"A DEATH-STRUGGLE BETWEEN TWO CIVILIZATIONS"*

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I. INTRODUCTION: THE TRIAL OF THE CENTURY

The 1925 *State v. Scopes* evolution-creation trial in Dayton, Tennessee has been called "the world's most famous court trial,"[1] and it was a trial that certainly did arrest the world's attention. As William Jennings Bryan, the special prosecutor in the trial, noted, "[w]e are told that more words have been sent across the ocean by cable to Europe and Australia about this trial than has [sic] been sent by cable in regard to anything else happening in the United States."[2] Indeed, few other trials have produced such crowded courtrooms and worldwide media attention or have resulted in as many full-length movies and reenactments of its proceedings as has this trial.

Bryan believed that the trial had "stir[red] the world"[3] because this "cause . . . goes deep. It is because it extends wide and because it reaches into the future beyond the power of man to see. Here has been fought out a little case of little consequence as a case, but the world is interested because it raises an issue . . . ."[4] Award-winning historian Henry Steele Commager described how that "issue"[5] became a sensationalized spectacle:

> The religious question—the wisdom of the state law forbidding the teaching of evolution in public schools—was, to be sure, confused by the legal one—the right of the state to enact such a law. Both public

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* THE WORLD'S MOST FAMOUS COURT TRIAL: TENNESSEE EVOLUTION CASE 74 (3d ed. 1925) (quoting Clarence Darrow, second day of the trial, July 13, 1925) [hereinafter WORLD'S MOST FAMOUS COURT TRIAL].

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1 *See* WORLD'S MOST FAMOUS COURT TRIAL, *supra* note *.

2 *Id.* at 316.

3 *Id.*

4 *Id.*

5 *Id.*

> opinion and counsel largely ignored the legal and concentrated on the religious issue. It was appropriate that [William Jennings] Bryan should have appeared as counsel for the prosecution, for he was not only the most distinguished and eloquent of American fundamentalists but largely responsible for the enactment of anti-evolution laws in several southern states. It was less appropriate, perhaps, that Clarence Darrow should have been chief counsel for the defense, for in the eyes of most Americans he represented not modernist religion but irreligion, and his advocacy of evolution and assault upon Fundamentalism enabled the prosecution to identify science with atheism.
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> Constitutionally Bryan's case was unimpeachable, for in a democracy, as Justice Holmes never tired of pointing out, the people have a right to make fools of themselves. Bryan, however, did not adopt this logical but embarrassing position. Neither he nor Darrow argued the constitutional issue, and their evasion was encouraged by the Court, the press, and public opinion. It was not young John T. Scopes, after all, who was on trial but fundamentalism itself. To the delight of the newspapermen and the chagrin of the devout, the trial degenerated into a circus and a brawl.[6]

The trial revolved around a 1925 Tennessee law which stated that

> it shall be unlawful for any teacher in any of the Universities, normals and all other public schools of the state which are supported in whole or in part by the public school funds of the state, to teach any theory that denies the story of the divine creation of man as taught in the Bible and to teach instead that man has descended from a lower order of animals.[7]

When substitute teacher John Scopes taught a biology class in which he "classified man along with cats and dogs, cows, horses, monkeys, lions, horses and all that,"[8] he was charged with violating that law.

At the trial level, District Judge John Raulston allowed the introduction of evidence and arguments that pertained only to whether John Scopes had violated the law as written. The jury believed that Scopes had violated the law and found him guilty. The jury, however, requested the judge to levy the fine, so the judge imposed on Scopes the minimum fine specified by the law for a conviction.[10] On appeal to the Tennessee Supreme Court, the jury verdict was upheld, but the fine was

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[6] HENRY STEELE COMMAGER, THE AMERICAN MIND: AN INTERPRETATION OF AMERICAN THOUGHT AND CHARACTER SINCE THE 1880'S 181-83 (1950).

[7] Scopes v. State, 289 S.W. 363, 363-64 n.1 (Tenn. 1927) (quoting the Tennessee Anti-Evolution Act, Chapter 27 of the Acts of 1925).

[8] WORLD'S MOST FAMOUS COURT TRIAL, *supra* note *, at 126.

overturned because the law stipulated that the jury, not the judge, must determine the amount of the fine.[9]

The district court, in examining only whether Scopes had violated the law, refused to consider the two objections raised by Clarence Darrow and the *Scopes* defense team: (1) that the law prohibited teaching the scientific theory of evolution and, therefore, violated the State's requirement "'to cherish . . . science'";[10] and (2) that the law violated the constitutional prohibition against an establishment of religion.[11]

On appeal, the Tennessee Supreme Court was willing to examine those two objections.[12] On the first issue, the court upheld the law's constitutionality, explaining its reasoning as follows: "Evolution, like prohibition, is a broad term . . . . It is only to the theory of the evolution of man from a lower type that the act before us was intended to apply, and much of the discussion we have heard is beside this case."[13]

Although the general characterization of the *Scopes* case was that of a legal showdown between the opposing beliefs of creation and evolution, as the court noted, this characterization was inaccurate. Actually, the issue of the case was whether one specific variety of evolution teaching— and not all evolution teaching— might be banned. This was further confirmed in Justice Chambliss' concurring opinion in which he pointed out that under the law, several theories of evolution, and even evolution in general, could still be taught:

> Conceding that "the theory of evolution is altogether essential to the teaching of biology and its kindred sciences," it will not be contended by Dr. Reinke, or by learned counsel quoting from him, that the theory of evolution essentially involves the denial of the divine creation of man . . . . The theories of Drummond, Winchell, Fiske, Hibbens, Millikan, Kenn, Merriam, Angell, Cannon Barnes, and a multitude of others, whose names are invoked in argument and brief, do not deny the story of the divine creation of man as taught in the Bible, evolutionists though they be . . . . Our laws approve no teaching of the Bible at all in the public schools, but require only that no theory shall be taught which denies that God is the Creator of man— that his origin is not thus to be traced.[14]

For these reasons, the court rejected Darrow's challenge to the law and then added,

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[9] *Scopes*, 289 S.W. at 367.

