EDITOR'S INTRODUCTION

On behalf of the Regent University School of Law faculty and all the editors and staff members who were so generous with their valuable time and energy, I am honored to introduce the inaugural issue of the *Regent University Law Review.* This publication is the culmination of the dedication and sacrifice of all those appearing on the masthead. Each shared the same vision, which is the justification for introducing this Law Review.

Because the *Regent University Law Review* is unlike any presently in publication, the purpose of this introduction is to explain why we started this Review. We recognize that there are many law reviews currently published and that a new law review is not something that a school should start without seriously considering why the profession is in need of it. Such consideration is especially important today when many commentators believe that law reviews provide little more than an opportunity for students to gain research and writing experience and a forum for jurists to pontificate on obscure and inconsequential legal issues. If I agreed with this conclusion, I would not have participated in this new venture. While my exposure to the needs and deficiencies that exist in the legal field has been limited, my own research and the wise advice of those I have consulted militate against the foregoing pessimistic opinion of law reviews.

The legal profession, perhaps more than any other, is thought intensive. Law schools design their curricula not only to teach specific points of law, but also to teach students how to think. Our professors inculcated us with the maxim that directs us to "think like lawyers." Our stock in trade is the peculiar way in which we think. Once we learn this skill, however, we do not necessarily remain proficient. Like anything else, constant practice is essential to keep those mental abilities finely honed. If we are to avoid the malaise that follows intellectual laxity, continued mental exercise is essential. John Stuart Mill recognized that with respect to any idea,

> when it has come to be an hereditary creed, and to be received passively, not actively—when the mind is no longer compelled, in the same degree as at first, to exercise its vital powers on the questions which its belief presents to it, there is a progressive tendency to forget all of the belief except the formularies, or to give it a dull and torpid assent, as if accepting it on trust dispensed with the necessity of realizing

> it in consciousness, or testing it by personal experience, until it almost ceases to connect itself at all with the inner life of the human being.[1]

As I study my textbooks and read law review articles, it appears that many underlying philosophies are simply taken for granted. Is law really *anything* Congress enacts? Is the Constitution nothing more than what the Supreme Court says it is? Do judges make law or only say what it is, and is there a difference? If the answers seem obvious to you, upon what are your conclusions based? Are the premises passively accepted, or are they continually subjected to scholastic inquiry? If Mill is right, then they must be rigorously examined or they will become nothing but empty shells of belief.

I believe that law reviews are singularly well suited to addressing these kinds of questions. Law reviews should be the vehicles through which we obviate the passive acceptance of any belief. They should be challenging the Bar to remember that when an idea no longer requires the mind's faculties to support it, that idea or belief no longer motivates, but simply remains as a conclusionary statement devoid of a supporting rationale.

As a result of the many questions needing serious treatment, the forum ought to be extensive. Therefore, far from being scholastic overkill, the large number of eclectic law reviews now in print keeps the profession from sinking into self-satisfaction, from a cessation of conscious questioning of the foundations upon which their intellectual edifices rest. Most law reviews, however, are not so much concerned with the foundation of any given article as they are with the reasoning process embodied within it. Moreover, we believe that most of the articles are based on the same underlying philosophies which, while of recent origin, have not been questioned in quite some time. The articles presented in this Review, however, will address both the quality of reasoning and the bases upon which that reasoning rests. It should not be surprising, then, that some of the ideas in this introduction and in the following articles, commentaries, notes, and comments challenge many preconceived notions about law. That is one of our purposes. True propositions of law will withstand close scrutiny; propositions not capable of surviving that scrutiny should be questioned and, if necessary, abandoned. It is not only *other* scholars' intellectual foundations that must undergo this analysis,

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1. J. MILL, ON LIBERTY 38-39 (E. Rapaport ed. 1978) (1st ed. 1859).

however. For we, and hopefully our readers too, will not hesitate to question and analyze ours as well.

