by money, but that from virtue comes money and every other good of man, public as well as private. This is my

¹¹⁵ ANALYTIC JURISPRUDENCE ANTHOLOGY, *supra* note 7, at 289.

teaching, and if this is the doctrine that corrupts the youth, I am a mischievous person . . . I sought to persuade every man among you that he must look to himself and seek virtue and wisdom before he looks to his private interests. . . .The difficulty, my friends, is not to avoid death, but to avoid unrighteousness.

And will life be worth living, if that higher part of man be destroyed, which is improved by justice and depraved by injustice?¹¹⁶

Socrates both describes and exemplifies a laudable life, one that surely rose to supranormal¹¹⁷ proportions. Professor Anthony D'Amato wrote that "to Socrates, and presumably to the Athenian citizenry as a whole, judging from the evidence which exists, a trial and judgment was simply an attempt by the tribunal to apply 'the law,' an immutable concept which somehow had a separate, independent existence unchanged by specific cases."¹¹⁸ Herein lies another statement of the higher law, which every epoch, including the 21st century, ought to follow. Here is a noble example of magnanimity in the face of manifest *injustice*.

Although Socrates himself faced death, he believed that in the greater scheme of things, nothing ultimately

¹¹⁶ PLATO, APOLOGY 30, 36, 39, 49 (B. Jowett trans., Random House 1937).

¹¹⁷ Plato's life rose to the supernatural at least in the statistical, social-psychological sense, but more importantly in the sublime, moral sense. See THE SOCIOLOGICAL PERSPECTIVE: A VALUE-COMMITTED INTRODUCTION (Michael R. Leming et al. eds., Academic Books 1989)(drawing distinctions between variations of the term "normal" in chapter on social change in theory and practice).

¹¹⁸ ANALYTIC JURISPRUDENCE ANTHOLOGY, *supra* note 7, at 119, quoted in Anthony D'Amato, *Obligation to Obey the Law: A Study of the Death of Socrates*, 49 S. CAL. L. REV. 1079, 1080 (1976).

detrimental could happen to the good person.¹¹⁹ While this sacrificial speech extolling justice and virtue was the crowning achievement of Socrates' life, it is also a fitting introduction to Socrates' prize pupil Plato, and his contribution to this topic.

C. Plato

Many of Plato's dialogues concern the virtues, such as justice, wisdom, and prudence. Like many Asian philosophers, his political writings, including *Republic*, *Statesman*, and *Laws*, address the improvement of the soul.¹²⁰

In the *Republic*, Plato reasoned that the guardians were "to live together in the continual practice of virtue, which was to be their sole pursuit."¹²¹ One may question whether most politicians, attorneys, judges, and other national leaders actually believe that "[t]he art of politics has to do with the soul: what gymnastics and medicine are to the body, legislation and the administration of justice are to the soul."¹²² Thankfully, those who take seriously a jurisprudence of justice, virtue, and higher law still contemplate such statements. It hardly fits, however, the mold of a demagogue who runs roughshod over his own people.

Plato even criticized the renowned Pericles, saying that Pericles should have sought "to implant justice in their souls and take away injustice, to implant temperance and

¹¹⁹ SAINT AUGUSTINE, CITY OF GOD, (Marcus Dods trans., Hafner 1945). St. Augustine expresses similar notions in works such as the magisterial *De Civitatis Dei*, which many consider his magnum opus.

¹²⁰ See generally, PLATO, LAWS (Benjamin Jowett trans., Random House 1937); PLATO, REPUBLIC, *supra* note 113; PLATO, STATESMAN (Julia Annas & Robin Waterfield eds., Cambridge Univ. Press 1995).

¹²¹ PLATO, TIMAEUS 18 (Donald J. Zeyl trans., Hackett Pub. Co. 2000).

¹²² PLATO, GORGIAS 464 (Walter Hamilton trans., Penguin Books 1971).

take away intemperance, to implant virtue and take away every vice.”¹²³ Plato’s central thesis throughout his published works is that the most important task in this life is the improvement of the soul through virtue.¹²⁴ It is not a mere, surface behaviorism. Rather, it is more akin to Harold Koh’s notion of internalization.¹²⁵ One might question whether Plato’s central thesis might find more widespread and profounder application in international, as well as domestic, law.

The Sophists are akin to the American public’s perception of the legal profession. Plato roundly criticizes the Sophists’ use of rhetoric as solely a way to win wealth or power, rather than to instill virtue.¹²⁶ Plato shows the problems with Thrasymachus’s definition of justice as whatever benefits the stronger because it assumes that the strong really apprehend what is best, and thus, that they are wiser than the weak.¹²⁷ Thrasymachus’s definition suggests a move towards anarchy if people are constantly and illegitimately vying with each other for power and dominance, and it leads to ignoring justice or defending injustice as the better way to life.¹²⁸ These criticisms actually apply to misguided relativism as applied to law, and open the door to ill-conceived self-interest. This threatens what Thomas Hobbes subsequently referred to as the “[war] of every man against every man, this also is consequent; that nothing can be Unjust. The notions of Right and Wrong, Justice and Injustice have there no place.”¹²⁹ Furthermore, it can make no transcendently binding distinction between good and evil, justice and injustice. If what Gandhi called soul force does not prevail,

¹²³ *Id.* at 504, 513-14.

¹²⁴ PLATO, REPUBLIC, *supra* note 113, at 338-52.

¹²⁵ Koh, *supra* note 10.

¹²⁶ PLATO, REPUBLIC, *supra* note 113.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ HOBBS, *supra* note 114, at 112.

then other force—be it military, governmental, or legal—often does.¹³⁰ International law generally depends more on its stake in justice and higher law than the march of troops to enforce their orders. It usually must win voluntary acceptance of its jurisdiction and good-faith compliance with its orders. Thus justice, virtue, and higher law gain greater significance in the international law context.

In *Phaedrus*, Plato expresses concern about sophistical rhetoric¹³¹ that seems hauntingly applicable to what passes as law and international law. According to this view, the orator need only understand the beliefs of his judges, who judge him on the art of persuasion, not on the truth of the matter.¹³² The orator can extol evil as being good, and might persuade the public as well to do evil instead of good.¹³³ He influences their souls, but without true knowledge.¹³⁴ To what end does he sway others—merely self-interested ones? Such criticisms must be taken seriously if legal and political discourse is to rise above sophistry. This position does not, however, exclude prudential uses of rhetorical (yet honest) tools harnessed to just causes in accordance with higher law and justice because there is an important distinction between these two positions.

When distilled, one of the issues is between opinion and knowledge and the other between appearance and reality. When Protagoras expresses the opinion that man is the measure of all things, this notion, if logically pushed to its limits, affirms all opinions—including the opinion that his own opinion is false.¹³⁵ So even Protagoras must admit

¹³⁰ Dr. Samuel Ling, *Asian History Lecture* (Spring 1996).

¹³¹ PLATO, *PHAEDRAS*, in *THE DIALOGUES OF PLATO* 169-72, 177-79 (B. Jowett trans., 4th ed., Oxford Univ. Press 1964) (1871).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ PLATO, *THEAETETUS*, in *4 THE DIALOGUES OF PLATO* 268-69, 288-90, 304-06, 308 (B. Jowett trans., 3d ed., Clarendon Press 1892).

that at least one opinion is wiser and truer than another; but this deduction makes the wiser and truer notions into the measure of things. Thus, man in general is not the measure of all things because not all opinions are equally valuable, true, wise, or worthwhile.¹³⁶ So there must be some anchor of justice, virtue, and higher law, such as the related set of honesty, veracity, and integrity, as contrasted with mendaciousness, duplicity and falseness, by which to ground such statements.

The relativist is deceived into thinking that, because the world is continually changing in its temporal particularities, justice, virtue, and higher law are also mutating. If so, then everything is in a process of becoming; unchanging "being," or in other words, permanent, essential ontologies, are then abolished. Noting that appearances and temporal contingencies change does not lead one ineluctably to conclude that the underlying *reality* changes too.

Plato's famous cave analogy speaks to this point.¹³⁷ The Sophist relativist is like a prisoner who, suffering from a form of amnesia and confined to a world of flitting shadows, supposes these appearances to be all the reality there is.¹³⁸ If he could think, if he could look behind himself, if he could exit the cave, his reality would be very different.¹³⁹ The Sophist fails because his rhetoric is not liberated by knowledge of the truth, but is instead a slave to opinions based on appearances, the convenience of expedience, temporal contingencies, prestige, or other factors that vary from place to place and from one individual to another.¹⁴⁰ Sophistical resistance to justice, other virtues, and higher law fails. This statement applies

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

to all sophisticated opinions—whether by judicial, legislative, or executive branches.

Sheer pragmatism or formalism is not enough. Justice and injustice are not changing expedients for changing circumstances; they are rooted in a changeless reality indiscernible by the physical senses alone. So then it is not Socrates, but the Sophists, who impoverished the souls of Athenian youth by failing to extol justice, virtue, and higher law.

In *Timaeus*, Plato discusses how God set things in order and constructed the cosmos by giving to all things proportion, measure, and harmony.¹⁴¹ According to Plato, this cosmic harmony should extend to the law-governed city where justice means the harmony of right, just relationships, and proportionate treatment, and also to the good life ruled wisely by the virtue graced soul.¹⁴² As musical harmony depends on mathematical relationships between notes, so must human life be properly ordered if it is not to end in painful discord, dissolution, or even death. Indeed Plato declares, “The harmony of the soul is virtue.”¹⁴³ So the discussion again centers on virtue. Even modicums of virtue can help prevent some of the tragedies that legal systems repeatedly endure.

In *Republic*, Plato calls for rule by wise, philosopher-kings rigorously educated to disciplined habits aimed at true understanding and the continual pursuit of the good.¹⁴⁴ Such people can help add to the stature of legal systems and the profession.

Plato’s theory of forms as unchanging, transcendent ideals¹⁴⁵ becomes relevant here. Reason¹⁴⁶ does not

¹⁴¹ PLATO, *TIMAEUS*, *supra* note 122.

¹⁴² *Id.*

¹⁴³ PLATO, *LAWS*, *supra* note 121, at 653.

¹⁴⁴ PLATO, *REPUBLIC*, *supra* note 113.

¹⁴⁵ *Id.*

¹⁴⁶ The use of the term “reason” is in the broader, classical sense. It includes virtue and a healthy conscience along with rationality and

develop mere opinions about justice and then apply them in governing the appetites.¹⁴⁷ The mind does not fabricate virtues, but rather it discovers what is objectively and inherently good.¹⁴⁸ The goal is to attain, however imperfectly or fallibly, to what justice, virtue, and higher law really are, rather than how they appear to a Thrasymachus or to any other person. An objective rooting in real justice, virtue, and higher law still exists, and a just legal system, by definition, depends upon these realities and our best efforts to apprehend and apply them.¹⁴⁹

In *Laws*, Plato proposes the model of a law-governed community in which the people themselves value the good.¹⁵⁰ Indeed, a person's entire energy throughout life should be devoted to the development of virtue. Plato ultimately concludes that it is not mere mortals, but God who ought to be the measure of all things.¹⁵¹

It is important to note that Plato's conception of knowledge is not just a matter of knowledge as against ignorance or opinion, nor just an ability to define or describe a virtue.¹⁵² Discernment between good and evil is required, along with the practiced capacity for making sound judgments that recognize goodness when

logic.

¹⁴⁷ PLATO, *REPUBLIC*, *supra* note 113.

¹⁴⁸ *Id.*

¹⁴⁹ Many centuries later, scholars such as St. Thomas Aquinas and others built on this foundation. See, e.g., THOMAS AQUINAS, *TREATISE ON LAW* (R.J. Henle trans., Univ. of Notre Dame Press 1993). Presumably, one should not extend hate towards people, but to that which contravenes justice. Hating injustice because of loving [Greek: *agape*] people against whom the injustice is wrought deserves the label virtue. At the same time, that hate should not extend even to the perpetrator of the injustice.

¹⁵⁰ PLATO, *LAWS*, *supra* note 121.

¹⁵¹ See *id.* at 653, 717, 770.

¹⁵² See JOHN GOULD, *THE DEVELOPMENT OF PLATO'S ETHICS* (Russell & Russell 1972) (1955).

exemplified in particular cases.¹⁵³ Furthermore, it is not a detached, unemotional kind of thinking, but is filled with wonder at and a deep devotion to the good.¹⁵⁴ Such a framework exercises virtue, pursues justice, and comports with higher law.

Plato employs the analogy of a lover absorbed day and night with his beloved, or rather, with the ideals that the beloved exemplifies.¹⁵⁵ According to Plato, our calling in the legal and governmental spheres and in life is to romance and be romanced by justice, virtue, and higher law.

Similarly, in *Phaedrus* Plato likens the soul to a charioteer with two winged horses, one wanton and wild, the other spirited but controllable, soaring towards the sun in all its majesty.¹⁵⁶ As long as the wanton horse is uncontrolled, there can be no united effort and both horse and charioteer plunge down to the earth again and again.¹⁵⁷ But if the driver guides the spirited horse while giving it the lead, then its strength will control the wanton one so that they will pull together and soar to the heavens.¹⁵⁸ Plato speaks of the higher aspects of humans harnessing the appetitive or animal side.¹⁵⁹ The brute inside must be disciplined to soar to the heavens.¹⁶⁰ Otherwise, the host of horrors that parade through this world will march on.

Plato, as an encapsulation, states, "Wherefore we ought to fly away from earth to heaven as quickly as we can; and to fly away is to become like God, as far as this is possible; and to become like him is to become holy, just,

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ PLATO, *PHAEDRAS* *supra* note 132.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

and wise.”¹⁶¹ In other words, it is an exhortation towards a just and virtuous life under the highest possible law. This view has become all too rare as Western Civilization has reached what Harold Berman calls the “twilight of transcendence.”¹⁶²

Plato continues this same theme in *Laws* when he writes that “he who would be dear to God must, as far as is possible, be like him and such as he is.”¹⁶³ Several motifs emerge from these writings. First, this entire metaphysical discussion grounds itself in unchanging and transcendent Fact and Reality—in virtue, justice, and higher law. In this sense, law is a fact.¹⁶⁴ Second, Plato’s forms theory introduced a theory of universals with unchanging natures that dominated the jurisprudence of most of the history of Western Civilization, which continues to this day. This is the best foundational theory for international law and law in general.

In *Statesman*, Plato likens God to a statesman shepherding his people, but in *Laws* Plato offers his last and most detailed account.¹⁶⁵ Plato describes God as powerful, purposeful, intelligent, and good in an outgoing way because everything he designs is directed toward the overall goodness of the universe.¹⁶⁶ Individual virtue and the just city-state are supposed to be part of this cosmic

¹⁶¹ PLATO, *THEAETETUS*, *supra* note 136, at 235.

¹⁶² See BERMAN, *supra* note 4.

¹⁶³ PLATO, *Laws*, available at

<http://classics.mit.edu/Plato/laws.4.iv.html> (last visited Feb. 2, 2006). For an alternative translation, see also PLATO, *THE LAWS* 175 (Trevor J. Saunders trans., Penguin Books 1970) (“you must do your level best to make your own character reflect his, and on this principle the moderate man is God’s friend, being like him”).

¹⁶⁴ See Anthony D’Amato, *On the Connection Between Law and Justice*, 26 U.C. DAVIS L. REV. 527 (1993).

¹⁶⁵ See, e.g., PLATO, *LAWS*, *supra* note 121, at 894-903; PLATO, *STATESMAN*, *supra* note 121, at 269-75.

¹⁶⁶ See, e.g., PLATO, *LAWS*, *supra* note 121.

harmony. Because they imitate God's goodness, they are microcosms of the whole.¹⁶⁷ Each legal system, whether international or domestic, can aspire to such lofty objectives.

The chief purpose of *Timaeus* seems to be to link justice to the structure of the cosmos—higher law.¹⁶⁸ This higher law grounds itself in reality, in the forms, in the nature of the soul, in cosmic harmony, in the idea of the good, and in God. No better theoretical framework exists.

In contrast to secularized individualism, skepticism, and relativism that prevail in present legal culture, Plato tells the reader:

The ruler of the universe has ordered all things with a view to the excellence and preservation of the whole, and each part, as far as may be, has an action and passion appropriate to it . . . one of these portions of the universe is thine own, unhappy man, which, however little, contributes to the whole . . . and in order that the life of the whole may be blessed; and that you are created for the sake of the whole, and not the whole for the sake of you.¹⁶⁹

¹⁶⁷ *Id.*

¹⁶⁸ PLATO, *TIMAEUS*, *supra* note 122.