[10] *Id.* at 366 (quoting TENN. CONST. art. 11, § 12).

[11] *Id.* at 366-367.

[12] *Scopes*, 289 S.W. at 366.

[13] *Id.* at 364.

[14] *Id.* at 369 (Chambliss, J., concurring) (quoting Dr. E. N. Reinke, professor of biology at Vanderbilt University, upon whom the defense team relied).

> If the Legislature thinks that . . . the cause of education and the study of science generally will be promoted by forbidding the teaching of evolution in the schools of the state, we can conceive of no ground to justify the court's interference. The courts cannot sit in judgment on such acts of the Legislature or its agents and determine whether or not the omission or addition of a particular course of study tends "to cherish science."[15]

On the second objection raised against the law, the court rejected the argument that the law violated any constitutional prohibition against the establishment of religion, explaining as follows:

> We are not able to see how the prohibition of teaching the theory that man has descended from a lower order of animals gives preference to any religious establishment or mode of worship. So far as we know, there is no religious establishment or organized body that has in its creed or confession of faith any article denying or affirming such a theory. So far as we know, the denial or affirmation of such a theory does not enter into any recognized mode of worship. Since this cause has been pending in this court, we have been favored, in addition to briefs of counsel and various amici curiæ, with a multitude of resolutions, addresses, and communications from scientific bodies, religious factions, and individuals giving us the benefit of their views upon the theory of evolution. Examination of these contributions indicates that Protestants, Catholics, and Jews are divided among themselves in their beliefs, and that there is no unanimity among the members of any religious establishment as to this subject. Belief or unbelief in the theory of evolution is no more a characteristic of any religious establishment or mode of worship than is belief or unbelief in the wisdom of the prohibition laws. It would appear that members of the same churches quite generally disagree as to these things. Furthermore, chapter 277 of the Acts of 1925 *requires* the teaching of nothing. It only *forbids* the teaching of the evolution of man from a lower order of animals.[16]

Justice Chambliss, in his concurrence, further explained why nothing religious had been established:

> Considering the caption and body of this act as a whole, it is seen to be clearly negative only, not affirmative. It requires nothing to be taught. It prohibits merely. And it prohibits, not the teaching of *any* theory of evolution, but that theory (of evolution) only that denies, takes issue with, positively disaffirms, the creation of man by God (as the Bible teaches), and that, instead of being so created, he is a product of, springs from, a lower order of animals. No authority is recognized or conferred by the laws of this state for the teaching in the public schools, on the one hand, of the Bible, or any of its doctrines or dogmas, and this act prohibits the teaching on the other hand of any denial thereof. It is purely an act of neutrality. Ceaseless and

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[15] *Id.* at 366.

[16] *Id.* at 367.

> irreconcilable controversy exists among our citizens and taxpayers, having equal rights, touching matters of religious faith, and it is within the power of the Legislature to declare that the subject shall be excluded from the tax-supported institutions, that the state shall stand neutral, rendering "unto Caesar the things which be Caesar's and unto God the things which be God's," and insuring the completeness of separation of church and state.[17]

Interestingly, while the then-sitting Tennessee Supreme Court viewed upholding the law as an act of neutrality, contemporary courts have found State acts— far more innocuous than the 1925 Tennessee law and expressly mandating neutrality— to be unconstitutional establishments of religion.[18] For example, American Law Reports notes that

> [t]he Supreme Court held that the establishment clause was violated by Louisiana's Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act, in Edwards v Aguillard (1987) 482 US 578, 96 L Ed 2d 510, 107 S Ct 2573. The Act declared that it was enacted to protect academic freedom; required public schools to give balanced treatment to the "sciences" of creation and evolution in classroom lectures, textbooks, library materials, or other programs to the extent that they dealt in any way with the origin of man, life, the earth, or the universe; decreed that when creation or evolution is taught, each shall be taught as a theory rather than proven scientific fact, defined "Creation-Science" and "Evolution-science" as the scientific evidence for, respectively, creation or evolution, and inferences therefrom; forbid discrimination against any public school teacher who chooses to be a creation scientist or to teach scientific data pointing to creationism; provided that instruction in the subject of origins is not required, but insisted on instruction in both

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[17] *Id.* at 369 (Chambliss, J., concurring).

[18] It has been only in recent years that courts have adopted a different meaning for "establishment of religion" from that held by the judiciary for its first century-and-a-half. That is, prior to the mid-twentieth century, the prohibition against "an establishment of religion" was interpreted to mean just what James Madison had said it meant during the debates on the First Amendment— the establishment of a national church. *See* 1 ANNALS OF CONGRESS 451 (Gales & Seaton 1834); REPORTS OF THE COMMITTEES OF THE HOUSE OF REPRESENTATIVES MADE DURING THE FIRST SESSION OF THE THIRTY-THIRD CONGRESS 1-9 (Washington, A.O.P. Nicholson 1854); REPORTS OF THE COMMITTEES OF THE SENATE OF THE UNITED STATES FOR THE SECOND SESSION OF THE THIRTY-SECOND CONGRESS 1-4 (Washington, Robert Armstrong 1853); 1 KATE MASON ROWLAND, THE LIFE OF GEORGE MASON 244 (New York, G. P. Putnam's Sons 1892); JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 314 (bicentennial ed., Regnery Gateway 1986) (1859); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 728 (Fred B. Rothman & Co. 1999) (1833); 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTIONS OF THE FEDERAL CONSTITUTION 198-99 (Philadelphia, J.P. Lippincott & Co. 1881) (1836).