I. OUR VISION

It is not enough to simply provide another scholarly forum. If that were the sole purpose of this Review, it would not be necessary, for the present number of law reviews is otherwise sufficient. To justify adding another to their numbers requires a foundation and purpose presently lacking in the field. That foundation and purpose is succinctly stated in the mission statement of our Law Review:

> The overarching mission of the Regent University Law Review is the same as that of Regent University, that is, to bring glory to God and to His Son, Jesus Christ, through the Holy Spirit. In addition, the Law Review seeks to further the mission of the Regent University School of Law: to bring the will of God to bear upon the legal profession through a legal education characterized by excellence, personal discipleship and nurture, and the application of Biblical principles to law.
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> The specific mission of the Regent University Law Review is:
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> 1. To provide a forum for a Christian perspective on law and the legal profession, especially through the application of Biblical principles to law;
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> 2. To encourage and publish legal scholarship of the highest quality; [and]
>
> 3. To seek and publish materials that will be of benefit to the practicing bar; . . . .[2]

Regent University is a Christian institution. Our faculty believes the Bible to be the inspired Word of God, and the students receive instruction based on Biblical principles. This does not mean, however, that this Review will focus on legal issues that impact Christianity or those issues in which Christians are primarily interested. Our vision is much broader. We believe that God's law has something to say about every area of law. To the inevitable objection that the law of nature and nature's God could not possibly have anticipated such topics as corporate taxation, antitrust suits, or the constitutional incorporation

2. REGENT U.L. REV. CONST. statement of mission.

doctrine, I answer: Every legal question must rest on some foundational premise, and that premise must stand the test of measurement against the law of nature and nature's God. Jesus illustrated the importance of foundations with relation to our faith when he said:

> [E]veryone who hears these words of mine and puts them into practice is like a wise man who built his house on the rock. The rain came down, the streams rose, and the winds blew and beat against that house; yet it did not fall, because it had its foundation on the rock. But everyone who hears these words of mine and does not put them into practice is like a foolish man who built his house on sand. The rain came down, the streams rose, and the winds blew and beat against that house, and it fell with a great crash.[3]

Both houses were identical but for their foundations. This parable compels me to closely examine the foundations not only of my faith, but of my education and chosen profession as well.

We introduce the *Regent University Law Review* because the foundations of the legal profession have not been challenged. The articles we intend to publish will have an underlying philosophy that may be unfamiliar to many in the legal profession today. Therefore, because the authors will, for the most part, define the foundational issues only tangentially as they analyze the substance of their topics, in the following section I will attempt to encapsulate the framework principles upon which the following articles, and those in subsequent issues, are based.

II. THE NATURE OF LAW

The need to thoroughly analyze the nature of law arises very infrequently. Legal education focuses largely on the pragmatics of the tasks the faculty is preparing us to perform. After graduation we will be swamped with the day-to-day demands of our new jobs. In fact, unless we go on to teach jurisprudence, we will have little incentive to examine the basis of our education and practice. I am thankful, therefore, that our professors have continually prompted us to investigate our presuppositions. As a result, I have become curious. Why do we learn law the way we do? What are the sources of law? For that matter, what *is* law?

3. *Matthew* 7:24-27 (New International).

These are hardly new questions, but the answers that jurists presently propose do not even come close to reaching a consensus. Obviously I cannot bring an end to the controversy by way of these introductory remarks. But I do hope to set this Law Review on such a course that it *will* be able to definitively answer these questions. In the comments that follow, I will reintroduce some ideas that many scholars have ignored for a number of years. I will begin with what we believe to be the nature of law.

A. Law and Science

The advent of Darwin's theory of evolution spawned a revolution in the way people thought, including those outside the biological scientific community for which the theory was intended. It created a new paradigm. The ramifications of this theory spread even as far as the legal community, allowing Justice Charles Evans Hughes to blithely state that "[w]e are under a Constitution, but the Constitution is what the judges say it is."[4] Discarding the idea that the law has a fixed content, Hughes preferred instead to believe that it evolves with the passage of time. Robert K. Skolrood of the National Legal Foundation is fond of analogizing this kind of thought process to a homeowner who demands that, when interest rates go down, his fixed rate mortgage should be renegotiated because the times have changed. Even more radical is the Critical Legal Studies (CLS) group which no longer believes in the rule of law. The well-known CLS apologist Roberto Unger proposes:

> In the broadest sense, law is simply any recurring mode of interaction among individuals and groups, together with the more or less explicit acknowledgment by these groups and individuals that such patterns of interaction produce reciprocal expectations of conduct that ought to be satisfied.[5]

The import of this statement is that the most compelling reason for obeying the law is that "this is the way things are done." As conduct changes and becomes generally accepted, the law changes. Obviously, in this sense law has no prescriptive force; it is merely an observation of society's conduct sanctioned with the appellation

4. THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 144 (D. Danelski & J. Tulchin ed. 1973).

5. R. UNGER, LAW IN MODERN SOCIETY 49 (1976).

"law." While only a small percentage of practicing attorneys would go as far as those who subscribe to CLS' theories, it appears that most jurists tacitly agree that law is something that evolves and changes to fit different situations. Because this perception originated in the scientific community, I will begin there as well.