¹⁶⁹ PLATO, *Laws*, available at

<http://classics.mit.edu/Plato/laws.10.x.html>. For an alternate translation, see also PLATO, *THE LAWS* 437 (Trevor J. Saunders trans., Penguin Books 1970) ("The supervisor of the universe has arranged everything with an eye to its preservation and excellence, and its individual parts lay appropriate active or passive roles according to their various capacities . . . a mere speck that nevertheless constantly contributes to the good of the whole – is you, you who have forgotten that nothing is created except to provide the entire universe with a life of prosperity. You forget that creation is not for your benefit: you exist for the sake of the universe.").

Hence, Plato thinks the good is ultimately found in a more wholistic and community context, and ultimately, in the mind of God. If law does not contribute in this way, it loses an important facet of its *raison d'être*.

In their thinking about the cosmos, the early Greek philosophers struggled to distinguish between appearances and reality. Plato and Aristotle extended this concern into the metaphysical domain suggesting that what appears to some to be the good in reality may not be so.¹⁷⁰ Pleasure, wealth, power, or success may be sought as the highest ends, when in reality they are not. This confusion between appearance and reality in ethics underlies the contest between two dominant images of human life that Alasdair MacIntyre finds in a post-Homeric reflection—a life aiming at virtue or excellence (*arete*) and a life aiming at superficial “success” or power.¹⁷¹ Every branch of government would do well to pursue the former rather than the latter.

The former image of virtue or excellence (*arete*) is found in the works of Plato and Aristotle. The latter image of superficial success or power is also found in the writings of Aristotle's one-time student, Alexander the Great.¹⁷² Neither power nor success, nor pleasure, nor wealth is in reality the *highest* good, even though to some people they appear so. This claim does not deny the value of success, pleasure, or wealth in the service of virtuous ends.

Socrates, Plato, and Aristotle concerned themselves with the improvement of the soul and developed an ethic of virtue grounded in the ordered nature of reality as a whole.¹⁷³ Those in or influential to legal systems would be

¹⁷⁰ *Id.*

¹⁷¹ ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 88 (Univ. of Notre Dame Press 1988).

¹⁷² *Id.*

¹⁷³ See FINNIS, *supra* note 7, at ch. 8 (analyzing and synthesizing important strands of thought of these foremost Hellenic thinkers).

well advised to follow such an approach rather than making positivistic or formalistic excuses for injustice, vice, or violations of higher law. To Plato's student, Aristotle, we turn next for further grounding in justice, virtue, and higher law the best basis for law as a whole and international law especially.

D. Aristotle: Justice, Telos, Virtue, and the Higher Life through Higher Law

Aristotle merges the notion of justice with virtue by crowning justice as the apogee of virtue in relation to others:

Thus, this kind of justice is complete virtue or excellence, not in an unqualified sense, but in relation to our fellow men. And for that reason justice is regarded as the highest of all virtues, more admirable than morning star, and, as the proverb has it, "In justice every virtue is summed up." It is complete virtue and excellence in the fullest sense, because it is the practice of complete virtue. It is complete because he who possesses it can make use of his virtue in their own affairs, but who are incapable of using it in their relations with others. Therefore, the saying of Bias seems to be apt that "Ruling will show the man," for being a ruler already implies acting in relation to one's fellow men and within society. For the very same reason, justice alone of all the virtues is thought to be the good of another, because it is a relation to our fellow men in that it does what is of advantage to others, either to a ruler or to a fellow member of society.

Now, the worst man is he who practices wickedness toward himself as well as his friends, but the best man is not one who practices virtue toward himself, but who practices it toward others. For that is a hard thing to achieve.¹⁷⁴

Aristotle does not stop with justice as a perfect virtue in human relationships alone. In addition, he hints at the relation between human virtue, higher law, justice, and the divine.¹⁷⁵ Being is not morally neutral; in fact, the world of particulars is laden with issues of justice throughout,¹⁷⁶ including matters in the international law domain, as well as domestic law spheres.

Aristotle states:

If God is always in that good state in which we sometimes are, this compels our wonder: and if in a better state this compels it yet more. And God is in a better state. And life belongs to God; for the actuality of thought is life, and God is that actuality. . . . We say therefore that God is a living being, eternal, most good, so that life and duration continuous and eternal belong to God.”¹⁷⁷

The just and virtuous—the human *telos*¹⁷⁸—is the full development of this potential,¹⁷⁹ which is our highest

¹⁷⁴ ARISTOTLE, NICOMACHEAN ETHICS 114 (Martin Ostwald trans., Macmillan 1986) (internal citations omitted).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ ARISTOTLE, *Metaphysics*, available at <http://classics.mit.edu/Aristotle/metaphysics.12.xii.html>.

¹⁷⁸ In Greek, *telos* means “end” or “purpose.” “God and nature,” writes Aristotle, “create nothing that has not its use.” ARISTOTLE, ON THE HEAVENS, 271A.33 (Harv. Univ. Press 2000) (1957).

good. It is *eudaimonia*, usually translated “happiness,” but actually closer to “well-being,” although “well” simply reiterates “good” (“being” itself being good). Aristotle elaborates: the human good is the activity of the soul in accordance with virtue (*arete*).¹⁸⁰ Such activity never violates and always harmonizes with higher law.

Moral virtues are the excellence of the appetitive life, whereas intellectual virtues indicate excellence in the life of the mind.¹⁸¹ Such human flourishing is compromised, according to Aristotle, in those who live for pleasure, wealth, or honor. Other animals have such appetites too, yet only humans have the power to reason including the healthy functioning of the conscience and to guide those appetites.¹⁸² The human *telos* does not exclude pleasure or other such satisfactions; indeed, achieving the good brings its own pleasure.¹⁸³ No other species has courts, legislatures, or executive branches—or the deliberative processes found in legal, political, and academic discussions.

Actualizing such a life is a developmental process; the Maker grants the capacity, but to develop it requires just habits. Just habits require just choices repeatedly made and reinforced until they become second nature.¹⁸⁴ Just choices, in turn, must be determined by practical reason deliberating about what accords with higher law. The various appetites, as well as pleasure and pain in general, may be felt both too much and too little, and neither side of the spectrum from the balanced center is good.¹⁸⁵ But to

¹⁷⁹ Potential translates to *dunamis* in the Greek.

¹⁸⁰ ARISTOTLE, *NICOMACHEAN ETHICS* *supra* note 175; *see also* JOHN M. COOPER, *REASON AND HUMAN GOOD IN ARISTOTLE* ch. 1 (Harv. Univ. Press 1975).

¹⁸¹ ARISTOTLE, *Metaphysics*, *supra* note 178.

¹⁸² ARISTOTLE, *NICOMACHEAN ETHICS*, *supra* note 175, at 16-17.

¹⁸³ *Id.* at 20-22.

¹⁸⁴ *Id.* at 33-35.

¹⁸⁵ *Id.* at 36-38.

feel them, at the right times, with reference to the right objects, towards the right people, with the right motive, and in the just way, mediates between these extremes and characterizes virtue.¹⁸⁶ Herein, we find Aristotle's famous Golden Mean between extremes.¹⁸⁷

So what are the implications for jurisprudence, for the state, and for laws? The "best kind of state exists not just to provide external goods but for the good of the soul—in effect, to make men good . . . the state therefore inculcates right habits by means of just laws."¹⁸⁸ Aristotle also states, "For legal judgment decides and distinguishes between what is just and what is unjust."¹⁸⁹ This venerable sage continues:

This is why we do not allow the rule of a man but the rule of reason because a man takes too large a share for himself and becomes a tyrant. A (true) ruler, however, is the guardian of what is just and as such, he is also the guardian of equality and fairness.¹⁹⁰

All in society, especially those distinctly responsible as leaders of the legal and political realms, should help further such ends that abide by the rule of law, nourished by higher law through justice.

Henry Veatch, an Aristotle scholar, tells us that the most important end of knowledge is not knowledge of humankind, because humans are not the most important entities in the universe.¹⁹¹ According to Aristotle, the very

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 111.

¹⁸⁸ ARISTOTLE, THE POLITICS, I.1-2, VII.1-3 (Steven Everson ed., Cambridge Univ. Press 1988).

¹⁸⁹ ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 175, at 129-30.

¹⁹⁰ *Id.* at 130.

¹⁹¹ See HENRY B. VEATCH, ARISTOTLE: A CONTEMPORARY

nature of our being points us beyond ourselves; humans are not the measure of all things, for only God is perfectly good.¹⁹² In reality, the human *telos*, our highest end, is God.¹⁹³ Pursuing justice, virtue, and higher law created by the Uncreated¹⁹⁴ then justly becomes the virtuous pursuit of every state and every legal system, most vividly in the international sphere, but also in domestic realms.

IV. Conclusion

In any legal system, but especially international legal systems, this foundation of justice, virtue, and higher law alone will sustain long-term flourishing and fulfillment, both individually and societally. It points the way towards progress and needed reform of positive law. The accumulated weight of wise words over the centuries from both the East and the West¹⁹⁵ exhort us in this direction. It is a safeguard against such monstrosities as Nazi, Maoist, and Stalinist oppression, and acts as a beacon to light the way into the future of our global village.

The words of the great 20th-century Princeton McCormick Chairholder and jurisprudential scholar Edwin Corwin provide a fitting finale to this essay:

There are, it is predicated, certain principles of right and justice which are entitled to prevail of their own intrinsic excellence,

APPRECIATION (Indiana Univ. Press 1974).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ As Dostoevsky indicated, if God is dead, then everything is permissible. See FYODOR DOSTOEVSKY, *THE BROTHERS KARAMAZOV* (Ralph E. Matlaw ed., Constance Garnett trans., Norton & Co. 1976); see also, FYODOR DOSTOEVSKY, *CRIME AND PUNISHMENT* (Constance Garnett trans., Dutton 1963).

¹⁹⁵ See Finnis, *supra* note 7, at ch. 8 (handling profound thoughts from Plato, Aristotle, and Aquinas).

altogether regardless of the attitude of those who wield the physical resources of the community. Such principles were made by no human hands. . . . They are eternal and immutable. In relation to such principles, human laws are, when entitled to obedience save as to matters indifferent, merely a record or transcript, and their enactment an act not of will or power but one of discovery and declaration.¹⁹⁶

Thus, the pronouncements of every legal system, international especially, but also domestic, the judgments of every court, the formulations of every legislature, the decisions of every executive, should discover,¹⁹⁷ declare and follow accordingly. It would result in greater worthiness to lead and greater legitimacy for people to follow. Herein, lay the seeds of true progress¹⁹⁸ and reform.

¹⁹⁶ CORWIN, *supra* note 9, at 4-5 (emphasis in original).

¹⁹⁷ "In contrast, natural lawyers claim that morality is not so much to be defined as to be discovered; reality is not created but apprehended." NATURAL LAW AND CONTEMPORARY PUBLIC POLICY, *supra* note 18, at 8.

¹⁹⁸ While rejecting the notion of automatic, inexorable "progress," the use here nonetheless promises progress to the extent justice, higher law, and virtue are embraced.

TOWARD EQUAL ACCESS TO JUSTICE:
RETHINKING THE ROLE OF LAW SCHOOLS

Douglas A. Blaze^{*}

“Injustice anywhere is a threat to justice everywhere.”[†]

I. Introduction

If the goal is equal access to justice, as it must be, the pro bono efforts of lawyers are relatively insignificant. Despite years of exhortation by an impressive assortment of judges and bar leaders and the addition of increasingly strong aspirational language in professional rules,¹ an abysmally small percentage of lawyers engage in pro bono representation.² According to the best national estimate, lawyers provide on average less than a half-an-hour per week of assistance to the poor.³ Staff attorneys from federally-funded legal aid programs provide most of the civil legal services available to low-income clients.⁴ The

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[†]Martin Luther King, Jr., *Letter from a Birmingham Jail*, April 16, 1963, *available at* http://www.sas.upenn.edu/African_Studies/Articles_Gen/Letter_Birmingham.html.

¹The ABA Model Rules of Professional Conduct state: “Every lawyer has a professional responsibility to provide legal services to those unable to pay.” MODEL RULES OF PROF’L CONDUCT R. 6.1 (2003).

²Judith L. Maute, *Changing Conceptions of Lawyers’ Pro Bono Responsibilities: From Chance Noblesse Oblige to Stated Expectations*, 77 TUL. L. REV. 91, 94 (2002).

³Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283, 291 (1998).

⁴The Legal Services Corporation (LSC) administers the federal grant

pro bono efforts of private attorneys supplement the work of the legal aid offices. But even legal aid and pro bono efforts combined only serve, at best, twenty-percent of the civil legal needs of the poor.⁵ Not only is the situation unlikely to improve in any significant way in the future, it may be getting worse.⁶

For pro bono to be a meaningful component of any comprehensive effort to significantly increase the availability of legal services to the indigent,⁷ there must be structural changes to the system of the delivery of pro bono legal services. The present system of shared responsibility between the federally-funded legal service providers and the private bar has not been sufficiently effective in

program to civil legal aid programs. See 45 C.F.R. § 1600-1644 (2002).

⁵ Maute, *supra* note 2, at 94; see also Douglas A. Blaze, *The Crisis in Legal Aid: Working Together, We Just Might Make a Difference*, TENN. B. J., Jan. 2003, at 14 (reviewing Tennessee statistics).

⁶ For example, current federal support for legal services adjusted for inflation is approximately one-half of the 1980 funding level. See Federal Funding Follies Chart, Equal Just. Mag., Summer 2002 at 18-19, available at <http://www.ejm.lsc.gov/EJMIssue2/federal/funding/federalfundingchart.jpg>. Even more telling, a recent study in Tennessee found that only 5% of the civil legal needs of the poor are being met. See Thomas J. Galligan, Jr., *Understanding the Unrepresented: The Tennessee Statewide Comprehensive Legal Needs Survey for 2003*, TENN. B. J., Feb. 2005, at 14, 16.

⁷ There are, of course, a number of alternative ways to address the problem of limited access to justice, including mandatory pro bono requirements and increased funding through a special tax on lawyers. In addition, a number of commentators have questioned the relative efficacy of pro bono work as a means of meeting the legal needs of the poor. See, e.g., Rob Atkinson, *A Social-Democratic Critique of Pro Bono Publico Representation of The Poor: The Good as the Enemy of the Best*, 9 AM. U. J. GENDER SOC. POL'Y & L. 129, 139-57 (2001). The debate, while very important, is beyond the scope of this brief essay. The discussion here accepts the legitimacy of the potential contribution of the pro bono efforts to the goal of more equal access to justice.

increasing the amount of pro bono work by private lawyers. To effect the dramatic changes that are required, new participants are needed and new leaders must step forward.

This essay examines one possible source of new leadership and additional resources—law schools. Law schools can be much more than a modest supplemental source of pro bono services. Using the University of Tennessee College of Law student pro bono program as an example, this essay attempts to demonstrate that law schools are uniquely positioned to assume a vital role in advancing the cause of equal access to justice.

II. Limitations of the Present System

Most pro bono programs are operated by, or in association with, federally-funded legal service programs. The reason is simple—money. Governing regulations require federally-funded legal service programs to devote “at least twelve and one-half percent (12 1/2 %) of [their federal funding] to the involvement of private attorneys in the delivery of legal services.”⁸ The preferred way of involving private attorneys in serving the poor is through pro bono representation or reduced fee programs.⁹ As a result, legal aid programs have assumed a prominent role in the coordination and provision of pro bono legal services. While many pro bono projects are operated in association with bar organizations, legal aid offices provide leadership for the projects by using “private attorney involvement” (PAI) funds for program administration and coordination.¹⁰

While there are a number of benefits to a

⁸ 45 C.F.R. § 1614.1 (2002).

⁹ 45 C.F.R. § 1614.23(a) (2002).