> creationist and evolutionary models if public schools chose to teach either . . . .[19]

Significantly, even though the Louisiana statute specifically mandated that instruction be limited to an examination of "scientific data"[20] and "scientific evidence for, respectively, creation or evolution"[21] and never mentioned either God or the Bible, the Court nevertheless found it to be an unconstitutional establishment of religion. As one legal observer insightfully noted, "The courts . . . apparently find creationism to be a religious doctrine, but will not make evident the definition of religion which underlies their decisions."[22]

Yet, why did the earlier Tennessee court find that a State statute specifically acknowledging God in relation to creation was not an unconstitutional establishment of religion? The answer is, in the words of Justice Chambliss, because the law reflected the provisions of

> our Constitution and the fundamental declaration lying back of it, through all of which runs recognition of and appeal to "God," and a life to come. The Declaration of Independence opens with a reference to "the laws of nature and nature's God," and holds this truth "to be self-evident, that all men are created equal, that they are endowed by their Creator," etc., and concludes "with a firm reliance on the protection of Divine Providence." The Articles of Confederation and Perpetual Union read, "And whereas, it hath pleased the Great Governor of the world."[23]

Because the State law was consistent with the explicit language in our federal governing documents, and because it negated only "the right to teach in the public schools a denial of the existence, recognized by our Constitution, of the Creator of all mankind,"[24] it was upheld by the court. Based, therefore, on the wording in the founding documents, Justice Chambliss concluded "[t]hat the Legislature may prohibit the teaching of the future citizens and office holders to the state a theory which denies the Divine Creator will hardly be denied."[25]

Significantly, to reach this conclusion, the decision cited three of the four documents identified in the United States Code as "organic

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[19] Gregory G. Sarno and Alan Stephens, Annotation, *Constitutionality of Teaching or Suppressing Teaching of Biblical Creationism or Darwinian Evolution Theory in Public Schools*, 102 A.L.R. FED. 537, 547-48 (1991) (footnote omitted).

[20] *Id.* at 547.

[21] *Id.*

[22] Judith A. Villarreal, *God and Darwin in the Classroom: The Creation/Evolution Controversy*, 64 CHI.-KENT L. REV. 335, 359 (1988).

[23] *Scopes*, 289 S.W. at 368 (Chambliss, J., concurring).

[24] *Id.*

[25] *Id.*

laws"[26]— the documents that establish and define the operation of our government. Since these organic laws specifically fuse the concept of a divine creator into the American structure of government, the case prompts a probing question: may the judiciary nullify, or find unconstitutional, a teaching expressly set forth in the documents it is charged with upholding?

II. THE TIMELESSNESS OF THE CONFLICT

The response to the preceding question often comes in the form of an objection: science has acquired new information unknown to those who framed our government; therefore, based on this new information, the courts must reach conclusions at variance with those stipulated by the founding documents. Arguing another way, Vermont Law School Professor Steven Wise posits that "facts change and with them the scientific theories that assume those facts . . . . When facts change, the law that assumes those facts should change."[27]

It is a mistake, however, to believe that the arguments about evolution actually postdate the Framers of our governing documents. While uninformed laymen erroneously believe the theory of evolution to be a product of Charles Darwin in his first major work of 1859, the historical records are exceedingly clear that our Framers were well-acquainted with the theories and principal teachings of evolution— as well as the science and philosophy for and against evolution— well before Darwin synthesized those long-standing teachings in his writings.

For example, Nobel Prize winner Bertrand Russell explains that "[t]he general idea of evolution is very old; it is already to be found in Anaximander (sixth century B.C.) . . . . [and] Descartes, Kant, and Laplace had advocated a gradual origin for the solar system, in place of sudden creation . . . ."[28] Professor Henry Fairfield Osborn, a zoologist and paleontologist, agrees, declaring that there are "ancient pedigrees for all that we are apt to consider modern. Evolution has reached its present fullness by slow additions in twenty-four centuries."[29] Osborn further states that

> [e]volution as a natural explanation of the origin of the higher forms of life . . . developed from the teachings of Thales and Anaximander into those of Aristotle . . . . [A]nd it is startling to find him, over two

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[26] The Organic Laws of the United States of America, 1 U.S.C.A. § 1 (West 1987) (including the Articles of Confederation, the Declaration of Independence, the Constitution, and the Northwest Ordinance).

[27] Steven M. Wise, *How Nonhuman Animals Were Trapped in a Nonexistent Universe*, 1 ANML L. 15, 42 (1995) (footnote omitted) [hereinafter *Nonhuman Animals*].

[28] BERTRAND RUSSELL, HUMAN KNOWLEDGE: ITS SCOPE AND LIMITS 33-34 (1948).

[29] HENRY FAIRFIELD OSBORN, FROM THE GREEKS TO DARWIN I (1924).

> thousand years ago, clearly stating, and then rejecting, the theory of the Survival of the Fittest as an explanation of the evolution of adaptive structures."[30]

British anthropologist Edward Clodd similarly affirms that "[t]he Pioneers of Evolution—the first on record to doubt the truth of the theory of special creation, whether as the work of departmental gods or of one Supreme Deity, matters not—lived in Greece about the time already mentioned; six centuries before Christ."[31]

For example, Anaximander introduced the theory of spontaneous generation;[32] Diogenes introduced the concept of the primordial slime;[33] Empedocles introduced the theory of the survival of the fittest and of natural selection;[34] Democritus advocated the mutability and adaptation of species;[35] Lucretius, before the birth of Christ, announced that all life sprang from "mother earth" rather than from any specific deity;[36] Bruno published works arguing against creation and for evolution in 1584-85;[37] Leibnitz taught the theory of intermedial species;[38] Buffon taught that man was a quadruped ascended from the apes, about which Helvetius also wrote in 1758;[39] Swedenborg advocated and wrote on the nebular hypothesis (the early "big bang") in 1734,[40] as did Kant in 1755.[41] It is a known fact that countless works for (and against) evolution had been written for over two millennia prior to the drafting of our governing documents and that much of today's current phraseology surrounding the evolution debate was familiar rhetoric at the time our documents were framed.

In fact, Dr. Henry Osborn, curator of the American Museum of Natural History in New York City, describes the third period in the history of evolution[42]—the period in which our Framers lived—as a

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[30] *Id.* at 6.