Stephen Hawking is a brilliant theoretical physicist whose work in the intricate areas of general relativity and quantum mechanics has brought him both great recognition and a Nobel prize. Since he deals with complex theories, he graciously prefaced his recent book, *A Brief History of Time,* with a definition of "scientific theory":

> In order to talk about the nature of the universe and to discuss questions such as whether it has a beginning or an end, you have to be clear about what a scientific theory is. I shall take the simple-minded view that a theory is just a model of the universe, or a restricted part of it, and a set of rules that relate quantities in the model to observations that we make.... A theory is a good theory if it satisfies two requirements: It must accurately describe a large class of observations on the basis of a model that contains only a few arbitrary elements, and it must make definite predictions about the results of future observations.[6]

Of particular interest is Hawking's requirement that a scientific theory must be capable of predicting future observations. The assumption implicit in this requirement is that the rules governing the theory will apply in the future exactly as they do when the prediction is made.

Mr. Hawking observes how different theories gain ascendency only to be disproved by further investigation and experimentation. For example, although Newton's theory of gravity very closely predicted Mercury's orbit around the sun, Einstein's general theory of relativity described that planet's motion much more accurately.[7] The explanation for the latter theory's prevalence does not lie in any conception that the fundamental laws of the universe had changed. To the contrary, Einstein simply had a fuller understanding of those laws than did Newton. All of Hawking's work relies on the fact that the laws of the universe have always been the same and always will be. It is simple to

6. S. HAWKING, A BRIEF HISTORY OF TIME 9 (1988).
7. *Id.* at 10.

conclude, then, that if the general theory of relativity is ever superceded, it will be because study and experimentation have produced a greater understanding of how the universe works, not because the rules have changed. Should any of the laws of the universe ever change, *any* of them, all of Einstein's, Hawking's, and scores of other outstanding scientists' theories would come to naught. Thus, the scientific community cannot agree with a paradigm whose fundamental premise is that laws are in a constant state of change. Such a paradigm would violate Hawking's second rule for a good scientific theory, viz, the theory must accurately predict future observations. The evolution-of-laws theory can only predict, at best, that nothing can be predicted. Hawking would not be impressed.

B. Historical Understanding of the Nature of Law

This premise that the laws of the universe are fixed and unchanging did not originate with Stephen Hawking, of course. The great scientists throughout history believed the same. Some simply had an incomplete understanding of the subject they studied. Scholars outside of the scientific community have also traditionally agreed with this premise. Sir William Blackstone believed that law "is a *rule;* not a transient sudden order from a superior, to or concerning a particular person; but something permanent, uniform, and universal."[8] President Calvin Coolidge reflected this belief when he observed that "[m]en do not make laws. They do but discover them. Laws must be justified by something more than the will of the majority. They must rest on the eternal foundation of righteousness."[9]

The eternal foundation of righteousness upon which President Coolidge relied for the authority of law was more thoroughly explained shortly after our nation was born. Fifty years after the ratification of the U.S. Constitution, John Quincy Adams looked back on the justifications for America's Declaration of Independence. He reasoned that the basis for (1) the necessity of separating from England, (2) the rights of individuals, and (3) the purpose and legitimacy of government, is derived from the "laws of nature and of nature's God, and of course presupposes the existence of a God, the moral ruler of the universe, and a rule

8. 1 W. BLACKSTONE, COMMENTARIES *44 (emphasis in original).
9. C. COOLIDGE, HAVE FAITH IN MASSACHUSETTS 4 (1919).

of right and wrong, of just and unjust, binding upon man, preceding all institutions of human society and of government."[10] The implications of this statement are tremendous. There can be no mistake about what Adams meant: (1) there is a law pre-existing governments that does not depend on any man's volitional action or decision, (2) this law has a determinate content, separating right from wrong, and defining justice, and most importantly (3) this law is binding upon man—it does not require his agreement or consent.