¹⁰ For example, Legal Aid of East Tennessee (LAET) operates a Pro Bono Project in the Knoxville, Tennessee area in cooperation with four county bar associations. Federal funds support a project director and staff.

collaborative effort between legal aid programs and the private bar in the provision of pro bono legal services, there are inherent structural limitations in such a delivery system. First, federally-funded legal service programs are subject to significant regulatory restrictions, which limit who can be represented, what kind of legal matters can be handled, and even what types of legal strategies can be employed on behalf of clients.¹¹ These restrictions effectively extend to any project in which a federally-funded legal aid program is involved or any project which is financially supported by the legal aid program, regardless of the original source of the supporting funds.¹² Thus, any pro bono program operated in association with a federally-funded legal aid provider, as most are, is similarly limited with respect to clients, case types, and legal strategies. For example, pro bono lawyers likely would be precluded from representing many recent immigrants or from filing class actions.¹³

Second, while the predominant paradigm of pro bono projects as cooperative ventures between legal aid providers and bar associations may foster collaboration between the partners, the organizational structure can also limit the sense of ownership and degree of commitment on the part of each partner. Both partners share responsibility; no partner has primary responsibility. Without clearly identified leadership, accountability for a project's success

¹¹ See, e.g., 45 C.F.R. § 1613 (2002) (restricting legal assistance with respect to criminal proceedings); 45 C.F.R. § 1615 (2002) (restricting actions collaterally attacking criminal convictions); 45 C.F.R. § 1617 (2002) (prohibiting class actions); 45 C.F.R. § 1626 (2002) (restricting legal assistance to aliens); 45 C.F.R. § 1633 (2002) (restricting representation in certain eviction proceedings); 45 C.F.R. § 1637 (2002) (restricting representation of prisoners); 45 C.F.R. § 1639 (2002) (prohibiting challenges to welfare reform legislation).

¹² 45 C.F.R. § 1610 (2002) (discussing use of non-LSC funds, transfers of LSC funds, and program integrity).

¹³ 45 C.F.R. § 1617 (2002) (regarding class actions); 45 C.F.R. § 1626 (2002) (dealing with restrictions on legal assistance to aliens).

may be diluted, thereby hindering growth and progress.

This problem can be exacerbated by the competing priorities of the legal service programs. For a legal aid office, the primary mission will usually be to directly provide the highest quality legal services to the greatest number of people having the most significant need. Committing money and effort to pro bono projects can conflict with that mission, however, by diverting time and energy from direct client service. Pro bono initiatives are viewed, at least by some legal aid personnel, as a less efficient means of serving the client population.¹⁴ As a result, the overall commitment of a legal aid office to a pro bono project and its success may be diminished.

Regardless of the reasons, the reality is that the pro bono efforts fostered by "private attorney involvement" funding have been met with limited success. Although the twelve and one-half percent PAI funding requirement has been in place since 1981,¹⁵ there has been no significant increase in pro bono legal representation by private lawyers in the intervening two decades. To the contrary, the contribution of the pro bono efforts of the private bar to more equal access to justice remains relatively small.¹⁶

Pro bono can potentially play a much more important and meaningful role in the struggle for equal access to justice.¹⁷ To maximize that potential, however, new partners, new leaders, and new approaches need to be identified and utilized. Numerous commentators have

¹⁴ See *Recommendations of the Conference on the Delivery of Legal Services to Low-Income Persons*, 67 FORDHAM L. REV. 1751, 1785-86 (1999) [hereinafter *Recommendations*] (discussing the need to evaluate PAI initiatives).

¹⁵ *Id.* at 1785.

¹⁶ See *supra* notes 2-4 and accompanying text.

¹⁷ See Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 FORDHAM L. REV. 2415, 2415-16 (1999) (discussing the valuable historical contribution of pro bono work).

argued that law schools have a special responsibility—ethically, morally, and pedagogically—to participate in programs providing pro bono legal assistance to the poor.¹⁸ This essay expressly adopts and embraces those arguments. The thesis of this essay, however, is somewhat different. Not only do law schools have a particular responsibility to participate in the provision of pro bono legal services, law schools are uniquely positioned to assume a crucial role in advancing the cause of equal access to justice through such participation.

III. Why Law Schools: An Example

The University of Tennessee College of Law has sponsored a student pro bono program, known as UT Pro Bono, for over ten years.¹⁹ Like many law school pro bono projects, the program is limited in the amount and scope of services provided.²⁰ Yet, even as the project is presently configured, the contribution is not insignificant: 33% of the students participate in collaboration with 60 alumni lawyers, providing nearly 1400 hours of pro bono service

¹⁸ See, e.g., id. at 2433-36; James L. Baillie & Judith Bernstein-Baker, *In the Spirit of Public Service: Model Rule 6.1, The Profession and Legal Education*, 13 LAW & INEQUALITY 51, 62-67 (1994); Howard Lesnick, *Why Pro Bono in Law Schools*, 13 LAW & INEQUALITY 25, 25-

29 (1994); David Luban, *Faculty Pro Bono and the Question of Identity*, 49 J. LEGAL EDUC. 58, 68-70 (1999); Christina L. Rosas, Note, *Mandatory Pro Bono Publico for Law Students: The Right Place to Start*, 30 HOFSTRA L. REV. 1069, 1075-78 (2002).

¹⁹ For more information on UT Pro Bono, see UT Pro Bono, <http://www.law.utk.edu/departments/CLINIC/clinicprobono.htm> (last visited Sept. 9, 2005).

²⁰ For extensive information on law school pro bono programs, including the report of the Commission on Pro Bono and Public Interest Opportunities of the Association of American Law Schools, see Association of American Law Schools, www.aals.org/probono/ (last visited Sept. 9, 2005).

annually.²¹ Moreover, there are several attributes of UT Pro Bono that effectively demonstrate the considerable potential for law schools to play a key role in the provision of pro bono legal services. For example, law schools are uniquely situated to provide access to valuable sources of expertise and new resources that could be mobilized on behalf of pro bono clients.

A. Interdisciplinary Resources

One of the most successful components of UT Pro Bono is the Family Justice Project. Law students and lawyers participating in the Family Justice Project interview, counsel, and assist with the legal needs of the families of students enrolled at three elementary schools in Knoxville. The three schools are designated as “full-service” schools, meaning that each school serves as an access point for the families to a panoply of social and legal services. The project, which is the brainchild of Professor Robert Kronick of the University of Tennessee College of Education, Health, and Human Sciences, operates as an interdisciplinary collaboration between students and faculty at the College of Law, faculty from the College of Education, local social services agencies, and Legal Aid of East Tennessee (LAET). The interdisciplinary cooperation enables project teams to utilize a more holistic approach to the social and legal problems presented by the client families.

The law school involvement has been crucial to the success of the program. As part of a larger university, the law school has been able to serve as a connection between the education faculty and the other partners. At the same

²¹ Statistics for the 2001-2002 and 2004-2005 academic years are contained in project records on file with the author. Specifically, the student hours recorded for 2001-2002 and 2004-2005 were in excess of 1400 and 1100 hours respectively.

time, significant connections between the law school and LAET provide a bridge between the legal aid program and other participating individuals and organizations.

As the Family Justice Project demonstrates, law schools have enormous potential to provide connections to other academic departments to facilitate innovative interdisciplinary approaches to the social and legal needs of the poor. So far the experience of UT Pro Bono has been that other academic departments are uniformly enthusiastic about getting involved. For example, both the College of Social Work and the College of Nursing have assisted with a component program of UT Pro Bono that assists victims of domestic violence.

The value of such a multi-disciplinary approach to the legal needs of the poor is widely recognized.²² The newest label for this type of legal service program is "holistic representation." This approach requires consideration and analysis of the legal problem being confronted in the context of the client's life and larger community problems. The "whole client condition is crucial, not just case resolution."²³ An essential element of this broader problem-solving strategy is reliance on other professionals like social workers.²⁴

Yet, just getting people together is not enough. Law schools have to commit not only to the task of bringing various disciplines to the table; law schools have to commit to the more challenging responsibility of facilitating and coordinating the efforts of those disciplines for the benefit of clients with legal and social problems. This role, however, is appropriate for law schools and one

²² See, e.g., *Recommendations*, *supra* note 14, at 1766.

²³ Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401, 429 (2001) (discussing whole-client representation or holistic advocacy in criminal cases).

²⁴ *Id.*

that law schools are well-situated to assume.

B. Connections To The Profession

Law students are naturally interested in a very wide range of practice areas; UT Pro Bono, being designed and run by law students, reflects the breadth of those interests. UT Pro Bono includes programs that serve the homeless, victims of domestic violence, low-income taxpayers, inmates with potential innocence claims, and immigrants, among others. These programs are operated in association with the private bar, selected alumni, the public defender, the criminal defense bar, and several legal aid offices.

The breadth of these connections represents an opportunity, as yet unrealized, to address a significant flaw in the present system of delivering legal services to the poor. Sources of legal services for low-income clients are overly compartmentalized. Different legal service providers often operate in relative isolation from other providers.²⁵ For example, civil legal aid lawyers cannot handle any criminal matter, even when the criminal proceeding is directly related to a client's civil case and the criminal matter may significantly affect the resolution of the civil case.²⁶ Yet, there is little, if any, collaboration or cooperation between public defenders representing indigent criminal defendants and legal aid lawyers serving essentially the same clients.²⁷

²⁵ Recognizing this problem, the Legal Services Corporation initiated a controversial planning process designed to encourage greater coordination and collaboration among federally-funded legal aid programs and other service providers. See John A. Tull, L.S.C. Program Letter 98-1, February 12, 1998, *available at* www.lsc.gov/foia/pl/98-1.htm.

²⁶ 45 C.F.R. § 1613 (2002).

²⁷ For example, the Knox County Public Defender recently sponsored a national conference devoted to addressing all of a client's socio-legal needs, including civil legal problems, through "holistic representation."

At the same time, there is a renewed or resurgent interest in addressing the legal and social needs of the poor in a more coordinated and comprehensive way.²⁸ Someone needs to facilitate communication and collaboration to make this “holistic” ideal more of a reality. The efficacy and efficiency of the provision of legal services could be improved significantly. Such collaboration would encourage creative and innovative approaches to legal and social problems. Initiating a dialogue between the various providers of legal services to the poor would be an important first step. As the UT Pro Bono program demonstrates, law schools can, and should, assume responsibility for starting the process.

C. Flexibility

One of the key reasons for the success of UT Pro Bono is the inherent flexibility of the overall program. As student interest has changed or new client needs have become apparent, new components of the program have been created.²⁹ For example, in the past few years, the immigrant Hispanic population of East Tennessee has increased dramatically. There are, however, few social or legal programs serving this group of people. Legal aid

See The National 40th Anniversary Gideon Celebration, www.pdknox.org/Gideon/program.html (last visited Sept. 9, 2005). No civil legal aid lawyer attended this celebration.

²⁸ See, e.g., Stacy L. Brustin, *Legal Services Provision Through Multidisciplinary Practice – Encouraging Holistic Advocacy While Protecting Ethical Interests*, 73 U. COLO. L. REV. 787 (2002); Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288 (2003).

²⁹ The downside of a student-run program is, of course, the possibility that as student interest wanes or particular students graduate, projects may decline or even fade away. An institutional commitment by the school to the new projects can mitigate, if not eliminate, this problem.

programs, as discussed previously, are limited by regulatory restrictions in their ability to serve many immigrants.³⁰ To fill the void of available services, a member of the law faculty, Fran Ansley, and several law students created the Hispanic Assistance Project in cooperation with a local Catholic church and several Spanish-speaking members of the bar. As the project was initially designed, participating law students and lawyers provided legal advice and referrals at the Catholic church one Sunday every month. Over time, the focus of the project has changed to address more directly identifiable legal needs of this particular client community.

As the Hispanic Assistant Project illustrates, the ability to respond quickly, creatively, and without restriction permits a program to address particular legal problems more effectively. Flexible program design can also maximize the special interests, and resulting commitment, of participating students and lawyers. Unfortunately, as discussed previously, the structure of the present prevailing pro bono service delivery system does not share these attributes.

D. Students and Faculty

UT Pro Bono is student-run and receives limited law school support. The law school provides office space and a very modest operating budget. The clinical program provides minimal secretarial support. The project has no paid administrator or other staff. Participation is entirely voluntary, although the law school now recognizes public service and pro bono work by students. Despite these limitations, approximately one-third of the law students participate, contributing an average of 70 hours per participant. If the law school increased its institutional commitment by providing a full-time paid coordinator, for

³⁰ See *supra* notes 9-11 and accompanying text.

example, it is reasonable to assume that student participation would also increase.

There are 187 law schools approved by the American Bar Association.³¹ In the fall of 2004, total J.D. enrollment at those schools was over 140,000.³² The potential of this resource is considerable to say the least. For example, if the “aspirational” goal of a minimum of 50 hours of pro bono work per lawyer contained in the ABA Model Rules of Professional Conduct³³ were applied to law students, over six and one-half million hours of pro bono work would be contributed. Even if the requirement were reduced to a more modest 50 hours of pro bono work during the three years of law school and only half the students participated, over one million hours of pro bono work would still be generated. Even assuming that law students represent a less efficient method of providing legal services—due to training and supervision needs—law students can make a significant contribution to the cause of greater access to justice.

The indirect benefits of student involvement are also important. Hopefully, participation would foster an increased understanding of the need for equal access to justice among law students, as well as a desire and commitment to engage in pro bono or public interest work after graduation from law school.³⁴ Presumably, the result would be both a short-term and long-term increase in the number of “lawyers” providing pro bono legal services. Participation would also provide students with an

³¹ ABA-LSAC, Official Guide to ABA-Approved Law Schools, app. A, at 832 (Wendy Margolis et al. eds., Law School Admissions Council, 2006).

³² *Id.*

³³ MODEL RULES OF PROF'L CONDUCT R. 6.1 (2003).

³⁴ Stephen F. Befort & Eric S. Janus, *The Role of Legal Education in Instilling an Ethos of Public Service Among Law Students: Towards a Collaboration Between the Profession and the Academy on Professional Values*, 13 LAW & INEQUALITY 1, 13 (1994).

additional opportunity to develop lawyering skills and gain invaluable experience.

Law faculty can also make a significant contribution. For example, at The University of Tennessee, several faculty members have taken the lead in developing particular student pro bono projects to address problems of interest to those faculty members. As mentioned previously, a faculty member was instrumental in establishing the Hispanic Assistance Project. Another faculty member, working with the criminal defense bar, helped create and now serves as faculty advisor to the Tennessee Innocence Project. As Professor Luban has noted, somewhat amusingly, some faculty may be reluctant to take on significant case or client responsibility.³⁵ But faculty participation does not necessarily have to involve direct legal representation of clients. Faculty participation can take many forms, including service as experts, consultants, community educators, and advisors to particular pro bono projects. And, hopefully, participation in a limited role by faculty members may instill sufficient confidence and increase the extent of their involvement.

Admittedly students are not skilled lawyers. Law students can, however, provide a broad array of services. Students can assist with client communications, fact investigation, and legal research.³⁶ The range of legal services law students can effectively provide can be expanded considerably with appropriate and targeted training and, most importantly, sufficient supervision.

For students to make a truly meaningful contribution, there must be a sufficient number of lawyers

³⁵ David Luban, *Faculty Pro Bono and the Question of Identity*, 49 J. LEGAL EDUC. 58, 72 (1999) (noting that academic colleagues often remark "that they have tenured colleagues they would be afraid to loose on a hapless client").

³⁶ See generally Rebecca A. Cochran, *Legal Research and Writing Programs as Vehicles for Law Student Pro Bono Service*, 8 B. U. PUB. INT. L. J. 429 (1999).

participating to provide direction and supervision. Even if most law faculty became involved, a large number of additional practicing attorneys would be needed. Any law school led or sponsored pro bono program has to include the involvement of a large number of lawyers to help handle cases and supervise students. Fortunately law schools have access to an enormous pool of potential candidates in their alumni.

E. Alumni

More of the nearly 700,000 lawyers in the United States need to become involved in the provision of pro bono services. To achieve that goal, new ways of encouraging participation must be identified. One possibility that merits serious consideration is utilizing the existing relationship between law schools and alumni.

All lawyers are—hopefully—alumni of some law school. Alumni often have a special affinity for, or connection with, their law school. If law schools became more directly involved in the provision of pro bono legal services, the alumni relationship could be used to mobilize a significant number of attorneys that are not presently involved with pro bono work. For example, on several occasions, UT Pro Bono has solicited assistance for particular projects from alumni in the area. In those instances, special care was taken to solicit assistance from alumni lawyers that had not previously participated in the pro bono project operated jointly by the Knoxville Bar Association and Legal Aid of East Tennessee. The response to the UT Pro Bono solicitation was uniformly overwhelming, as far more lawyers responded than the student leaders of UT Pro Bono could effectively utilize in the project.