[31] EDWARD CLODD, PIONEERS OF EVOLUTION FROM THALES TO HUXLEY 3 (photo. reprint 1972) (1897).

[32] Anaximander lived around 600 B.C.

[33] Diogenes lived around 550 B.C.

[34] Empedocles lived from 495 to 455 B.C.

[35] Democritus lived from 460 to 370 B.C.

[36] Lucretius lived from 98 to 55 B.C.

[37] Bruno lived from 1548 to 1600.

[38] Leibnitz lived from 1646 to 1716.

[39] Buffon lived from 1707 to 1788 and Helvetius lived from 1715 to 1771.

[40] Swedenborg lived from 1688 to 1772.

[41] Kant lived from 1729 to 1804. For information on the material found in the text accompanying notes 33-42, *see, e.g.*, OSBORN, *supra* note 29; *see also*, PETER J. BOWLER, EVOLUTION: THE HISTORY OF AN IDEA (1984); ROBERT E. D. CLARK, DARWIN: BEFORE AND AFTER, AN EXAMINATION AND ASSESSMENT (1958); CLODD, *supra* note 31.

[42] Dr. Osborne identifies four periods of evolution: 1. Greek Evolution—640 B.C. to 1600; 2. Modern Evolution—1600 to 1800; 3. Modern Inductive Evolution—1730 to 1850;

period which produced the evolution writings of "Linnæus, Buffon, E[rasmus] Darwin, Lamarck, Goethe, Treviranus, Geof. St. Hilaire, St. Vincent, Is. St. Hilaire. Miscellaneous writers: Grant, Rafinesque, Virey, Dujardin, d'Halloy, Chevreul, Godron, Leidy, Unger, Carus, Lecoq, Schaafhausen, Wolff, Meckel, Von Baer, Serres, Herbert, Buch, Wells, Matthew, Naudin, Haldeman, Spencer, Chambers, Owen."[43] Clearly, it was not in the absence of knowledge about the debate over evolution, but rather in its presence, that our Framers made the decision to incorporate the principle of a creator in our governing documents.

Thomas Paine provides one example affirming this conclusion. Although Paine was the most openly and aggressively anti-religious of the Founders, in his 1787 *Discourse at the Society of Theophilanthropists in Paris*, Paine nevertheless forcefully denounced the French educational system's teaching that man was the result of prehistoric cosmic accidents or had developed from some other species.[44]

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and 4. Modern Inductive Evolution— 1858 to 1893. *See* OSBORN, *supra* note 29, at 10-11. The Modern Inductive Evolution period continues in present day. *See id.*

[43] *Id.* at 11.

[44] It has been the error of schools to teach astronomy, and all the other sciences, and subjects of natural philosophy, as accomplishments only; whereas they should be taught theologically, or with reference to the *Being* who is the author of them: for all the principles of science are of divine origin. Man cannot make, or invent, or contrive principles; he can only discover them, and he ought to look through the discovery to the author.

When we examine an extraordinary piece of machinery, an astonishing pile of architecture, a well-executed statue, or a highly finished painting where life and action are imitated, and habit only prevents our mistaking a surface of light and shade for cubical solidity, our ideas are naturally led to think of the extensive genius and talents of the artist.

When we study the elements of geometry, we think of Euclid. When we speak of gravitation, we think of Newton. How then is it, that when we study the works of God in the creation, we stop short, and do not think of God? It is from the error of the schools in having taught those subjects as accomplishments only, and thereby separated the study of them from the *Being* who is the author of them . . . .

. . . .

The evil that has resulted from the error of the schools, in teaching natural philosophy as an accomplishment only, has been that of generating in the pupils a species of atheism. Instead of looking through the works of creation to the Creator himself, they stop short, and employ the knowledge they acquire to create doubts of his existence. They labor with studied ingenuity to ascribe everything they behold to innate properties of matter, and jump over all the rest by saying, that matter is eternal.

. . . .

And when we speak of looking through nature up to nature's God, we speak philosophically the same rational language as when we speak of looking through human laws up to the power that ordained them.

God is the power of first cause, nature is the law, and matter is the subject acted upon.

Paine certainly did not advocate this position as a result of religious beliefs or of any teaching in the Bible, for he believed that "the Bible is spurious" and "a book of lies, wickedness, and blasphemy."[45] Yet, this anti-Bible Founder was nevertheless a strong supporter of teaching the theistic origins of man.

III. THEISTIC V. NON-THEISTIC APPROACHES

For the past twenty-five centuries, the debate has divided itself along two primary approaches. As Justice Chambliss noted: "Two theories of organic evolution are well-recognized, one the theistic . . . . [And t]he other theory is known as the materialistic, which denies that God created man, that He was the first cause . . . ."[46]

Confirming this general distinction between approaches, Dr. Robert Clark from Cambridge University notes that

> Haeckel claimed that spontaneous generation must be true, not because its truth could be confirmed in the laboratory, but because, otherwise, it would be necessary to believe in a Creator . . . .[47]
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> Compare the remark of Sir Charles Lyell: "The German critics have attacked me vigorously, saying that by the impugning of the doctrine of spontaneous generation, I have left them nothing but the direct and miraculous intervention of the First Cause."[48]

Yet, despite the fact that the arguments about evolution frequently implicate religion, John Dewey accurately observed that evolution is largely a scientific issue: "The vivid and popular features of the anti-Darwinian row tended to leave the impression that the issue was between science on one side and theology on the other. Such was not the

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> But infidelity, by ascribing every phenomenon to properties of matter, conceives a system for which it cannot account, and yet it pretends to demonstration.

7 THOMAS PAINE, *Age of Reason: The Existence of God, in* LIFE AND WRITINGS OF THOMAS PAINE 2-4, 8 (Daniel Edwin Wheeler ed., 1908).

[45] 6 THOMAS PAINE, *Age of Reason: Being an Investigation of True and Fabulous Theology in Two Parts, in* LIFE AND WRITINGS OF THOMAS PAINE 132 (Daniel Edwin Wheeler ed., 1908).