Even in 1839, when John Quincy Adams made the foregoing address, this formulation of the nature of law was not a novelty. Blackstone considered the nature of law in an in-depth manner. The result was a cogent, incisive analysis in his famous treatise on the laws of England. In the same vein as Hawking, Blackstone began with observations of different natural laws:

> Law, in its most general and comprehensive sense, signifies a rule of action; and is applied indiscriminately to all kinds of actions, whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics, or mechanics, as well as the laws of nature and of nations. And it is that rule of action, which is prescribed by some superior, and which the inferior is bound to obey.[11]

From this he deduces that laws are fixed and uniform. He progresses from an examination of how laws apply to inanimate objects to how they apply to animate objects. While noting that the laws applying to the latter are more complex and numerous, he maintains that they are "equally fixed and invariable ... [and are] guided by unerring rules laid down by the great creator."[12] He culminates his general observations by reasoning:

> This then is the general signification of law, a rule of action by some superior being: and in those creatures that have neither the power to think, nor to will, such laws must be invariably obeyed, so long as the creature itself subsists, for its existence depends on that obedience. But laws, in their more confined sense, and in which it is our present business to consider them, denote the rules, not of action in general,

10. Discourse by John Quincy Adams for The New York Historical Society on the Fiftieth Anniversary of the Inauguration of George Washington as President of the United States (April 30, 1839), *reprinted in* 6 J. CHRISTIAN JURIS. 1 (1987).

11. 1 W. BLACKSTONE, COMMENTARIES *38.

12. *Id.* at 38-39.

> but of *human* action or conduct: that is, the precepts by which man, the noblest of all sublunary beings, a creature endowed with both reason and freewill, is commanded to make use of those faculties in the general regulation of his behaviour.[13]

Obviously we are not interested in law as it applies to inanimate objects or animal life, except insofar as it helps to construct our paradigm. Observing the nature of law in this context simply lays the foundation. The real point of interest is how the laws of nature apply to man. The superior being who authored the laws of nature also commands man to use his faculties of reason and free will to order his affairs consistently with those natural laws. Though he may choose to disobey those laws, man is incapable of choosing not to be bound by them. It is here that most modern jurists depart from Blackstone.

Today it is popular to argue that law is nothing but a humanly created instrument designed to enable one group of people to regulate the activities of another group. So construed, law is a malleable concept that can be easily reformulated as various behaviors and desires come in and go out of vogue. This understanding of law is convenient, but has little substance to commend it. Blackstone's premises, however, militate against this popular conception of law:

> God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when he created man, and endued him with freewill to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that freewill is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.[14]

Law originates with God and is impressed on His creation, including mankind. As a result of the recent emphasis on individual rights, some reflection is necessary to come to terms with the concept that

> [m]an, considered as a creature, must necessarily be subject to the laws of his creator, for his is entirely a dependent being.... [A] state of dependence will inevitably oblige the

13. *Id.* at 39.
14. *Id.* at 39-40.

> inferior to take the will of him, on whom he depends, as the rule of his conduct: not indeed in every particular, but in all those points wherein his dependence consists.[15]

There is no codification of the law of nature to fit every occasion, nor need there be. The law of nature and nature's God provides the framework within which we operate and the guiding principles for filling in the interstices. "There are, it is true, a great number of indifferent points, in which both the divine law and the natural leave a man at his own liberty; but which are found necessary for the benefit of society to be restrained within certain limits."[16] Thus, both God and nature stand in witness that murder is wrong. Neither Scripture nor nature, however, directly addresses whether import tariffs should be imposed, what the personal income tax rate ought to be, or how appeals should be prosecuted in the federal court system. In matters such as these, we are left to our discretion and mutual agreement.

That we are bound to obey the superior's law does not abridge our liberty or rights. On the contrary, it is only because the law emanates from a superior source and is fixed, uniform, and universal that we can speak of individual rights. If it were possible for a person, or even a majority of people, to change our nation's foundational agreement—that "[w]e hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, *that among these are Life, Liberty, and the Pursuit of Happiness*"[17]—speaking of rights would be an impossibility. A right than can be eliminated at the discretion of one's peers is an empty, futile concept. That men are endowed by their Creator with these unalienable rights means that even if all should band together to deprive you of your rights, you have an immutable source of authoritative law upon which to stand.

III. Discovery of the Law

At this point I could end the analysis and be left with a valid, albeit abstract, formulation of the nature of law. The purpose of this Review, however, is to bring these truths to bear on contemporary legal questions. Are the laws of nature and

15. *Id.* at 39.
16. *Id.* at 42.
17. The Declaration of Independence para. 1 (U.S. 1776) (emphasis added).

nature's God relevant to the legal community today? If Hawking's and Blackstone's conclusions on the permanency of laws are correct, then those laws of nature must be relevant. How we discover those concepts is the next step I would like to examine.