Law school involvement may also appeal to other interests of bar members. Many lawyers are very interested

in legal education and the training of new lawyers. Pro bono programs can easily be designed to involve both lawyers and law students in service that provides significant learning opportunities. For example, through UT Pro Bono, law students regularly participate in the LAET Saturday Bar Program. Through the Saturday Bar Program, lawyers conduct intake interviews of potential pro bono clients. Law students regularly assist the lawyers in conducting the interviews and the students have the opportunity, if appropriate, to assist the pro bono lawyer ultimately assigned to the case. As a result, students have the opportunity to learn lawyering skills through direct experience and observation. Participating lawyers have the satisfaction of providing both quality legal services to the client and a valuable educational experience to the law student.

IV. The Challenges

Obviously there are enormous hurdles that would have to be overcome before a significant law school-led pro bono initiative could become a reality. Several, such as securing sufficient and serious participation by alumni lawyers and law students, have already been mentioned. Hopefully, many other problems can be solved through creative program design and cooperation among the involved partners.

Securing adequate financial resources, however, could prove more challenging. Funding for higher education is a perennial problem, and law schools are no different. But if the responsibilities for pro bono are shifted to the law schools, part or all of the funds presently devoted to pro bono could be proportionately redirected. For example, a portion of allocated PAI funds could be shifted from legal service programs to law school pro bono

programs where appropriate.³⁷ The loss of funds by legal service programs would be offset by the reduction in responsibility and staffing needs and the renewed ability to focus exclusively on direct service to clients. The bar would also have to provide financial support in recognition of the fact that, even if the law schools begin to provide needed leadership and coordination, equal access to justice is a professional responsibility of the entire bar. In addition, the expanded public service provided by the law schools may well result in increased funding from new and existing sources of financial support.

But the biggest challenge would be securing a commitment from the law schools to accept the responsibility and to assume the mantle of leadership. Moreover, the culture of many law schools and law school faculties may significantly limit the receptivity of those institutions to accepting the enormous task and responsibility suggested here. Virtually every law school professes to have a three part mission: scholarship, teaching, and service. The reality is, however, that service lags far, far behind scholarship and teaching in institutional value and importance. While a pro bono program of the scale envisioned here would have some educational value, the program's primary purpose definitely would be service. Therefore, a law school's willingness to accept and assume responsibility for pro bono would require a reconsideration, if not reordering, of institutional values.³⁸

³⁷ Under present regulations, the restrictions applicable to legal aid programs would apply to law schools if they received PAI funds. *See supra* notes 10-12 and accompanying text. The combined effort of the organized bar and law schools could potentially result in changes to the regulations.

³⁸ *See* Gregory Vincent, *Reviving the Land-Grant Idea Through Community-University Partnerships*, 31 S.U. L. REV. 1, 21-22 (2003) (advocating that land-grant universities should engage in renewed outreach to address societal problems through university-community partnerships).

Gaining law school support would be difficult, but not impossible, to achieve. For example, thirty years ago, much of legal academia strongly resisted the idea of clinical education. Now, however, nearly every law school has a clinical program of some significance—and trumpets that fact in recruiting quality students. But the effort will take time and pressure—pressure from the bench, the bar, and from within the academy. It would also take a few pioneering law schools, working in cooperation with the bar and legal services programs, to lead the way.

V. Conclusion

Most members of the legal profession, even legal academics, agree that law schools should play some role in working toward the goal of equal access to justice. But law schools should and can do far more than just provide supplemental assistance to existing pro bono programs. Law schools should and can become vital partners in the provision of pro bono legal services. Law schools are uniquely positioned to enlist the assistance of other disciplines and mobilize the relatively untapped resources of alumni and law students in the effort. Although the profession as a whole must be committed to achieving equal access to justice, law schools can and should lead the effort.

EUTHANIZING THE PROFOUNDLY MENTALLY
INCAPACITATED:
A SIMPLE ECONOMIC ANALYSIS

*Bernard A. Eskandari**

I. Introduction

Throughout history, the killing of those that society deems unfit has gone in and out of fashion. Typically, the targets of such programs are the mentally disabled, the physically disabled, and the insane. Sexual orientation, religious or political beliefs, and propensity for criminality may become part of the criteria as well, depending on society's commitment and fervor for such a program. The apparent reason for killing the unfit is to create a superior population—a citizenry that is both mentally and physically superior—while reducing the incidence of those in society that constitute a drain—those who ostensibly take more from society than they contribute. Underlying this bestial policy is a seductive economic argument— if a society's goal is to maximize wealth, it must be sensible policy to remove those from society who do not contribute any wealth and in fact only consume it. Certainly the wealth of society is increased if the net detractors are “removed.”

This comment will begin by discussing a few societies that have implemented programs to do away with those deemed undesirable. Part III contends that it is unnecessary for the purposes of this paper to draw a bright-line rule between what is considered a low quality life and what is not, but will use the profoundly mentally incapacitated as an example of what policy-makers might deem a low quality life. Part IV discusses several widely

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published rationales for euthanizing the profoundly mentally incapacitated. Part V argues that even if it is seemingly economically advantageous to euthanize the profoundly mentally incapacitated, there are both economic reasons as well as non-economic reasons for why it is not a beneficial practice for society to implement (i.e. the “Against Law and Economics” aspect).

II. A Few Different Historical Approaches to Dealing with Low Quality Lives

In the last hundred years, Nazi Germany implemented the most robust euthanasia program aimed at maintaining purity. Amid the turmoil of World War II, Hitler’s T-4 “euthanasia” program was implemented to eliminate “life unworthy of life.” Germany’s mentally disabled were the first to be deliberately exterminated; “defective” children were removed from their families and taken to hospitals where they were exterminated. The program was soon expanded to include adults in order to prevent any “deficient” member of the German “master race” from breeding and passing on their inferiority.¹ What the Third Reich first did to the defenseless mentally disabled would soon include other defenseless people who were labeled “subhuman” or “useless eaters.”² One rationale for the T-4 program—or at least one rationale given by the government to the German public—was largely economic. Nazi propaganda posters made the

¹ Wikipedia Encyclopedia, T-4 Euthanasia Program, http://en.wikipedia.org/wiki/T-4_Euthanasia_Program (last visited Dec. 21, 2004).

² Ellen Myers, *The Mentally Retarded The Least of our Brethren*, <http://www.creationism.org/csshs/v07n1p26.htm> (citing Robert H. Jackson, *The Hadamar Trial* p. ii. (1949)) (last visited Dec. 23, 2004).

German population aware that a person suffering from a hereditary defect costs the public 60,000 Reichmarks during his lifetime.³ The implicit meaning behind these posters was, of course, that the German people were better off without the “hereditary defective.”⁴

Unfortunately, the United States is not without its own embarrassing history. While the United States has not resorted to euthanizing those deemed worthless, it has participated in mass sterilization. The mentally disabled have been subjected to unnecessary institutionalization and, as a result of the eugenics movement, involuntary sterilization. The idea behind this initiative rested on the notion that sterilizing large numbers of “defective” people would prevent the perpetuation of targeted defects and genetic diseases.⁵ Although the mentally ill and disabled were the most frequent victims of this program, unwed mothers and boys in reformatories and orphanages were also included, especially if they were judged to be of low intelligence.⁶ In total, an estimated 60,000 to 100,000

³ See app. A.

⁴ Between 1933 and 1939, unemployment in Germany dropped from six million (50% of the German population) to three hundred thousand. The Nazis and the German Economy, http://www.historylearningsite.co.uk/nazis_and_the_german_economy.htm (last visited Dec. 19, 2004). Of course, this statistic is largely Nazi propaganda because women were not included in the unemployment statistics. The unemployed were forced to take whatever work they were given or be classified as “work shy” and placed in a concentration camp. *Id.* Jews lost citizenship, and 1.4 million men were conscripted. *Id.*

⁵ See *Buck v. Bell*, 274 U.S. 200, 207 (1927) (concluding that “[t]hree generations of imbeciles are enough”).

⁶ *Breeding Better Citizens: Forced Sterilization in the U.S. A Hidden Chapter of American History* (ABC News television broadcast, Mar. 22, 2000). Race was also a factor, as a large number of Southern blacks were sterilized. *Id.* These sterilizations became known as the

people were sterilized in the United States.⁷

Sterilization aside, the mentally disabled are still not treated particularly well in the United States. Nightmarish accounts of staff beatings and sexual abuse of residents in institutions are not uncommon.⁸ Shockingly, it is reported that at one Washington, D.C. area institution, the dentist was actually a veterinarian.⁹ While the United States has come a long way since the days of forced sterilizations, no one can seriously argue it has come nearly far enough.

The Netherlands is not only a western trendsetter in legalizing drugs and prostitution, but also in allowing doctors to kill people who want to die. Since 2001, a medical practitioner in the Netherlands may euthanize a terminally ill patient who unequivocally expresses a well-

“Mississippi appendectomies.” *Id.*

⁷ *Id.* State governors have recently started apologizing for past eugenics laws that led to forced sterilizations. For example, Oregon Governor John Kitzhaber apologized for the more than 2,500 forced sterilizations from 1917 to 1983, which included girls in reform school, people in mental institutions, and poor women selected by welfare workers. See *Governor Apologizes for Forced Sterilizations*, THE SEATTLE POST-INTELLIGENCER, Dec. 3, 2002, at B2. One year later, Governor Gray Davis apologized for the more than 19,000 involuntary sterilizations that took place in California mostly before World War II. See *Davis Apologizes for Sterilizations*, THE SAN DIEGO UNION-TRIBUNE, Mar. 13, 2003, at A4.

⁸ Louie Estrada, *Advocate for Mentally Retarded Found Inspiration in Misfortune*, THE WASH. POST, May 30, 2004, at C10.

⁹ *Id.* Some experts believe institutional abuse is so permanent and unshakable that they have proposed euthanasia for the more severely retarded persons. *A Time to Take Sides*, Center on Human Policy, School of Education, Syracuse University, 1979, http://soeweb.syr.edu/thechp/TAKE_SIDES.htm (last visited Dec. 8, 2004) (citing HEIFETZ & MANGEL, *THE RIGHT TO DIE: A NEUROSURGEON SPEAKS OF DEATH WITH CANDOR* (Putnam 1975)).

informed desire to die and who is in unbearable pain, provided that there are no measures available to make the patient's suffering bearable.¹⁰ As a result, doctors in the Netherlands perform around 3,000 "mercy killings" a year.¹¹ Outrage over allowing doctors to engage in such activity was immediate. Opponents unsurprisingly put forward slippery slope arguments—voluntary euthanasia today, involuntary euthanasia tomorrow. It looks as though the opponents might not have been too far off; a hospital in the Netherlands recently proposed guidelines for mercy killings of terminally ill newborns and has already performed such procedures.¹²

Performing mercy killings on babies thus raises the question of whether it is ever appropriate to euthanize a person who is incapable of deciding for themselves whether he or she wants to end his or her life. Those in the Netherlands who support baby euthanasia say that the guidelines would mirror the guidelines used for adult patients suffering with great pain and no hope for relief and would provide that euthanasia of a newborn should be acceptable when the child's medical team and independent doctors agree that her pain cannot be eased and when there is no hope for improvement.¹³ Proponents in the Netherlands point to several examples of afflictions that may trigger newborn euthanasia: extremely premature births, brain damage, spina bifida, and epidermosis bullosa (a rare blistering illness).¹⁴ Dutch officials estimate that

¹⁰ PETER SINGER, *RETHINKING LIFE AND DEATH*, 146 (St. Martin's Press 1995).

¹¹ *Id.* at 143.

¹² Toby Sterling, *Netherlands Hospital Euthanizes Babies*, A.P. NEWS, Nov. 30, 2004, at A1.

¹³ *Id.*

¹⁴ *Id.*

involuntary euthanasia would be applicable in only about ten cases a year.¹⁵

III. What is a Low Quality Life?

This comment will not discuss real-world criteria for determining a low quality life. Exact line drawing is not the focus of this comment; the goal is not to make a policy determination of who falls below the threshold. Rather, for the purposes of this comment, a low quality life will be one that ostensibly appears in its totality to cost society more than it provides. The Nazis, twentieth century American policy makers, and Dutch officials all dealt with or are dealing with this issue and each has come to a different conclusion.¹⁶ Differentiating between a low quality life and one that is not low quality does not advance this comment's purpose, although I do wonder whether any life is low quality. The relevant question is whether it would be economically advantageous for society to terminate low quality lives, assuming we could determine which lives are low quality and which are not. If some infallible machine could do the calculations, is this something we would want to do? Purely for the purpose of discussion, the reader should consider the following as examples of lives possibly qualifying as low quality: someone who is in a permanent vegetative state ("PVS"),

¹⁵ *Id.*

¹⁶ Ultrasounds are routinely performed during pregnancy and can detect birth defects such as cleft palate. A study in Israel revealed that after detection for cleft palate, 95.8% of affected fetuses were aborted. Gregory Wolbring, *The Silenced Targets, Inside Human Genetics and Genomics*, available at <http://www.mindfully.org/GE/GE4/Silenced-Targets-WolbringISIS30jan02.htm> (last visited Dec. 11, 2004).

someone born with most of his brain missing,¹⁷ or someone who is profoundly mentally disabled.¹⁸ All three afflictions refer to someone who effectively has no brain function. For the purposes of this comment, I will use the generic, non-scientific term “profoundly mentally incapacitated” to refer to all three and those similarly afflicted.

IV. Rationale for Terminating Low Quality Lives

Before we begin, I want to consider the factors that are likely to influence society’s treatment of low quality lives. While people seem to be genetically programmed to feel protective toward children, we do not seem to feel as protective towards the mentally disabled. This is evidenced by the number of mentally disabled patients in state and private institutions. Such “putting away” behavior is analogous to the institutionalization of the elderly—as it

¹⁷ This condition is known as anencephaly. Babies born with this condition only have a brain stem and are only capable of reflex actions. See SINGER, *supra* note 10, at 39. People who are in a PVS or who suffer from anencephaly are not conscious and have no hope of regaining consciousness because the conscious portion of the brain is either dead or completely missing. *Id.* PVS is a condition where patients are considered to have permanently lost the function of their cerebral cortex. All voluntary reactions or behavioral responses reflecting consciousness, volition, or emotion at the cerebral cortical level are absent. Although a PVS patient does not experience any observable pain or suffering, she remains permanently unaware. See Christian J. Borthwick, *The Permanent Vegetative State: Ethical Crux, Medical Fiction?* 12 ISSUES L. & MED. 167, 168-69 (1996).

¹⁸ Those that are profoundly mentally retarded have an IQ in the range of 0-24 and a mental age of 2 years or less. Such people are incapable of guarding themselves against common physical dangers. See Wikipedia Encyclopedia, Mental Retardation, <http://en.wikipedia.org/wiki/Retarded> (last visited Dec. 13, 2004).

seems our love for them diminishes as they get older.¹⁹ It makes biological sense that our instinctive feeling of protection towards children would not apply to the elderly or the profoundly mentally incapacitated. For “[i]nclusive fitness is unlikely to be promoted by the devotion of huge resources to the survival of persons who, by reason of [mental incapacitation or old age], are not reproductively or otherwise productive, either actually or (like children) potentially.”²⁰

If society’s goal is to maximize wealth, then it becomes rather straightforward why euthanizing lives that provide negative value to society makes sense. If we were to remove each negative valued life in society, there would be a net gain in wealth. For example, imagine we have a society of three people and we are able to determine that person A contributes 20 units of wealth to society, person B contributes 10 units of wealth to society, and person C contributes -5 units of wealth to society (consumes 5 units of wealth from society). With person C in this society, the total wealth is 25 units; whereas without person C, the total wealth is 30 units. So if our goal is to maximize society’s wealth, we are better off without person C. This logic is analogous to the Nazi propaganda poster discussed above.²¹ This simple model, however, fails to take into account the countless variables discussed below.

This is not a novel understanding of human value. For example, in extremely poor societies where food is scarce, the cost of feeding an elderly person may mean the starvation of a child. In such a society, it is unremarkable that the elderly will be left to starve or even be murdered.²²

¹⁹ RICHARD A. POSNER, *AGING AND OLD AGE*, 203 (1995).

²⁰ *Id.*

²¹ *See app. A.*

²² POSNER, *supra* note 19, at 205. “Some 20 percent of primitive

Moreover, it is not uncommon for the elderly in these societies to acquiesce to society's death-to-the-elderly norm and even go to their death merrily.²³ When resources are extremely scarce, the death of one person often means the continued life of another. Therefore, under dire circumstances, calculating the value of each person's life is inevitable.