[46] *Scopes*, 289 S.W. at 368 (Chambliss, J., concurring).

[47] *See* CLARK, *supra* note 41, at 15 (parenthetical omitted). Haeckel (1834-1919) was a German zoologist and evolutionist who was a strong proponent of Darwinism and who proposed new notions of the evolutionary descent of man. s.v. "Haeckel, Ernst," XII ENCYCLOPAEDIA BRITANNICA 803-804 (11th ed. 1910).

[48] *Id.* at n.2. Sir Charles Lyell (1797-1875) was a Scottish geologist largely responsible for the general acceptance of the view that the earth's surface developed over long periods of geologic time. Lyell's achievements laid the foundation for evolutionary biology. He authored several works that influenced Darwin. s.v. "Lyell, Sir Charles Baronet," XVII ENCYCLOPAEDIA BRITANNICA 158-159 (11th ed. 1911).

case—the issue lay primarily within science itself, as Darwin himself early recognized."[49]

Indeed, this has always been, and still is, a hotly contested debate among highly credentialed scientists from both sides. These debates over evolution continue to prove that establishing the origin of man is, scientifically speaking, an inquiry still surrounded by much hypothetical conjecture and controversy. That is, while science has settled within its community issues such as gravity, fluid dynamics, heliocentricity, and the laws of motion, scientists still have not reached any agreement, much less clear consensus, on the issue of the origins of man.

The debate over the origins of man has always focused on theistic versus non-theistic explanations. Those who embrace theism may be loosely grouped under three different views: (1) intelligent-design (that which exists came into being by divine guidance, but the period of time required or the specifics of the process are unsettled, possibly unprovable, and therefore remain debatable); (2) theistic evolution (that which exists came into being over a long, slow passing of time through natural laws and processes but under divine guidance); and (3) special creation (that which exists came into being in six literal days). These three theistic views and the non-theistic view constitute four separate historical approaches to the origins of man.[50]

Proponents of the non-theistic approach began advocating their position twenty-five centuries ago. For example, Empedocles (495-435 B.C.) was the father and original proponent of the evolution theory, followed by advocates such as Democritus (460-370 B.C.), Epicurus (342-270 B.C.), Lucretius (98-55 B.C.), Abubacer (1107-1185), Bruno (1548-1600), Buffon (1707-1788), Helvetius (1715-1771), Erasmus Darwin (1731-1802), Lamarck (1744-1829), Goethe (1749-1832), and Lyell (1797-1875).[51]

In the theistic camp, Anaxigoras (500-428 B.C.) was the father of intelligent design, and the same belief was expounded by such distinguished scientists and philosophers as Descartes (1596-1650), Harvey (1578-1657), Newton (1642-1727), Kant (1729-1804), Mendel

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[49] JOHN DEWEY, THE INFLUENCE OF DARWIN ON PHILOSOPHY AND OTHER ESSAYS IN CONTEMPORARY THOUGHT 2 (1910).

[50] While multiple camps will occasionally lay claim to the same writer, theorist, or scientist, the individuals are listed according to the camp wherein the majority of writers now place them or in the camp with which their own writings best comport. For example, while many of the earliest writers believed in the Greek and Roman gods, they did not believe in a First Cause as the origin of man; they are, therefore, placed in the non-theistic origins camp. Similarly, other writers, such as Goethe and Bruno, were pantheists, believing that all of nature is god and that nature, therefore, created itself—that its origins simply sprang forth without a First Cause; these writers, too, are consequently placed in the camp of non-theistic origins.

[51] *See, e.g.*, OSBORN, *supra* note 30.

(1822-1884), Cuvier (1769-1827), and Agassiz (1807-1873).[52] Significantly, even Charles Darwin (1809-1882), strongly influenced by the writings of Paley (1743-1805),[53] embraced the intelligent design position, explaining that

> [a]nother source of conviction in the existence of God, connected with the reason and not with the feelings, impresses me as having much more weight. This follows from the extreme difficulty or rather impossibility of conceiving this immense and wonderful universe, including man with his capacity of looking far backwards and far into futurity, as the result of blind chance or necessity. When thus reflecting I feel compelled to look to a First Cause having an intelligent mind in some degree analogous to that of man; and I deserve to be called a Theist.
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> This conclusion was strong in my mind about the time, as far as I can remember, when I wrote the *Origin of Species* . . . .[54]

John Dewey, an ardent twentieth-century proponent of Darwinism, explained why the intelligent design position— scientifically speaking— was reasonable:

> The marvelous adaptations of organisms to their environment, of organs to the organism, of unlike parts of a complex organ— like the eye— to the organ itself; the foreshadowing by lower forms of the higher; the preparation in earlier stages of growth for organs that only later had their functioning— these things were increasingly recognized with the progress of botany, zoology, paleontology, and embryology. Together, they added such prestige to the design argument that by the late eighteenth century it was, as approved by the sciences of organic life, the central point of theistic and idealistic philosophy.[55]

This position of intelligent design, also called the anthropic or teleological view, is embraced by an increasing number of contemporary distinguished scientists, non-religious though some of them claim to be.[56]

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[52] *Id.*

[53] JAMES RACHELS, CREATED FROM ANIMALS: THE MORAL IMPLICATIONS OF DARWINISM 10 (1990) ("Darwin had studied [Paley's] reasoning and had decided that it was irrefutable."). Dr. James Rachels is a professor at the University of Alabama at Birmingham.

[54] CHARLES DARWIN, THE AUTOBIOGRAPHY OF CHARLES DARWIN 92-93 (Nora Barlow ed., 1958) (footnote omitted).

[55] DEWEY, *supra* note 49, at 11.