Blackstone's analysis leads naturally to his assertion that

> [t]his law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.[18]

If human laws contrary to the laws of nature and nature's God are of no validity, then it is crucial to be able to discover those foundational laws.

How do we know what the Declaration's "self-evident truths" or laws of nature actually are? Is it tacit knowledge, something with which we are born? Obviously not, for I have spent the last three years discovering how much I need to learn. Because law is something learned, not inborn, the implication is that in law, much as in science, we are able through observation and study to use our reason to discover those natural laws. How far, though, will pure reason take us in accurately discovering the law?

> [I]f our reason were always, as in our first ancestor before his transgression, clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance, the task would be pleasant and easy; we should need no other guide but this. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error.[19]

Reason, in and of itself, is not sufficient. This brings us to the underlying principle that sets the *Regent University Law Review* apart from all others and justifies its existence. We believe, as did Blackstone, in the pre-eminence and authority of the Bible in the matters to which it speaks. The law revealed in Scripture, with which the law of nature is in all points consistent, both having the same Author, is our ultimate recourse for truth. For it is the corruption of reason that

18. 1 W. BLACKSTONE, COMMENTARIES *41.
19. *Id.*

> has given manifold occasion for the benign interposition of divine providence; which, in compassion to the frailty, the imperfection, and the blindness of human reason, hath been pleased ... to discover and enforce its laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures.[20]

We are, and must be, subject to the principles contained in Scripture. Just as we do not choose to submit to the general theory of relativity, so is consent unnecessary with regard to the general principles of Scripture, though when considered carefully, reason will show that it is only logical that we are subject to them. The great international jurist Hugo Grotius recognized the applicability of revealed law: "[H]ere, then, is another source of law besides the source in nature, namely, the free will of God, to which, as our intellect irresistibly tells us, we must submit."[21] Although it may be difficult to discern how this incorporation of Biblical principles works in practice, it is our purpose to publish articles that will demonstrate these principles in application to specific legal questions.

IV. CONCLUSION

The final foundational premise of this Review also derives from what we believe to be the nature of law. John Stuart Mill poignantly expressed the need for this culminating principle in his observation of the gap between what some people purport to believe and the way in which they actually conduct their activities:

> They are not insincere when they say that they believe these things. They do believe them, as people believe what they have always heard lauded and never discussed. But in the sense of that living belief which regulates conduct, they believe these doctrines just up to the point to which it is usual to act upon them. The doctrines in their integrity are serviceable to pelt their adversaries with; and it is understood that they are to be put forward (when possible) as the reasons for whatever people do that they think laudable.... They have an habitual respect for the sound of them, but no feeling

20. *Id.* at 41-42.

21. H. GROTIUS, THE LAW OF WAR AND PEACE 6 (L. Loomis trans. 1949) (1st ed. 1625).

> which spreads from the words to the things signified and forces the mind to take *them* in and make them conform to the formula.[22]

It is not enough to develop a right principle of law only to have it languish in the recesses of our minds. As the writer of Ecclesiastes tells us, "[o]f making many books there is no end, and much study wearies the body."[23] Incessant studying and writing are of little value when the exercise ends there. Study must manifest itself in application, or as noted in Ecclesiastes, we will only become wearied. Our purpose is to put what we have learned into practice and to provide others with a forum to do the same. There may be no end to the making of books, but when the topic is worth pursuing, the vast number of books is essential.

The Bible admonishes us that when we encounter truth, we are not to remain unchanged by it:

> Do not merely listen to the word, and so deceive yourselves. *Do what it says.* Anyone who listens to the word but does not do what it says is like a man who looks at his face in the mirror and, after looking at himself, goes away and immediately forgets what he looks like. But the man who looks intently into the perfect law that gives freedom, and continues to do this, not forgetting what he has heard, *but doing it*—he will be blessed in what he does.[24]

We are committed to making the *Regent University Law Review* available to those attorneys, judges, and professors who want to thoughtfully examine their profession in order to discover the truth of the law of nature and nature's God. It is then up to all of us to commit ourselves to James' command to continually look intently into the perfect law that gives freedom and, most importantly, to put into practice what we see in that law. Then not only will we be blessed and, incidentally, avoid Mill's scathing indictment, but we will also bring glory to God, which is our overarching mission.

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22. J. MILL, *supra* note 1, at 40 (emphasis in original).
23. *Ecclesiastes* 12:12 (New International).
24. *James* 1:22-25 (New International) (emphasis mine).