A. Abortion as a Substitute

Empirical data tending to support or refute the policy of euthanizing low quality lives is hard to come by. Steven Levitt and John Donohue investigate the next best thing in a paper entitled "The Impact of Legalized Abortion on Crime."²⁴ According to their research, since 1991 homicide rates have dropped 40% with violent crime and property crime each dropping more than 30%.²⁵ Why? Levitt and Donahue contend that the drop in crime is not the result of more jails and better police,²⁶ but assert that it

societies" killed their old people. *Id.* at 203 n.4.

²³ *Id.* at 203 (citing LUCY MAIR, *AFRICAN SOCIETIES*, 197 (Cambridge Univ. Press 1974)). It has become popular understanding that Eskimos set adrift their elderly on ice floes to die, though there is some debate as to how widespread this practice was. See Straight Dope, Science Advisory Board, *Did Eskimos put their elderly on ice floes to die?*, May 4, 2004,

<http://www.straightdope.com/mailbag/meskimoicefloe.html> (last visited Dec. 14, 2004) (clarifying that it was really the Yuits and Inuits who engaged in this practice during times of famine).

²⁴ John J. Donohue III & Steven D. Levitt, *The Impact of Legalized Abortion on Crime*. (Nat'l Bureau of Econ. Research, Working Paper No. W8004, Nov. 2000), available at <http://ssrn.com/abstract=249508> (last visited Sept. 10, 2005).

²⁵ *Id.* at 1.

²⁶ *Id.* at 2.

was the Supreme Court's 1973 decision in *Roe v. Wade*²⁷ legalizing abortion.²⁸

Levitt and Donahue argue that abortion helps lower crime for two reasons. First, women who have abortions are those most at risk to give birth to children who might commit crime.²⁹ Studies show that while teenagers, unmarried women, and the economically disadvantaged are all more likely to have abortions, they are also more likely to have children who are at higher risk for committing crimes during adolescence.³⁰ Second, legalized abortion allows mothers "to delay childbearing if the current conditions are suboptimal."³¹ This means children will be born into better environments, thereby reducing future criminality.³² Drawing on this premise, Levitt and Donahue conclude that crime in 1997 was 15-25% lower than it would have been had abortion been illegal.³³

Although Levitt and Donahue's paper has been criticized,³⁴ they provide an interesting argument for terminating potentially low quality lives.³⁵ It is one of the few empirical studies that supports the contention that

²⁷ 410 U.S. 113 (1973).

²⁸ See Donohue & Levitt, *supra* note 24, at 2.

²⁹ *Id.* at 3.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 34.

³⁴ Randall K. O'Bannon & Laura Antkowiak, *Abortion Link to Crime Decreased Debunked*, <http://www.nrlc.org/news/2001/NRL06/randylaura.html> (last visited Dec. 23, 2004) (discussing John Lott and John Whitley's reservations about the statistical analysis in Levitt and Donahue's paper).

³⁵ For the purposes of this paper, abortion is no different than euthanizing a person outside the womb. The concept in the end is the same—there are people who are potentially bad for society and society would be better off if they were no longer around.

society can be made better, in at least one respect, if we prevent certain “high risk” lives from coming into being. Most people would agree that lower crime is a good thing.

It is not clear, however, whether society would truly be better off without these high-propensity-for-crime babies even if one accepts the notion that crime rates will certainly be lowered. It is highly probable that many of those who fall into the high-propensity-for-crime baby category will not commit crimes, but will become contributing members of society. It is not inconceivable that an aborted child might have one day discovered the cure for AIDS or cancer. To this end, Levitt and Donohue’s paper does nothing to prove that terminating low quality lives will make society better. If accurate, it only demonstrates that terminating low quality lives could make society better.

B. Cost to Care for the Profoundly Mentally Incapacitated

The cost to institutionalize the mentally disabled is high. The state of California alone spends \$600 million annually.³⁶ The annual cost to care for a resident in one California state development center is just over \$160,000.³⁷ In Washington, D.C., the cost of providing services to the

³⁶ Ed Pope, *Bill Would Phase Out Centers for Retarded*, SAN JOSE MERCURY NEWS, July 23, 2001, available at <http://www.psych-health.com/dd30.htm>.

³⁷ Association of Regional Center Agencies, *History of the Developmental Disabilities Service Delivery System in California*, <http://64.233.167.104/search?q=cache:9FphKCLIRg0J:www.arcnet.org/pdfs/HistoryOfSystem.pdf+History+of+the+Developmental+Disabilities+Service+Delivery+System+in+California&hl=en> (last visited Dec. 20, 2004).

mentally retarded and developmentally disabled averages approximately \$120,000 per year per resident.³⁸ Of the approximately six million mentally retarded individuals in the United States,³⁹ roughly 10% are in institutions.⁴⁰ Even assuming the average cost for the institutional care of one mentally disabled person in the United States is only \$50,000 per year, the total cost of institutionalization is an astounding \$30 billion per year. As for patients in a permanent vegetative state (PVS), the number is slightly less daunting. A survey of care costs for PVS patients in a nursing facility suggested a range from \$126,000 to \$180,000 per year per patient.⁴¹ Based on this, a rough approximation of the total costs in the United States for the care of adults and children in a permanent vegetative state is around \$4 billion.⁴²

³⁸ D.C. Auditor, *Cost of Care for the District's Mentally Retarded and Developmentally Disabled Exceeded \$300 Million Over a Three-Year Period*, (Dec. 18, 2000) <http://www.dcwatch.com/auditor/audit030.htm> (last visited Dec. 14, 2004). And remember, this is the same area that has been known to employ veterinarians instead of dentists. *See supra*, note 9 and accompanying text. One can only imagine the cost if patients were receiving proper care.

³⁹ Disability Statistics, http://codi.buffalo.edu/graph_based/demographics/.statistics (last visited Dec. 14, 2004).

⁴⁰ *See* Dr. Joseph F. Smith Medical Library, *Mental Retardation*, <http://www.chclibrary.org/micromed/00056550.html> (last visited Dec. 23, 2004).

⁴¹ Borthwick, *supra* note 17, at 170-171.

⁴² *Id.* It is important to note, however, that this figure is misleading. Typically, a patient enters PVS after a long bout with some other illness like dementia. The real cost is the difference between taking care of a PVS patient versus taking care of a dementia patient.

C. Some Philosophers in Favor of Euthanizing the Profoundly Mentally Incapacitated

There may be moral issues which must be overcome before society would be willing to start euthanizing those who are considered "low quality." Thankfully, philosophers and commentators have helped ease these moral reservations.

Bruce Ackerman puts forward a conception of the liberal theory of society.⁴³ In this liberal society, a fetus is not a citizen because it cannot participate in public debate—going through a third party proxy does not count. Ackerman's point focuses on political conversation and participation in public discourse in which only some human entities can participate. He states, "A liberal community does not ask what a creature looks like before admitting it to citizenship. Instead, it asks whether the creature can play a part in the dialogic and behavioral transactions that constitute a liberal policy. The fetus fails the dialogic test—more plainly than do grown-up dolphins."⁴⁴ According to James Murray in his review of Ackerman's book, "Ackerman's theory depends on the ability to assert one's rights—a literal forensic aspect."⁴⁵ Murray also argues that the "rights of the talking ape are more secure than those of the human vegetable."⁴⁶ According to Ackerman, citizenship has nothing to do with biology; it

⁴³ See generally, BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (Yale Univ. Press 1980).

⁴⁴ *Id.* at 127.

⁴⁵ James R. Murray, Book Note, 58 NOTRE DAME L. REV. 942, 955 (1983) (reviewing BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (Yale Univ. Press 1980)).

⁴⁶ ACKERMAN, *supra* note 43, at 80.

only has to do with politics.⁴⁷ Ackerman further contends that those who cannot participate in the political process are perhaps without protective rights. Thus, it relieves us of the moral predicament of aborting fetuses and possibly ending the lives of those that are profoundly mentally incapacitated.⁴⁸

Today's preeminent philosopher dealing with the ethics of euthanasia is Peter Singer. Singer contends that the quality of a living being's consciousness is what gives its life value. The fact that a being is part of the species *Homo sapiens* is not relevant to the wrongness of killing it; "rather, characteristics like rationality, autonomy, and self consciousness [make] the difference."⁴⁹ According to Singer, because infants, regardless of whether they are disabled, and the profoundly mentally incapacitated lack these characteristics, killing them cannot be equated with killing normal human beings or any other conscious being for that matter.⁵⁰ Singer explains that the difference between killing a disabled infant and a normal infant does not lie in the fact that the normal infant has the potential to be a self-conscious living being, but rather in the attitudes of the parent. The "reason why it is normally a terrible thing to kill an infant is the effect the killing will have on its parents."⁵¹ The most plausible reason for attributing a right to life to a being applies only if there is "some awareness of oneself as a being existing over time, or as a

⁴⁷ *Id.*

⁴⁸ Confessedly, I do not fully understand Ackerman's SOCIAL JUSTICE IN THE LIBERAL STATE. Its brief discussion is included because, from what little I can gather, it seems relevant.

⁴⁹ PETER SINGER, PRACTICAL ETHICS 182 (Cambridge Univ. Press 1993).

⁵⁰ *Id.*

⁵¹ *Id.*

continuing mental self.”⁵² Because the profoundly mentally incapacitated are by definition incapable of such complex awareness, Singer sees no problem euthanizing such individuals so long as there are no “extrinsic” reasons for keeping them alive. This would include the emotional anguish euthanasia would have on a PVS patient’s loved ones. Although it may still be wrong to kill a conscious being that is not capable of rationality, autonomy, and self consciousness if that being is likely to experience more pleasure than pain,⁵³ a PVS patient would likely not fall into that category.⁵⁴

Joseph Fletcher, a Protestant theologian and a pioneer in the field of bioethics, has compiled a list of what he calls “indicators of humanhood.” The list includes: self awareness, a sense of the future, a sense of the past, the capacity to relate to others, concern for others, communication, and curiosity.⁵⁵ Like Singer, Fletcher argues that refusal “to approve of positively ending a subhuman life”⁵⁶ is absurd and that “mercy killing could be

⁵² *Id.* at 183. Singer wonders why it is morally wrong to kill, say, a PVS patient but it is acceptable to kill a sentient animal. He says, “If we compare a severely defective human infant with a nonhuman animal, a dog or a pig, for example, we will often find the nonhuman to have superior capacities, both actual and potential, for rationality, self-consciousness, communication, and anything else that can plausibly be considered morally significant.” SINGER, *supra* note 10, at 201. Such comparisons have made Peter Singer the target of much hatred. See, e.g., Sylvia Nasar, *Princeton’s New Philosopher Draws a Stir*, THE N.Y. TIMES, Apr. 10, 1999, at A1.

⁵³ SINGER, *supra* note 49, at 101.

⁵⁴ Singer asks if you would prefer an instant death or falling into a coma for ten years followed by death. He suggests there is no reason to pick the latter. See *id.* at 192.

⁵⁵ Joseph Fletcher, *Indicators of Humanhood: A Tentative Profile of Man*, HASTINGS CENTER REPORT 1-3 (1972).

⁵⁶ Joseph Fletcher, *Ethics and Euthanasia*, in TO LIVE AND LET DIE:

the right thing to do" in some circumstances where the person to be killed is a "human vegetable, whether spontaneously functioning or artificially supported."⁵⁷ Included in the circumstances which would justify mercy killing is the instance where one is considered "progressively degraded while constantly eating up private or public financial resources."⁵⁸ Fletcher has also argued that if the life of a severely retarded baby can be ended while still in the mother's womb through abortion, why can it not be terminated just after birth? According to Fletcher,

The only difference between the fetus and the infant is that the infant breathes with its lungs. Does this make any significant difference morally or from the point of view of values? Surely not True guilt arises only from an offense against a person, and [an individual with Down's Syndrome] is not a person.⁵⁹

By describing profoundly mentally incapacitated individuals as subhuman, both Singer and Fletcher are able to avoid moral impediments that stand in the way of applying a strict utilitarian standard as to whether the mentally incapacitated should live or die. Once the moral hang-ups are out of the way, there is nothing stopping a cost-benefit analysis of the lives of such afflicted individuals. Because of this, it is not surprising that, for Singer and Fletcher, the solution of euthanizing the

WHEN, WHY, AND HOW 116 (Robert H. Williams, ed., Springer-Verlag 1973) (internal quotations omitted).

⁵⁷ *Id.* at 119.

⁵⁸ *Id.*

⁵⁹ Joseph Fletcher, *The Right to Die: A Theologian Comments*, THE ATLANTIC MONTHLY, Apr. 1968, at 62, 63-64.

profoundly mentally incapacitated is an easy one, so long as no one will miss them too much.

D. The “Life” and Death of Nancy Cruzan and Terri Schiavo

In 1983, at the age of twenty-five, Nancy Cruzan lost control of her car on a country road, was ejected, and landed face down in a ditch filled with water. By the time help arrived, she had been without oxygen for several minutes. As a result, Nancy entered a persistent vegetative state. Her brainstem remained sufficiently intact to keep her body breathing without a respirator, but she could not swallow. Food and water were fed to her through a tube inserted into her nose running down to her stomach. Nancy remained like this for eight years.

Nancy’s parents, as her guardians, requested that the hospital remove the feeding tube, which would lead to Nancy’s eventual death. The hospital refused, and litigation began. The Missouri Supreme Court refused to allow the removal of the feeding tube because Nancy was not competent to refuse life-sustaining treatment herself.⁶⁰ The court could only give permission for the withdrawal of life-sustaining treatment if there was clear and convincing evidence that Nancy, while competent, would have wanted life-sustaining treatment to be withdrawn.⁶¹ So long as the state was paying the tab for Nancy’s care and the feeding tube imposed no substantial burden, the legal presumption remained “preserve life.”⁶² The Supreme Court of the

⁶⁰ *Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. 1988).

⁶¹ *Id.*

⁶² *See id.* at 419 (“The state’s concern with the sanctity of life rests on the principle that life is precious and worthy of preservation without regard to its quality. This latter concern is especially important when

United States granted certiorari and affirmed the Missouri Supreme Court holding that each state can make its own decision as to what should happen when an incompetent person has not previously expressed her desire to refuse treatment.⁶³ In reaching its decision, the Court accepted the right of the state of Missouri to demand clear and convincing evidence that it was what Nancy would have wanted.

Nancy died a few months after the Supreme Court decision was handed down when her feeding tube was finally removed. In the end, it was removed after former friends came out of the woodwork to say they remembered Nancy had indicated to them that she wished to die if she was ever in such a situation. This time the state of Missouri allowed the feeding tube to be removed.⁶⁴

What is the point? For seven of the eight years, it was clear the Nancy would never emerge from her vegetative state. The state of Missouri was paying \$130,000 a year to keep Nancy's body breathing. Moreover, her parents were under extreme strain, as they believed their daughter had died the day of the car crash.⁶⁵ During the media frenzy that surrounded the case, Nancy's father said, "It isn't my daughter (at the hospital). My daughter's been gone for over 6 1/2 years and that is just what is left of her."⁶⁶ On a nationally televised news

considering a person who has lost the ability to direct her medical treatment.").

⁶³ *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261 (1990).

⁶⁴ For an excellent account of Cruzan's story, see RICHARD EPSTEIN, *MORTAL PERIL: OUR INALIENABLE RIGHT TO HEALTH CARE*, 347-49 (Addison-Wesley 1997); SINGER, *supra* note 10, at 60-63.

⁶⁵ On Nancy's tombstone, the family engraved: Nancy Beth Cruzan – Born July 20, 1957 – Departed Jan 11, 1983 – At Peace Dec 26, 1990. See SINGER, *supra* note 10, at 62.

⁶⁶ Robert Steinbrook, *High Court to Rule on Halting Treatment:*

program, he stated, "My daughter died six years ago and the state will not let us have a funeral."⁶⁷ No one wanted Nancy's body to continue breathing indefinitely in a permanent vegetative state except for the state of Missouri.

Just last year, the courts were called in again to settle the fate of another woman in a permanent vegetative state. This time the woman was Terri Schiavo and the facts of the case were strikingly similar to those of the Nancy Cruzan case. Terri was a young woman who, through an unsettled accident, had oxygen cut off to her brain for a prolonged period. Afterwards, the doctors rendered her profoundly mentally incapacitated—a shadow of her former self. Terri was somewhat more "alert" than Nancy. Terri, unlike Nancy, was capable of breathing and maintaining blood pressure, but still required a feeding tube connected to her stomach to sustain life. Yet, the similarities ended there.