[56] Some of the contemporary academics and researchers embracing this position include Dr. Mike Behe of Lehigh University, Dr. Walter Bradley of Texas A & M, Dr. Sigrid Hartwig-Scherer of Ludwig-Maximilian University in Munich, Dr. Phillip Johnson and Dr. Jonathan Wells of the University of California at Berkeley, Dr. Robert Kaita of Princeton, Dr. Steven Meyer of Whitworth, Dr. Heinz Oberhummer of Vienna University, Dr. Siegfried Scherer of the Technical University of Munich, and Dr. Jeff Schloss of Westmont. There are numerous others that, to varying degrees, embrace the anthropic position: Dr. Brandon Carter of Cambridge, Dr. Frank Tipler of Tulane, Dr. Peter Berticci of Michigan

The second camp within the theistic approach is theistic evolution, which was first propounded by Aristotle (384-322 B.C.).[57] Other prominent expositors of this view included Gregory of Nyssa (331-396 A.D.), Augustine of Hippo (354-430 A.D.), St. Gregory the First (540-604 A.D.), St. Thomas Aquinas (1225-1274), Leibnitz (1646-1716), Swedenborg (1688-1772), Bonnet (1720-1793), and numerous contemporary scientists.[58] In fact, many of Darwin's contemporaries embraced this view, believing that "natural selection could be the means by which God has chosen to make man."[59] Dr. James Rachels, professor at the University of Alabama at Birmingham, confirms that many of Darwin's contemporaries espoused the theistic evolution theory:

> Mivart [a professor in Belgiuma who lived from 1827-1900] became the leader of a group of dissident evolutionists who held that, although man's body might have evolved by natural selection, his rational and spiritual soul did not. At some point God had interrupted the course of human history to implant man's soul in him, making of him something more than merely a former ape . . . .
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> . . . .
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> Wallace [who lived from 1823-1913] took a view very similar to that of Mivart: he held that the theory of natural selection applies to humans, but only up to a point. Our bodies can be explained in this way, but not our brains. Our brains, he said, have powers that far outstrip anything that could have been produced by natural selection. Thus he concluded that God had intervened in the course of human history to give man the 'extra push' that would enable him to reach the pinnacle on which he now stands . . . . Natural selection, while it explained much, could not explain everything; in the end God must be brought in to complete the picture.[60]

In fact, Darrow himself, during the trial, admitted that this was a prominent position of many in that day.[61] Dudley Malone, Darrow's co-counsel, even declared: "[W]e shall show by the testimony of men learned in science and theology that there are millions of people who believe in evolution and in the stories of creation as set forth in the Bible and who find no conflict between the two."[62]

State, Dr. George Gale of University of Missouri-Kansas City, Dr. John Barrow of Sussux University, Dr. John Leslie of the University of Guelph, Dr. Heinz Pagels of Rockefeller University, and Dr. John Earman of University of Pittsburgh.

[57] OSBORN, *supra* note 29 at 44.

[58] OSBORN, *supra* note 29 *passim*.

[59] RACHELS, *supra* note 53, at 3.

[60] *Id.* at 57-58. Mivart (1827-1900) was a professor and notable biologist in Belgium. *Id.* at 56. Wallace (1823-1913), Darwin's friend and rival, advocated natural selection prior to Darwin. *Id.* at 58.

[61] WORLD'S MOST FAMOUS COURT TRIAL, *supra* note *, at 83-84.

[62] *Id.* at 113.

Interestingly, writers who chronicle the centuries-long history of the evolution debate confirm that there have always been numerous evolutionists in both the theistic and the non-theistic camps.[63] Much of the proceedings in the *Scopes* trial reaffirmed that a belief in evolution was not incompatible with the teaching of theistic origins and a belief in a divine creator.

The third camp, special (or literal) creation, was championed by Francisco Suarez (1548-1617) and later by Pasteur (1822-1895), as well as by subsequent contemporary scientists.

The history of this controversy through recent years and even previous centuries makes clear that scientific discovery has not significantly altered any of these four views. There have always been, and still continue to be, scientists in each group finding new scientific facts that they interpret to bolster their arguments. Remarkably, only judges seem comfortable in settling which side of an ongoing centuries-old scientific debate is correct.

IV. PUBLIC OPINION ON THE ISSUE

Another noteworthy aspect of the Tennessee decision was a concurring Justice's desire to reach neutrality by teaching, on the one hand, neither the "Bible, or any of its doctrines or dogmas,"[64] or, on the other hand, "teaching [the] denial of . . . divine creation," because "[i]t is too well established for argument that 'the story of the divine creation of man as taught in the Bible' is accepted—not 'denied'—by millions of men and women . . . ."[65] Today, nearly a century-and-a-half after Darwin's original work, and following literally thousands of writings by scientists and philosophers on all sides of the evolution controversy, the court's characterization in the *Scopes* decision still seems accurately to reflect the public's sentiment today.

For example, in the 1920s, twenty state legislatures considered measures to prohibit the teaching of anti-theistic evolution; in the 1990s, the number of states that considered such measures was identical—twenty.[66] Polls also confirm that there has not been much shift in public opinion in recent decades. For example, in 1982, nine percent of the nation believed in non-theistic origins, thirty-eight percent in theistic

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[63] *See, e.g.*, OSBORN, *supra* note 29; *see also*, BOWLER, *supra* note 41; CLARK, *supra* note 41; CLODD, *supra* note 3.

[64] *Scopes*, 289 S.W. at 369 (Chambliss, J., concurring).

[65] *Id.*

[66] Steve Benen, *Science Test*, CHURCH & STATE, July/Aug. 2000, *at* http://www.au.org/cs7002.htm.

evolution, and forty-four percent in theistic special creation.[67] In 1998, an average of polls conducted from the 1980s and 1990s was compiled; the results showed that during that period, ten percent believed in non-theistic origins, forty percent in theistic evolution, and forty-five percent in theistic special creation.[68] A subsequent 1999 poll found that nine percent believed in non-theistic origins, forty percent in theistic evolution, and forty-seven percent in theistic special creation.[69]

Numerous other polls regularly confirm that from eighty-five to ninety percent of Americans embrace a theistic view, yet the courts simply do not permit this view to be presented,[70] preferring instead what the Tennessee court had described as the "teaching of a denial"[71] of the belief accepted "by millions of men and women."[72] The Supreme Court has indeed become a self-described "super board of education for every school district in the nation"[73] by prescribing non-theistic origins as the state orthodoxy throughout all public school classrooms.