No one but the state of Missouri wished to keep Nancy alive in such a state. In the case of Terri, however, her family fought to keep her alive, while her husband fought to have the feeding tube removed.⁶⁸ Because Terri did not have a living will,⁶⁹ the case centered on who should be able to decide Terri's fate: her husband, who was her legal guardian, or her family.

For the purposes of this comment, the normative

Family's Rights at Heart of 'Right to Die' Question, L.A. TIMES, July 29, 1989, at 1.

⁶⁷ *CNBC Live* (CNBC television broadcast, Mar. 31, 1989).

⁶⁸ *See, e.g., Schiavo ex rel. Schindler v. Schiavo*, 357 F. Supp. 2d 1378 (M.D. Fla. 2005). Ultimately, Terri's parents petitioned the Supreme Court but were denied relief. *See Schiavo ex rel. Schindler v. Schiavo*, 125 S. Ct. 1692 (2005).

⁶⁹ The Schiavo case made people much more focused on the subject of advanced directives, living wills, and estate planning in general. *See Tom Mighell, Estate Planning On The Web*, 68 TEX. B.J. 384 (2005).

question of who should decide the fate of someone who is profoundly mentally incapacitated is irrelevant. The interesting aspect of the Schiavo case is that her family gained some utility from Terri's life, even though Terri no longer could. This provides a much different situation than Nancy's case where her family, friends, and husband collectively wished to end her life. Terri's case is much more difficult from an expected utility position. An argument can be made that it is possible that the negative utility experienced by her husband in having Terri hooked up to the feeding tube was outweighed by the positive utility experienced by her parents. Of course, no one will ever know.

According to Richard Epstein, sustaining the life of someone who is profoundly mentally incapacitated serves no purpose. "The maxim, preserve life, only makes sense when the expected utility of that life to the holder of that life is positive."⁷⁰ The rule of continued treatment could make sense when the powerful could take advantage of the helpless. An example of this is when children take care of their elderly parents. Epstein argues that the permanent vegetative state is so different from all other ailments and so irreversible, that it falls into a separate category of its own. "A rule that said 'allow death in a permanent vegetative state' could easily be adopted without sliding down some slippery slope, so close is the permanent vegetative state to clinical death."⁷¹ "Choose life" makes little sense when there is so little for which to live.

V. Rationale Against Terminating Low Quality Lives

⁷⁰ EPSTEIN, *supra* note 64, at 348-49 (emphasis in original).

⁷¹ *Id.*

A. A Law and Economics Rationale

Compelling law and economics arguments exist against allowing doctors to perform euthanasia—voluntary or not. The Hippocratic Oath, which all physicians accept, requires doctors to “neither give a deadly drug to anybody who asked for it, nor . . . make a suggestion to this effect.”⁷² The Hippocratic Oath makes economic sense, as it ostensibly guarantees that doctors will act as faithful agents of the patient’s interest. If a patient is willing to pay up to \$50 for an educated diagnosis, but is fearful the doctor may prescribe unnecessary surgery, a bargain may not be reached even if the doctor offers his services for less than \$50. This is where the Hippocratic Oath comes in. Physicians get more business because sick people will be less inclined to practice home remedies or seek out quacks. In turn, patients will receive better care because they will be treated by medical experts. “Both physicians and patients would be better off if patients could place a high degree of trust in their doctors because the absence of such trust will prevent many mutually beneficial bargains from being reached.”⁷³

Giving patients the well-informed option to accept euthanasia does not alleviate all the aforementioned problems. Patients will still need to take costly precautions against doctors. Patients will still require protection from family members who can pressure the sick and dying into an early demise so that economic costs, such as costly medicine, can be lowered and financial gains, such as

⁷² Ludwig Edelstein, *The Hippocratic Oath: Text, Translation, and Interpretation* 3 (Henry E. Sigerist ed., John Hopkins Press 1943).

⁷³ See Nelson Lund, *Two Precipices, One Chasm: The Economics Of Physician-Assisted Suicide And Euthanasia*, 24 HASTINGS CONST. L.Q. 903, 907-08 (1997).

insurance policies, realized. Even if it is solely the patient's choice, doctors are experts in framing options to guarantee certain outcomes. Imagine being confronted with the question of "agonizing death" versus "gentle quick release." Because of this, the argument goes, the practice of physician-assisted suicide erodes the trust that patients give doctors and, therefore, increases costs. Many argue that this is not simply "a moral nicety," but rather a valuable device for reducing agency costs by diminishing the need for patients to take costly steps to monitor their doctors to ensure they are acting in the patient's best interest.⁷⁴

While the above argument may apply to those that are still conscious or have a glimmer of hope of one day becoming conscious, it is not clear whether it extends to those in a permanent vegetative state or those that are profoundly mentally disabled. Nelson Lund argues that once physicians begin assisting in "mercy killings" of those competent to give consent, it will become unbearably tempting for physicians to euthanize the most "dehumanized."⁷⁵ Here Lund's argument goes awry because his leap from the practice of voluntary euthanasia to the practice of non-voluntary euthanasia is shaky. He appeals only to human nature by claiming that doctors simply will not be able to control themselves.

Epstein argues that "state intervention must be used to preserve lives known to be worth living," but that "when life is hopeless or inert, the guardian [should have] the right, to see that the life ends; and if active euthanasia is the best means to achieve that end, so be it."⁷⁶ When a patient's prognosis is unclear, imperfect utilitarian

⁷⁴ See *id.* at 935.

⁷⁵ *Id.* at 919.

⁷⁶ EPSTEIN, *supra* note 64, at 358.

judgments are inescapable and the patient must be protected. But when there is no hope of recovery, the lives of those “haunted by pain of doomed to eerie silence” should not be preserved so long as the patient’s guardian does not object.⁷⁷ Lund contends that the guardians should never have the right to pull the plug no matter how bleak the prognosis. Therefore, Lund takes issue with Epstein’s argument as well.

B. Accuracy of Assessment Problems

But why not euthanize the PVS patient who, by definition, has no hope of recovery? For one reason, there could to be an accuracy problem in the assessment of those who truly are in a permanent vegetative state, as people who have been diagnosed as PVS sometimes “come back to life.”

Carrie Coons, an eighty-six year-old woman entered a hospital after a massive stroke. Initially able to speak, she quickly deteriorated into what was diagnosed as PVS. Coons’s sister maintained that Coons would not wish to be kept in this condition and petitioned the court to remove the feeding tube. The court accepted this wish and allowed the hospital to remove the tube.⁷⁸ Before the tube was removed, however, Coons woke up and began eating and speaking. This case illustrates both the imprecision of medical judgment and the dangers inherent in allocating the choice of life or death to family members. Apparently people sometimes come out of a seemingly permanent

⁷⁷ *Id.* Ignoring the thorny issue of guardianship, this is in stark contrast to the Schiavo case where her parents emphatically wished to keep her alive.

⁷⁸ *In re Gannon*, No. 0189-017460 (N.Y. Sup. Ct. Feb. 14, 1989).

vegetative state.⁷⁹

Even more frightening is the possibility that PVS patients are actually awake on the inside even though they appear dead to the world. An accuracy problem would also arise in being able to assess what it is like to be in a permanent vegetative state. Some claim that patients in a permanent vegetative state often experience periods of wakefulness.⁸⁰ Evidence shows that some patients who appear to be unconscious for extended periods of time and unresponsive to external stimuli report, upon recovery, that they had in fact been conscious even though they were incapable of showing any signs of awareness.⁸¹ When the feeding tubes are removed from a PVS patient who is able to breathe on his own, he starves to death over a period of days—a terrifying thought if the patient is awake on the inside, but unable to scream for help.

Further, studies show that happiness is relative. From the perspective of being healthy and normal, it is easy to pity those with severe ailments and question why they would want to live. But it is clear that people with Down's syndrome, for example, are capable of experiencing more pleasure than pain.⁸² In a 1978 study of the happiness of severe accident victims and lottery winners, researchers

⁷⁹ See, e.g., Harvey S. Levin et al., *Vegetative State After Closed Head-Injury: A Traumatic Coma Data Bank Report*, 48 ARCHIVES OF NEUROLOGY 580 (1991) ("Of 84 patients in the vegetative state who provided follow-up data, 41% became conscious by 6 months, 52% regained consciousness by 1 year, and 58% recovered consciousness within the 3 year follow-up interval.") *Id.* at 584.

⁸⁰ Lund, *supra* note 73, at 940-41 (citing Marcia Angell, *After Quinlan: The Dilemma of the Persistent Vegetative State*, 330 NEW ENG. J. MED. 1524, 1525 (1994)).

⁸¹ *Id.*

⁸² SINGER, *supra* note 49, at 187 ("Down's Syndrome is [not] so crippling as to make life not worth living.") *Id.*

found that paraplegics adapt better than most would expect.⁸³ The immediate effect of becoming physically challenged was extreme unhappiness and the immediate effect of winning the lottery was extreme joy. After several years, however, the happiness rates leveled off to essentially the pre-accident and pre-winning-the-lottery happiness levels.⁸⁴ “Perhaps people, through coping mechanisms, are able to adapt to disease better than they anticipated in advance.”⁸⁵ Because of this, policy-makers will likely fail to predict the utility of those they deem to have a low quality life. Thus, line-drawing errors are inescapable.

C. Intuitions and Biological Reasons Behind the Sanctity Of Life

Judge Richard Posner argues that, for better or worse, we have unshakable intuitions about the sanctity of human life. Posner writes, “These intuitions precede and inform, rather than following and being informed by, philosophical analysis of personhood.”⁸⁶ For some reason, we have intuitions that infanticide, enforcing suicide contracts, and euthanizing the profoundly mentally disabled are wrong. Posner claims that these intuitions stand or fall on “whether a monkey or a computer should be deemed more of a person than a severely demented or profoundly

⁸³ Phillip Brickman et al., *Lottery Winners and Accident Victims: Is Happiness Relative?*, 36 J. PERSONALITY & SOC. PSYCHOLOGY 917 (1978).

⁸⁴ *Id.*

⁸⁵ Christine Jolls, et al., *A Behavioral Approach to Law And Economics*, 50 STAN. L. REV. 1471, 1542 (1998).

⁸⁶ POSNER, *supra* note 19, at 257.

retarded human being.”⁸⁷ Accordingly, we will make no progress because of our immovable intuitions concerning the “priority of human beings over machines and animals.”⁸⁸ “At the bottom we test our theories by reference to our intuitions, the things we cannot help believing.”⁸⁹

One possible reason for valuing all human life is that humans gain pleasure from being part of a society that takes care of its disadvantaged people. During times of scarcity, primitive humans were forced to kill or let the weakest members of their community die.⁹⁰ Consequently, only the wealthiest communities were capable of ensuring that their sick and elderly survived the scarce times. The weakest members acted as a buffer. Surely the communities might have more food or resources without the sick, elderly, or disabled, but without them, the healthy would be the next to go. Evolutionarily, humans may gain pleasure from being part of a society that is able to maintain its sick and disabled. It is a survival instinct. This may explain our “objective moral view of our obligation to cherish, preserve, and protect even the most humble examples of [human life].”⁹¹ Intuition can be a powerful guide in answering ethical questions.

Further, euthanizing humans deemed to be of low quality may be a problem for the risk averse. A possible objection to this form of euthanasia is that it would lead to insecurity and fear among those who are not now, but

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 340 (1990).

⁹⁰ See *supra* notes 23-25 and accompanying text.

⁹¹ Scott Pruett, *Personhood: The Measure of Life*, available at http://www.lifeway.com/lwc/article_main_page/0,1703,A%253D156223%2526M%253D200166,00.html (discussing Singer's position).

might, come within its scope.⁹² As mentioned above, patients would become ever vigilant of their doctors as they became infirmed—always afraid that the next injection or pill would be the last.

D. Incommensurability and the Cost of Costing

Hidden within the rational economic choice to euthanize those individuals deemed low quality is the harm from the comparison of incommensurable goods, or what Calabresi and Bobbitt have called “the costs of costing.”⁹³ Incommensurability occurs when aligning goods along a single metric offends our judgment about how these goods should be characterized. The single metric is, of course, usually money. Using the market to determine the price of certain things causes an affront to our values, for example, “of market determinations that say or imply that the value of a life or of some precious activity integral to life is reducible to a money figure.”⁹⁴ Calabresi and Bobbitt use the example of slavery noting that “[t]he social costs of indentured labor . . . surely includes one’s outrage at inducing the poor to sell themselves, and this cost must be considered before the society allows peonage.”⁹⁵

So even if we are prepared to engage in the dialogue of whose life is worthless and begin the calculations to determine who should be euthanized, it seems that we will fail to arrive at the correct valuation. First, certain variables will be left out of the equation altogether because pricing incommensurable goods causes

⁹² SINGER, *supra* note 49, at 192.

⁹³ See GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 32 (Norton & Co. 1978).

⁹⁴ *Id.*

⁹⁵ *Id.* at 33.

immediate “violence to our considered judgments,” “affront to values,” and societal outrage.⁹⁶ Second, even if we attempt to measure these missing variables, some are incapable of sufficiently precise calculation. “Attempts to weigh precisely the social costs and benefits associated with different responses to a tragic choice result more often in the valuation of only what we can measure than in the measurement of all that we can value.”⁹⁷

When the decision to euthanize low quality lives is made, there is still another variable that must be calculated. “[O]ur lives and institutions depend on the notion that life is beyond price.”⁹⁸ A refusal to save lives or an affirmative choice to end lives is horribly costly. For example, life insurance policies are routinely taken out on coal miners for several hundred thousand dollars; but when the mine collapses, the authorities are willing to spend millions to save a single miner.⁹⁹ Being able to hold on to the ideal that all life is priceless, in itself, has value. Even if the decision to terminate a low quality life would be cost effective in the short run, it almost certainly will not be in the long run.

V. Conclusion

⁹⁶ *Id.* at 204 n.15 (“Costs which are difficult to measure, such as the affront to the value of human life entailed by a decision to authorize medical experimentation with the terminally ill, will often be left out of the accounting altogether, though the resulting narrowness of the premises will poison the conclusion.”). *See also* Laurence H. Tribe, *Trial By Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971).

⁹⁷ *See* CALABRESI & BOBBIT, *supra* note 93, at 204.

⁹⁸ *Id.* at 39.

⁹⁹ *See id.* (“A fortune may be spent to save a convict caught in a jailhouse fire.”)

On its face, the notion of euthanizing society's weakest and most unproductive individuals appears to make strict economic sense. Once other factors are introduced, however, not only does it become clear that such a policy does not make economic sense, but also that it is a notion we do not even want to entertain. As for those individuals in a permanent vegetative state, the rationale for not terminating their lives does not fit as nicely. As Peter Singer, Richard Epstein, and others have argued, there seems to be no difference between dying and being in a permanent vegetative state. Perhaps the issue lies with revamping the clinical definition of "death," which some doctors have proposed should encompass people who are in a permanent vegetative state.¹⁰⁰

¹⁰⁰ Dr. Marcia Angell, Executive Editor of the *New England Journal of Medicine*, has proposed that death should be redefined to include permanent vegetative states and that food should be withheld from the "dead" person until the heart and lungs stop. See Marcia Angell, *After Quinlan: The Dilemma of the Persistent Vegetative State*, 330 *NEW ENG. J. MED.* 1524 (1994).

Appendix A. Nazi Euthanasia Propaganda Poster¹⁰¹



Poster reads: "This person suffering from hereditary defects costs the people 60,000 Reichmarks during his lifetime. People, that is your money."

¹⁰¹ Wikipedia Encyclopedia, *T-4 Euthanasia Program*, available at <http://en.wikipedia.org/wiki/Image:EnthanasiePropaganda.jpg> (last visited Dec. 23, 2004).

A FIGHT 'TILL THE DEATH:
CONGRESS'S USURPATION OF STATE COURT POWER IN END-
OF-LIFE MATTERS

Leland C. Abraham

I. Introduction

In the spring of 2005, the United States Congress passed An Act for the Relief for the Parents of Theresa Marie Schiavo¹ ("the Act") in response to numerous requests by Michael Schiavo, Theresa's husband, to have Theresa's feeding tube removed. Michael Schiavo argued that, prior to her accident, Theresa ("Terri") made oral statements expressing her wish not to be kept alive in a persistent vegetative state.² The Act provided a mechanism for the parents of Terri Schiavo to institute legal proceedings to prevent the removal of Terri's feeding tube.³

Despite its numerous backers, many advocates of a patient's right to make end-of-life decisions perceive the Act as a step backwards. The Act negates Michael Schiavo's ability, as the surrogate decision-maker for Terri, to make the decision to withhold or withdraw food that is necessary to sustain her major life functions. While Michael Schiavo claims that he has empirical evidence that Terri did not want to be kept alive in a persistent vegetative state, the Act precludes him from fulfilling Terri's wishes

¹An Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15 (2005).

²*In re Schiavo*, 916 So. 2d 814 (Fla. Dist. Ct. App. 2005).

³See An Act for the Relief of the Parents of Theresa Marie Schiavo § 1.

without the threat of a lawsuit by Terri's parents.⁴ Furthermore, the Act prevents Michael Schiavo from complying with the holding of the court in *In re Schiavo*.⁵ In that case, the Florida District Court of Appeals refused to grant Terri's parents relief from a trial court judgment holding that, based on clear and convincing evidence, Terri was in a persistent vegetative state and would have decided to forego further use of a feeding tube.⁶ While the court ordered the feeding tube be removed under the Act, Michael Schiavo could not comply with the court order without the possibility of a lawsuit by Terri's parents.⁷

In this note, I will first provide a brief summary of the government's treatment of end-of-life decision-making and how that treatment assisted in the development of the Act. Then, I will examine the Act as it relates to the Fourteenth Amendment of the United States Constitution. Next, I will examine Congress's interest in this case, showing that Congress had neither a compelling interest to interfere with the state court's order nor a compelling interest in passing legislation to limit the rights of Michael Schiavo, in his capacity as surrogate decision-maker for Terri, to fulfill Terri's wishes. Finally, I will examine the separation of powers requirements and show that Congress's interference in this matter was a clear constitutional violation of the separation of powers doctrine and that, based on this violation, the Act should be overturned on appeal.

⁴ *Id.*

⁵ *In re Schiavo*, 916 So. 2d at 814.

⁶ *See id.*

⁷ *See An Act for the Relief of the Parents of Theresa Schiavo* § 2.

II. Development of an Act for Relief for the Parents of Terri Schiavo

A. Historical Perspective on End-of-Life Decision Making

The history of an individual's right to autonomy and self-determination is derived from several sources including the United States Constitution⁸ and state constitutional provisions.⁹ While these rights may seem to strike a cord in the court of public opinion, no court of law has ever held that these rights are absolute.

The patient's right to choose whether to receive medical treatment is an issue that has been debated for many years. Although some court opinions express the view that a citizen has the "right to be let alone,"¹⁰ most early refusals of medical treatment were disregarded, and patients were forced to undergo treatment.¹¹

The right to refuse treatment was debated for decades in cases concerning competent patients who sought to refuse medical treatment.¹² In most of those cases,

⁸ See, e.g., *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 262 (1990) (holding that a person has a liberty interest under the Due Process Clause to refuse unwanted medical treatment).

⁹ See, e.g., *id.*; *In re Quinlan*, 355 A.2d 647 (N.J. 1976), *cert. denied*, 429 U.S. 922 (1976).

¹⁰ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

¹¹ See, e.g., *Jacobson v. Mass.*, 197 U.S. 11 (1905) (holding that the protection of the public trumped the individual's right to refuse medical treatment when a patient refuses a smallpox vaccination shot).

¹² See, e.g., *In re Georgetown College*, 331 F.2d 1000, 1002-03 (1964) (balancing the legal rights and responsibilities of the hospital and its agents on one hand and the patient and her husband on the other).

however, the courts denied the competent person's attempt to refuse treatment.¹³ It was not until the question of withholding or withdrawing treatment was raised on behalf of incompetent patients that the courts began to recognize such a right in all patients.¹⁴ Regarding incompetent patients, courts rationalized that incompetent patients should not lose their rights to autonomy and self-determination merely because they lack competency.¹⁵ Those patients who are incompetent have the same decision-making rights as those who are competent, but they need another to assist them in making such end-of-life decisions.¹⁶ Once the right was recognized in incompetent patients, courts became more willing to recognize the right of competent patients to refuse treatment as well. Ironically, it was not until the United States Supreme Court heard a case involving the scope of end-of-life decision-making for an incompetent person in a persistent vegetative state¹⁷ that the Court addressed the issue as it relates to competent patients.

In 1976, the New Jersey Supreme Court decided *In re Quinlan*, which became the land-mark case addressing the rights of patients in persistent vegetative states.¹⁸ In *In re Quinlan*, a young woman was in a persistent vegetative

¹³ See, e.g., *Jacobson*, 197 U.S. 11.

¹⁴ See, e.g., *In re Quinlan*, 355 A.2d 647.

¹⁵ *Superintendent of Belchertown State School v. Saikewicz*, 370 N.E.2d 417, 423 (1977).

¹⁶ See, e.g., *In re Conroy*, 486 A.2d 1209, 1221 (1985) (stating that the court has a special responsibility to place appropriate constraints on private decision making and to create guideposts that will help protect people's interests in determining the course of their own lives); *Saikewicz*, 370 N.E.2d 417; *In re Quinlan*, 355 A.2d 647.

¹⁷ *Cruzan*, 497 U.S. 261.

¹⁸ *In re Quinlan*, 355 A.2d 647.

state and her breathing was assisted by a ventilator.¹⁹ Her father sought appointment as her guardian in order to discontinue all extraordinary medical procedures sustaining his daughter's life.²⁰ The New Jersey Supreme Court recognized that the incompetent patient had the right to have a guardian exercise for her the same decisions she could have made if competent and able to make them for herself.²¹ According to the court, her guardian's power to do this was not unconditional.²² Before he could request the withdrawal of life-sustaining treatment, however, his daughter's physicians had to conclude that there was no reasonable possibility that she would ever emerge from the vegetative state and regain her full cognitive abilities.²³

The debate over withdrawal of nutrition and hydration has been far-reaching. For many individuals, artificial nutrition and hydration administered through a feeding tube is another form of medical treatment, similar to breathing through a ventilation system. However, artificial nutrition and hydration bears little resemblance to eating and drinking naturally. The procedure is invasive to the patient's body, and most foods must be liquefied before they are inserted into the feeding tube. There is also debate over whether patients in persistent vegetative states suffer pain associated with the removal of the feeding tube.²⁴ When it comes to the removal of a feeding tube, most courts addressing the issue have held that a competent

¹⁹ *Id.* at 647.

²⁰ *Id.* at 651.

²¹ *Id.* at 663.

²² *Id.* at 671.

²³ *Id.* at 671-72.

²⁴ See Jeff M. Sellers, *When to Pull a Feeding Tube*, CHRISTIANITY TODAY, May 2005, available at <http://www.christianitytoday.com/ct/2005/005/9.48.html>.

person, or a surrogate acting for an incompetent person, can order the withholding or withdrawal of artificial nutrition and hydration.²⁵ Some courts, however, have held the contrary, especially in cases involving incompetent patients.²⁶

The next significant case addressing a patient's right to refuse medical treatment was *Cruzan v. Director, Missouri Department of Health*.²⁷ In *Cruzan*, the patient was in a persistent vegetative state as a result of a car accident.²⁸ Before her accident, she had made statements to her roommate indicating that she "would not wish to continue her life unless she could live at least halfway normally."²⁹ The issue in *Cruzan* was whether the Missouri standard requiring clear and convincing evidence of a patient's wishes before withdrawal of life-sustaining treatment violated the patient's due process rights.³⁰ The Supreme Court held that it did not.³¹ The Court indicated that the question of whether a constitutional right has been violated must be determined by balancing an individual's liberty interest against the relevant state interests.³² The

²⁵ See, e.g., *Gray v. Romeo*, 697 F. Supp. 580, 587 (R.I. 1988) (holding that if an incompetent patient, when competent, would have made the decision to refuse nutrition and hydration, a guardian ad litem may make the decision to refuse nutrition and hydration for that now incompetent patient).

²⁶ See, e.g., *Cruzan v. Harmon*, 760 S.W.2d 408, 417 (Mo. 1988), *aff'd*, 497 U.S. 261 (1990) (holding that the decision to refuse medical treatment must be an informed decision and in order to be informed, the patient must have capacity).

²⁷ *Cruzan*, 497 U.S. 261.

²⁸ *Id.* at 265.

²⁹ *Id.* at 268.

³⁰ *Id.* at 262.

³¹ *Id.* at 285.

³² *Id.* at 279 (quoting *Youngbanks v. Romeo*, 457 U.S. 307, 321 (1982)).

Court assumed that competent patients possess a liberty interest in ordering that medical treatment be withheld or withdrawn.³³ The Court stated that it does not, however, violate equal protection principles to deny substitute decision-making to incompetent patients because, unlike competent patients, they are not able to make end-of-life decisions.³⁴ The Court further stated that it is a patient's ability to hear and understand information and make decisions knowingly and voluntarily that distinguishes the competent patient from the incompetent patient.³⁵

While many believed that the *Cruzan* decision would hinder the right of incompetent patients to have others make treatment decisions for them, it does not seem to have had this effect. Although the Court held that the standard of clear and convincing evidence did not violate the constitutional rights of the patient, the Court did not mandate that all states adopt that burden of proof when allowing a surrogate to make decisions for an incompetent patient. State legislators are free to enact legislation that protects incompetent patients' rights to have others make end-of-life decisions for them. As a result of *Cruzan* and its predecessors, most states have enacted statutes governing the end-of-life decision making process for incompetent patients.³⁶ These statutes may specify the types of medical treatment that may be refused and may separate and draw distinctions between artificial ventilation, artificial nutrition, artificial hydration, surgery, kidney dialysis, and medication.³⁷ Some statutes may

³³ *Cruzan*, 497 U.S. at 279.

³⁴ *Id.* at 287.

³⁵ *Id.* at 279-80, 287.

³⁶ *See, e.g.*, TENN. CODE ANN. § 32-11-103(5) (West 2005); FLA. STAT. ANN. §§ 765.201-765.205, 765.301-765.305 (West 2005).

³⁷ *See, e.g.*, TENN. CODE ANN. § 32-11-103(5).

permit nutrition and hydration to be withheld, but only when certain standards are met.³⁸

Florida, the state where Michael and Terri Schiavo resided, deals with the subject of end-of-life decision making for incompetent patients in its statutory law. For example, § 765.305 of the Florida Statutes Annotated states that, in the absence of a living will, a health care surrogate, i.e. a person appointed to make the decisions for another,³⁹ is charged with deciding to withdraw or withhold life-prolonging procedures unless the designation limits the surrogate's authority.⁴⁰ Absent any limitation from the patient pertaining to the surrogate's authority to make decisions for the patient, the only statutory limitations on the surrogate's authority to withdraw life-prolonging procedures are: (1) that the surrogate be satisfied that the patient is in a persistent vegetative state, and (2) that the patient lacks a reasonable medical probability of recovering so that the right to decide may be exercised by the patient.

Legislators and courts are rarely faced with scenarios where family members disagree on whether life-prolonging procedures should be withdrawn. The parents of Terri Schiavo had engaged in a legal battle to prevent the removal of Terri's feeding tube. That legal battle ended on March 16, 2005 when the Florida District Court of Appeals upheld the Florida statute concerning a surrogate's decision-making power to remove an incompetent person's feeding tube.⁴¹ Five days later, on March 21, 2005, the United States Congress passed An Act for the Relief of the Parents of Theresa Marie Schiavo.⁴²

³⁸ *See id.*

³⁹ BLACK'S LAW DICTIONARY 1458 (7th ed. 1999).

⁴⁰ FLA. STAT. ANN. § 765.305 (West 2005).

⁴¹ *In re Schiavo*, 916 So. 2d 814.

⁴² An Act for the Relief of the Parents of Theresa Marie Schiavo.

III. Due Process: A Fourteenth Amendment Analysis

The Fourteenth Amendment of the U.S. Constitution forbids the government from depriving an individual of life or liberty without due process of the law.⁴³ In the more than two hundred years since the ratification of the U.S. Constitution, the government has taken an interest in ensuring that every citizen is provided due process of law when engaged in legal proceedings. The Fourteenth Amendment further provides citizens with protection from any law which abridges the privileges or immunities of the several states. The Fourteenth Amendment also affords all citizens equal protection of the laws.⁴⁴ If a patient's interest in self-determination and autonomy are founded on fundamental constitutional principles, the government must demonstrate that it has a compelling interest in overriding the patient's right to refuse treatment, and that the means of enforcing its interest is the least restrictive of the available alternatives.⁴⁵ The Supreme Court has held that, even if a patient's decision-making interest is not based on a fundamental right guaranteed by the U.S. Constitution, the government's restriction of that interest must satisfy a rational basis test.⁴⁶

⁴³ U.S. CONST. amend. XIV.

⁴⁴ *Id.*

⁴⁵ In some cases, the Supreme Court has departed from the application of a specific standard and has employed a test that balances the interests of the state with those of the individual and evaluates the weight of the obstacle the state has imposed upon the citizen's exercise of the right at issue. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

⁴⁶ *See Reno v. Flores*, 507 U.S. 292, 301-03 (1993).

IV. The Government's Compelling Interest

Courts have traditionally recognized four interests sufficient to override a patient's right to self-determination: (1) preserving life; (2) protecting the interests of innocent third persons; (3) preventing suicide; and (4) protecting the integrity of the medical profession.⁴⁷

A. Preserving Life

The government's interest in preserving life focuses not on the life of any one individual, but rather on the value of every person's life to society as a whole. It is an interest based on the sanctity of life and on every individual's dignity and worth.⁴⁸ If the government's interest in preserving life were found to override Terri's right to self-determination, the right to self-determination would be rendered meaningless. If Congress's interest in preserving the life of an incompetent patient is based on that individual's dignity, then Congress cannot, in good faith, deny Terri her right to autonomy. Moreover, if there is clear and convincing evidence that Terri did not want to live in a persistent vegetative state, as the court in *In re Schiavo* found,⁴⁹ the state should carry out her wishes. Thus, if the government's interest is in the sanctity of life and the individual's dignity, that interest must be honored

⁴⁷ See *Satz v. Perlmutter*, 362 So. 2d 160, 162 (1978); Saikewicz, 370 N.E.2d at 425.

⁴⁸ See, e.g., *In re Conroy*, 486 A.2d at 1220 (stating that all persons have a fundamental right to expect that their lives will not be foreshortened against their will).

⁴⁹ *In re Schiavo*, 916 So. 2d at 814.

when the individual, facing a prolonged, painful death or the indignity of having to be cared for by others, decides to refuse further medical care.

The assertion that the government has a fundamental interest in the sanctity of life may be attacked on the ground that many states have a death penalty designed to end the lives of those persons deemed culpable of egregious crimes. Likewise, for those who are sick or have various other injuries, the government's interest in preserving their lives is hardly absolute because the government does not guarantee health care for its citizens. In Terri's case, the state kept her alive, against clear and convincing evidence that she did not want to live in a persistent vegetative state. Terri was neither honored nor afforded dignity by the government's decision to keep her alive against clear evidence that she would have objected to such treatment.

In the 1970s, courts began to allow an individual's right to self-determination to override the government's interest in preserving life.⁵⁰ The individual's right to have life-prolonging treatment removed or withheld was initially recognized in cases where the invasion of the patient's body by the treatment was great and the patient's prognosis, even with treatment, was not favorable.⁵¹ Today, however, it is unlikely that a court would deny a patient's request to refuse treatment on the basis of the government's interest in preserving life, even if the

⁵⁰ See, e.g., *Rasmussen v. Fleming*, 741 P.2d 674, 683 (1987) (holding that an individual's right to chart his or her own plan of medical treatment deserves as much, if not more, constitutionally protected privacy than does an individual's home or automobile).

⁵¹ See, e.g., *In re Quinlan*, 355 A.2d 647 (relying on the fact that experts did not think the patient would survive with treatment and that the patient would certainly die without the treatment).

treatment in question was commonplace.⁵²

In Terri's case, the court held that Terri's wishes should be honored.⁵³ Congress then attempted to circumvent the court's ruling through the Act, which granted Terri's parents standing to bring suit against Michael Schiavo, Terri's surrogate decision-maker, if he complied with the court order.⁵⁴ Here, Congress did not show a compelling interest in the sanctity of life. Congress simply attempted to wield its authority in this area by overriding the state's authority. The Act did not address all residents similarly situated to Terri's condition; it only focused on Terri Schiavo.⁵⁵ For this reason, the Act does not show a compelling state interest in the sanctity of life.