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[67] *See* David W. Moore, *Americans Support Teaching Creationism as Well as Evolution in Public Schools*, GALLUP NEWS SERVICE (Aug. 30, 1999), *at* http://www.gallup.com/poll/releases/pr990830.asp.

[68] Stephen Huba, *Biblical Version of Creation OK by Americans*, DETROIT NEWS, Apr. 6, 1999, *available at* http://www.detnews.com/1999/religion/9904/06/04070004.htm.

[69] Moore, *supra* note 67.

[70] The courts have struck down as violations of the Constitution's Establishment Clause: (1) an Arkansas anti-evolution statute, *see* Epperson v. Arkansas, 393 U.S. 97 (1968); (2) a Mississippi statute prohibiting the teaching that man ascended from lower life forms, *see* Smith v. State, 242 So.2d 692 (Miss. 1970); (3) the teaching of any view or form of what the courts call "creationism", *see* Wright v. Houston Indep. Sch. Dist., 366 F.Supp 1208 (S.D. Tex. 1972); (4) a statute declaring that teachings regarding the origins of man must be taught only as theories, *see* Daniel v. Waters, 515 F.2d 485 (6th Cir. 1975); *see also* Steele v. Waters, 527 S.W.2d 72 (Tenn. 1975); (5) a statute requiring "balanced-treatment" between competing views of the origins of man, *see* McLean v. Arkansas Bd. of Educ., 529 F.Supp. 1255 (E.D. Ark. 1982), *see also* Edwards v. Aguillard, 482 U.S. 578 (1978); and (6) a policy requiring a disclaimer which informs students that evolution is only one theory of the origin of life and matter, to be read prior to the introduction of the theory of evolution into class discussion, *see* Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337 (5th Cir. 1999). Additionally, the courts have held that to discharge a teacher for teaching evolution was violating the Establishment Clause, *see* Moore v. Garston County Bd. of Educ., 357 F.Supp 1037 (W.D.N.C. 1973), whereas to discharge a teacher for teaching creation was protecting the Establishment Clause, *see* Webster v. New Lenox Sch. Dist., No. 88-C2328, 1989 U.S. Dist. LEXIS 6091 (N.D. Ill. May 25, 1989). Furthermore, to teach evolution, or to use textbooks teaching evolution, does not violate a creationist's religious rights, *see* Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987).

[71] *Scopes*, 289 S.W. at 369 (Chambliss, J., concurring).

[72] *Id.*

[73] McCollum v. Bd. of Educ., 333 U.S. 203, 237 (1948).

V. AN INFORMED DECISION

Significantly, each provision of our governing documents reflects a deliberate choice based on specific reasoning. As previously demonstrated, the evolution controversy was well-developed at the time our founding documents were drafted. The Framers, therefore, deliberately chose to incorporate into those documents not only a belief in elected representation over hereditary leadership, the consent of the governed over monarchy, separation of powers over consolidation, bicameralism over unicameralism, and republicanism over democracy, but also the belief in theistic origins over that of non-theistic origins.

Consequently, the fact that a position for a divine creator is officially made a part of our founding documents— documents of government and not documents of religion— makes theistic origins a part of our political, not merely religious or even scientific, theory. Under our founding documents, therefore, the judiciary can no more disallow theism than it can disallow republicanism or separation of powers.

Yet, if the contemporary courts are correct that either the acknowledgment of God or the teaching of a divine creator is an unconstitutional establishment of religion under the First Amendment, then evidently one of the purposes for the First Amendment was to prevent the teaching of specific principles in the Declaration of Independence. While such a conclusion is illogical, it is nevertheless defended by asserting that the belief in a creator is incorporated into the Declaration of Independence rather than the Constitution and that the Declaration of Independence is a separate document from, and is not to affect the interpretation of, the Constitution.

This argument is of recent origin, however, because well into the twentieth century, the Declaration of Independence and the Constitution were viewed as interdependent rather than as independent documents. In fact, the United States Supreme Court declared, "[The Constitution] is but the body and the letter of which the [Declaration of Independence] is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence."[74]

No other conclusion logically can be reached since the Constitution directly attaches itself to the Declaration of Independence in Article VII by declaring: "Done in convention by the unanimous consent of the States present the seventeenth day of September in the Year of our Lord one thousand seven hundred and eighty seven, and of the independence of the United States of America the twelfth."[75]

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[74] Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, 165 U.S. 150, 160 (1897).

[75] U.S. CONST. art. VII.

Additional evidence that the Framers viewed the Declaration of Independence as inseparable from the Constitution is shown by the fact that U.S. Presidents, including George Washington, John Adams, Thomas Jefferson, and James Madison, dated their government acts under the Constitution from the Declaration of Independence rather than the Constitution.[76]

Furthermore, the admission of territories as States into the Union was often predicated on an assurance by the State that the State's "[C]onstitution, when formed, shall be republican, and not repugnant to the [C]onstitution of the United States and the principles of the Declaration of Independence . . . ."[77]

The Framers believed that the Declaration of Independence provided the core values by which the Constitution was to operate and that the Constitution was not to be interpreted apart from those values. As John Quincy Adams explained in his famous oration, The Jubilee of the Constitution:

> [T]he *virtue* which had been infused into the Constitution of the United States . . . was no other than the concretion of those abstract principles which had been first proclaimed in the Declaration of Independence . . . .
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> . . . .
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> This was the platform upon which the Constitution of the United States had been erected. Its VIRTUES, its republican character, consisted in its conformity to the principles proclaimed in the Declaration of Independence, and as its administration . . . was to depend upon the . . . *virtue*, or in other words, of those principles proclaimed in the Declaration of Independence, and embodied in the Constitution of the United States.[78]

The Framers never imagined that the Constitution could be interpreted to violate the values they had proclaimed in the Declaration. For, under America's government as originally established, a violation of the principles of the Declaration of Independence was just as serious as a violation of the provisions of the Constitution. Nonetheless, courts over

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[76] *See* 1 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897 at 80 (1900) (proclamation by George Washington on August 14, 1790); 1 *id.* at 249 (proclamation by John Adams on July 22 1797); 1 *id.* at 357 (proclamation by Thomas Jefferson on July 16, 1803); 1 *id.* at 473 (proclamation by James Madison on August 9, 1809); 2 *id.* at 36 (proclamation by James Monroe on April 28, 1818); 2 *id.* at 376 (proclamation by John Quincy Adams on March 17, 1827); 2 *id.* at 440 (proclamation by Andrew Jackson on May 11, 1829).