B. Protecting Interests of Third Parties

Courts have traditionally recognized that governmental interest in protecting the interests of innocent third persons is sufficient to override an individual's right to self-determination. In *In re Georgetown College*, the court allowed the state's interest in protecting innocent third parties to override the decision of a Jehovah's Witness patient to refuse to undergo a blood transfusion because she was the mother of a minor child.⁵⁶ Recently, however, courts have allowed adults to refuse life-saving or

⁵² The results could be different if the patient wanted to take active steps, or have another person take active steps, to end the patient's life. In the case of assisted-suicide or active euthanasia, however, the state's interest in preserving life could prevail over the patient's interest in autonomous decision-making.

⁵³ See *In re Schiavo*, 916 So. 2d 814.

⁵⁴ See An Act for the Relief of the Parents of Theresa Marie Schiavo.

⁵⁵ See *id.*

⁵⁶ *In re Georgetown College*, 331 F.2d at 1009-10.

life-sustaining treatment even if the refusal would mean death, and would result in the dying patient leaving behind minor children.⁵⁷ These cases mainly have pertained to competent adult patients. For example, in *St. Mary's Hospital v. Ramsey*, the court upheld the right of a 27-year old Jehovah's Witness patient with one minor child to refuse the administration of blood products.⁵⁸

If an innocent third party exists in Terri's case, that party would be her parents. However, her parents were not dependents and did not rely on her financially, as a minor child would rely on a parent. Instead, Terri's parents were seeking guardianship of Terri.⁵⁹ If her parents had gained custody of her, then Terri would have been dependent upon them. Thus, Terri's parents would not have a claim of abandonment as would a child whose parent chooses not to accept life-prolonging treatment. Additionally, the court rulings pertaining to this governmental interest have involved competent patients. Because Terri was in a persistent vegetative state, she was an incompetent patient. For these reasons, the government's interest in protecting an innocent third party fails in the case of Terri Schiavo.

C. Preventing Suicide

The government has historically recognized an interest in preventing its citizens from committing suicide.⁶⁰ This interest coincides with the state's interest in the preservation of life for all its citizens, both collectively

⁵⁷ See, e.g., *St. Mary's Hospital v. Ramsey*, 465 So.2d 666, 668 (Fla. Dist. Ct. App. 1985) (observing that although there is a minor daughter, this case is difficult to categorize as abandonment).

⁵⁸ See *id.*

⁵⁹ *In re Schiavo*, 916 So. 2d 814.

⁶⁰ *In re Conroy*, 486 A.2d 1209.

and individually. The government's interest is relevant here because a patient's decision to withdraw or withhold life-prolonging treatment will lead to the patient's death, which will occur earlier in time than if the treatment had been continued.

For many years, courts have allowed the refusal or withdrawal of life-sustaining treatment, despite the government's interest in preventing suicide. These courts have asserted that the patient's death was not caused by the refusal or withdrawal of treatment, but rather by the patient's underlying medical condition.⁶¹ Courts have distinguished the withdrawal of treatment from suicide on the grounds that the patient's condition leading to the treatment was not self-inflicted and the patient's intent in refusing treatment was not to die. Rather, the intent was not to continue to live under the present conditions.⁶² Some courts have also expressed the opinion that withdrawal of treatment was not an action, but an omission and, therefore, could not be characterized as suicide.⁶³

Terri's expressed wish to refuse treatment cannot be characterized as suicide. The removal of nutrition here is not a self-inflicted procedure aimed at ending her life. It is, rather, the omission of measures that would prolong Terri's life in a state in which she expressly did not want to live. This case, as courts have previously held,⁶⁴ is

⁶¹ See, e.g., *In re Conroy*, 486 A.2d at 1219 (holding that patient would have died within one year even with the treatment); *Saikewicz*, 370 N.E.2d at 417.

⁶² See, e.g., *Perlmutter*, 362 So.2d. at 163 (holding that because the patient did not self-inflict his condition, the refusal of treatment cannot be characterized as suicide).

⁶³ See, e.g., *Vacco v. Quill*, 521 U.S. 793, 801 (1997) (distinguishing the refusal of life-sustaining treatment and demanding life-ending treatment).

⁶⁴ See *id.*

distinguishable from suicide because Terri did not express a will to refuse treatment in order to end her life. She expressed a desire to refuse treatment when she could not live in a normal state. This is fundamentally different from suicide because Terri's intent was not to end her life per se, but to end prolonged survival in a persistent vegetative state.

The government's interest in preventing suicide has resurfaced in the assisted-suicide debate. The supporters of assisted-suicide argue that, in many respects, those cases are indistinguishable from withdrawal of treatment cases. According to assisted-suicide proponents, there is no difference between withdrawing treatment that results in one's death and providing a means for one to die earlier than would be expected from a terminal or chronic condition. Assisted-suicide supporters do not necessarily argue that withdrawal of treatment is not suicide, but rather that, if a patient is allowed to hasten death through withdrawal, the patient should be allowed to achieve the same end through other means.⁶⁵ If the government's interest in preventing suicide is not compelling enough to override a patient's interest in refusing treatment, it also should not be compelling enough to override the patient's interest in shortening his or her life by other means. Patients should not be forced to die from infection or from lack of ventilation, nutrition, or hydration, rather than from a quicker, more effective method. Additionally, proponents of assisted-suicide argue that withdrawal of treatment is also an act rather than an omission. Even if withdrawal of treatment is an omission, the law imposes culpability for negative omissions as well as for positive

⁶⁵ See, e.g., *Quill*, 521 U.S. at 807 (overruling the lower court's assumption that individuals have a right to hasten death).

acts.⁶⁶ Those opposed to assisted-suicide fail to recognize a patient's constitutional right to autonomy.⁶⁷ Terri's decision to refuse life-prolonging treatment is not a fight that she should have to win in the court of public opinion, because one goal of the Fourteenth Amendment of the United States Constitution is to provide every citizen with autonomy.⁶⁸ For these reasons, the government cannot sustain an interest in preventing Terri's husband from removing her feeding tube because his goal was not to help her commit suicide, but simply to ensure that she would not be forced to live in a permanent vegetative state.

D. Maintaining Integrity in the Medical Profession

Another governmental interest offered in opposition to the withdrawal of life-sustaining treatment is the need to maintain integrity in the medical profession. Although this interest is frequently cited, it is rarely persuasive.⁶⁹ Members of the medical profession would argue that it is the role of health care providers to save lives, not take them, and that providers must have the freedom to treat patients according to their reasonable professional judgment.⁷⁰ Health care providers would further argue that withholding or withdrawing treatment that results in the

⁶⁶ See, e.g., *In re Quinlan*, 355 A.2d. at 647 (stating that although there are medical advances, justice will have to keep up with them).

⁶⁷ U.S. CONST. amend. XIV.

⁶⁸ *Id.*

⁶⁹ See, e.g., *Perlmutter*, 362 So.2d at 163-64 (quoting *Saikewicz*, 370 N.E. 2d at 426-27).

⁷⁰ See, e.g., *In re Quinlan*, 355 A.2d. at 668 (speaking of the need not to inhibit the "independent medical judgments" of physicians "in the pursuit of their healing vocation").

death of a patient may well violate their ethical code, as well as the code of the medical profession in general.⁷¹

In this case, the medical professional's ethical obligation is to consent to the wishes of the patient. To deny Terri her right to self-determination would be an egregious error on the part of the medical community. To override clear and convincing evidence that the patient would want to abstain from life-prolonging treatment in the event that the patient is in a persistent vegetative state is an authority not granted to medical professionals by any ethical code.

Likewise, courts have rejected the argument that the integrity of the medical profession is an interest compelling enough to override a patient's interest in self-determination and autonomy.⁷² The courts have taken the view that the medical profession's mission to save lives does not mandate life-sustaining treatment in all cases, especially those where the patient's prognosis is very poor or those in which the patient is in great pain or is permanently unconscious.⁷³ In Terri's case, she was in a persistent vegetative state, and she did not have a prognosis of recovery. Before her accident, Terri alluded to the fact that, if she were ever in such a state, she would want the life-sustaining measures halted so that she would not have to continue to live in an abnormal manner.⁷⁴ Courts have held that there are circumstances where appropriate medical care is comfort care, rather than life preserving

⁷¹ See *id.* at 664-69.

⁷² See, e.g., *Perlmutter*, 362 So.2d at 163-64 (stating that if the doctrine of informed consent and privacy have as their foundations bodily integrity, then those rights are superior to institutional considerations).

⁷³ See, e.g., *In re Quinlan*, 355 A.2d at 667.

⁷⁴ See *In re Schiavo*, 916 So. 2d at 814.

care.⁷⁵ For Terri, the most appropriate care would have been comfort care, in accordance with her wishes.

Generally, if health care professionals or institutions object to the withdrawal of treatment on individual ethical grounds, they will not be forced to act on the patient's wishes, so long as the patient can be transferred to another health care provider or institution that will help effectuate those wishes.⁷⁶ In order to comply with Terri's wishes, someone in the medical profession would not be forced to do something to which he or she was ethically opposed. Thus, there was no breach of any medical code of ethics by removing Terri's feeding tube. For these reasons, the government's interest in maintaining the integrity of the medical profession is irrelevant because Terri did not commit suicide, and the professional who ended this ordeal for her was not forced to do so.

V. The Act Versus Separation of Powers

While the ultimate decision concerning whether Terri's feeding tube should have been removed will be debated for many years to come, the effect of Congress's attempt to circumvent the order of a Florida Court of Appeals⁷⁷ is immediate. There is public sentiment that this piece of legislation was an attempt on the part of the U.S. Congress to usurp the authority of state law⁷⁸ and wield its

⁷⁵ See, e.g., *In re Quinlan*, 355 A.2d at 667 (noting that some physicians have chosen not to prolong the process of dying for the patient when it is clear that the patient is in an irreversible condition and therapy offers neither human nor humane benefit).

⁷⁶ But see *In re Requena*, 517 A.2d 886 (N.J. Super. Ct. Ch. Div. 1986), *aff'd*, 517 A.2d 869 (N.J. Super. Ct. App. Div. 1986).

⁷⁷ *In re Schiavo*, 916 So. 2d 814.

⁷⁸ FLA. STAT. ANN. § 765.305 (West 2005).

own authority.⁷⁹

The Act raises many constitutional inquiries and should not survive an appeal. Generally, legislative actions are those that have general application and prospective effect, not those which are targeted and retroactive.⁸⁰ The Act, however, is not merely legislation, but an attempt to accomplish something judicial and strictly outside the role of the legislature. Florida's Constitution clearly mandates a separation of powers.⁸¹ While these distinctions of power may overlap at times, it is difficult to find a constitutional basis for Congress's overruling a court order. The legislature, dissatisfied with the court order, granted Terri's parents standing to sue Michael Schiavo, even though the United States Supreme Court had already ruled that Congress may not interfere with judicial proceedings.⁸² Thus, the legislature should not have granted relief to Terri's parents because such relief was strictly judicial in nature. Congress should have adhered to the separation of powers principle as mandated by the nation's highest court.

It can hardly be argued that the courts are the best mechanism for determining end-of-life decisions. Because there is no universal statute to govern such decisions, states have devised their own statutes regarding who should make

⁷⁹ Barbara A. Noah, *Politicizing the End of Life: Lessons From the Schiavo Controversy*, 59 U. MIAMI L. REV. 107, 115-16 (2004).

⁸⁰ *Id.* at 117 (quoting Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1057 (1997) (explaining that the "general principle that statutes operate prospectively and judicial decisions apply retroactively is a matter of black letter law")).

⁸¹ See FLA. CONST. ART. II, § 3 ("The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.").

⁸² See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995).

end-of-life decisions. If the legislature was diametrically opposed to the language of a statute, it has the authority to amend such a statute. This, however, is a matter that Congress should not have decided by judicial means. The legislature cannot usurp the power of the courts, especially after a particular matter has been decided. The courts are committed to upholding the legislature's authority by rendering opinions consistent with the statutes, which is exactly what the court did in Terri's case.⁸³ The legislature, in turn, should remain true to the constraints of the statute, which requires that these matters be decided in a court of law.

It is important to note that there were alternative routes the legislature could have followed. For example, a private bill would not have offended the Constitution on the scale that Congress's usurpation of judicial power has. There is no provision in the U.S. Constitution that prohibits private bills. Because Terri made it clear that she did not want to live in a persistent vegetative state, as determined by the Florida courts,⁸⁴ it is unlikely that she would have perceived such a bill as favorable to her cause.

State elected officials take an oath to abide by their state constitutions. When Congress is allowed to override the authority of a state constitution, an extreme limitation is placed on the states' authority—one the Framers of the U.S. Constitution may not have envisioned.⁸⁵ It can be argued that the separation of powers discussed in the Florida Constitution⁸⁶ is to be respected by the U.S. Congress. Just as the states are not allowed to infringe on the decisions of the U.S. Congress, the U.S. Congress

⁸³ See *In re Schiavo*, 916 So. 2d 814.

⁸⁴ See *id.*

⁸⁵ See U.S. CONST. amend. X.

⁸⁶ See FLA. CONST. ART. II, § 3.

should not be allowed to overrule decisions made by the state and wield its own authority.

The other instances in which legislatures have interfered in family matters have also led to similar results. The Schiavo case bears some semblance to a recent federal decision regarding child custody.⁸⁷ Dr. Eric Foretich and his wife, Dr. Elizabeth Morgan, separated while Dr. Morgan was pregnant with their daughter, and they divorced shortly after their daughter's birth.⁸⁸ The D.C. Superior Court gave custody to Dr. Morgan, while Dr. Foretich retained visitation rights.⁸⁹ Dr. Morgan did not allow Dr. Foretich to visit his daughter, however, claiming he had sexually molested the girl.⁹⁰ The courts never found evidence of inappropriate behavior on the part of Dr. Foretich and jailed Dr. Morgan on contempt of court charges.⁹¹ Afterward, she fled with her daughter to New Zealand.⁹² At Dr. Morgan's request, Congress passed the Elizabeth Morgan Act,⁹³ which allowed Dr. Morgan to return to the United States without being subjected to the jurisdiction of the D.C. Superior Court. The Elizabeth Morgan Act also prevented Dr. Foretich from visiting his daughter unless his daughter consented.⁹⁴ Similar to the legislature's intervention in the Schiavo case, the Elizabeth Morgan Act referred specifically to the Morgan-Foretich dispute. Dr. Foretich contested the legislation arguing it

⁸⁷ See *Foretich v. United States*, 351 F.3d 1198 (D.C. Cir. 2003).

⁸⁸ See *id.* at 1204-05.

⁸⁹ *Id.* at 1205.

⁹⁰ *Id.*

⁹¹ *Id.* at 1205-06.

⁹² *Id.* at 1207.

⁹³ *Id.* at 1207.

⁹⁴ *Id.* at 1208.

was a violation of the separation of powers doctrine,⁹⁵ an argument the U.S. Court of Appeals accepted.⁹⁶ The U.S. Court of Appeals concluded that the Act was a punitive measure that was designed to separate Dr. Foretich from his daughter.⁹⁷ In reaching its conclusion, the court relied on the legislative history which spoke to the effect of the Act's aim to "correct an injustice" in the custody dispute.⁹⁸

The Act granting Terri's parent's relief has little distinction from the Elizabeth Morgan Act. While the Act passed by Congress on behalf of Terri's parents does not do the same damage to Michael Schiavo's reputation as the Elizabeth Morgan Act did to Dr. Foretich's reputation, the two acts are nonetheless similarly detrimental to the separation of powers doctrine. The cases are remarkably similar in that both involve the same questions and constitutional misgivings. On this basis, the Act violates the separation of powers doctrine and is therefore void.

VI. Conclusion

Congress's attempt to circumvent the Florida court's decision regarding the removal of Terri Schiavo's feeding tube violated her fundamental constitutional rights. She is guaranteed a right to autonomy⁹⁹ and she has a right to self-determination based on that right. Congress's attempt to usurp the state court's power not only violated Terri's constitutional rights, but it also offended the Framers' intent to afford states autonomy. Furthermore,

⁹⁵ *Id.* at 1208-09.

⁹⁶ *Id.* at 1226.

⁹⁷ *Id.* at 1223.

⁹⁸ *See id.* at 1225-26.

⁹⁹ *See, e.g.,* *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (stating that the right to autonomy is a fundamental constitutional right).

Congress has failed to show a compelling governmental interest by which to override the personal choice of Terri Schiavo. As a result, the Act is not constitutionally sound and should be overturned on appeal.