[77] 13 THE STATUTES AT LARGE, TREATIES, AND PROCLAMATIONS, OF THE UNITED STATES OF AMERICA 33 (Boston, Little, Brown & Co. 1866). *See also* 34 THE STATUTES AT LARGE OF THE UNITED STATES OF AMERICA 269 (1907).

[78] JOHN QUINCY ADAMS, THE JUBILEE OF THE CONSTITUTION 54 (New York, Samuel Colman 1839) [hereinafter JUBILEE OF THE CONSTITUTION].

the past half-century have isolated the two documents, making them mutually exclusive.

VI. A BATTLE OF CIVILIZATIONS

Returning to an examination of the *Scopes* case, since the point in question was not whether the teaching of evolution could be banned, but whether teaching a doctrine that denied the principles of the founding documents could be banned, what did the participants of the *Scopes* case see as the real issue? Strikingly, both sides believed that the case actually represented a struggle for society itself.

Scopes's defense counsel Arthur Hays described the case as a "duel to the death,"[79] and prosecutor General Thomas Stewart confirmed that it was an issue that "strikes at the very vitals of civilization."[80] William Jennings Bryan called it "a duel between two great ideas,"[81] and Darrow, shortly after the trial started, deprecatingly acknowledged that he was arguing the case as if it were "a death struggle between two civilizations."[82]

The participants on each side—like so many before and after them—understood that the ramifications of the question of theistic origins went far beyond any alleged scientific dispute and focused rather on what type of civilization America would experience. Interestingly, much of the debate in the trial actually addressed the societal ramifications that would be realized under each viewpoint.

Yet, how does a conflict between a theistic and a non-theistic view of the origins of man actually affect civilization? The answer to this question is that the embraced view determines a culture's approach to the meaning of life, and, subsequently will define both the purpose of government and the manner in which it will interact with its citizens. As Princeton Professor Peter Singer explains,

> In what sense does rejection of belief in a god imply rejection of the view that life has any meaning? If this world had been created by some divine being with a particular goal in mind, it could be said to have meaning, at least for that divine being. If we could know what the divine being's purpose in creating us was, we could then know what the meaning of our life was for our creator. If we accepted our creator's purpose (though why we should do that would need to be explained), we could claim to know the meaning of life.
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> When we reject belief in a god we must give up the idea that life on this planet has some preordained meaning. Life as a whole has no

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79 WORLD'S MOST FAMOUS COURT TRIAL, *supra* note *, at 170.

80 *Id.* at 198.

81 *Id.* at 170.

82 *Id.* at 74.

> meaning. Life began, as the best available theories tell us, in a chance combination of molecules; it then evolved through random mutations and natural selection. All this just happened; it did not happen for any overall purpose. Now that it has resulted in the existence of beings who prefer some states of affairs to others, however, it may be possible for particular lives to be meaningful.[83]

As Singer observes, if there is a creator, then there can be a purpose and meaning— even an intrinsic value— to life; however, if there is no creator, then there is meaning only for "particular" lives. Thus, how government touches the lives of its citizens will be radically different, depending on which view is adopted. For example, will all lives have intrinsic worth and therefore be protected equally by government, or will only "particular" lives have worth and, therefore, receive special protection and treatment? If all lives do not have equal worth, then who determines which lives will have worth and what criteria will be used to make that determination? If there is no creator, then there is no special purpose for a life— or a society— and in place of order and design will be policies reflecting chance and variableness. If there is no design, then even morality itself must become relative, dependent upon time, place, and circumstances.

John Dewey, a strong supporter of Darwin, recognized the difference that a belief in design made to a society. He acknowledged that a society which embraced the "design argument" was characterized by "purposefulness" and that "purposefulness gave sanction and worth to the moral and religious endeavors of man."[84] However, as Dewey also recognized, "the *Origin of Species* introduced a mode of thinking that in the end was bound to transform the logic of knowledge, and hence the treatment of morals, politics, and religion."[85] In short, to embrace Darwin's principles would result in a paradigm shift throughout the whole of society. As Commager confirmed:

> The impact of Darwin . . . repudiated the philosophical implications of the Newtonian system, substituted for the neat orderly universe governed by fixed laws, a universe in constant flux whose beginnings were incomprehensible and whose ends were unimaginable, reduced man to a passive role, and by subjecting moral concepts to its implacable laws deprived them of that authority which had for so long furnished consolation and refuge to bewildered man.[86]

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[83] PETER SINGER, PRACTICAL ETHICS 331 (2d ed. 1993) [hereinafter PRACTICAL ETHICS].

[84] DEWEY, *supra* note 49, at 10.

[85] *Id.* at 2.

[86] COMMAGER, *supra* note 6, at 83.

Darrow recognized—and Dewey, Singer, and others subsequently confirmed—that Darwinism would result in a new approach to civilization.[87]

However, this difference in the societal—that is, the civilizational—effects proceeding from which view of the origins of man was adopted was already understood and articulated centuries ago both by the Framers and by the political theorists on whom they relied. Therefore, their decision to include the belief in a creator in our form of government willfully established an approach that would distinguish the American philosophy of a civilized society from the non-theistic approaches to civilization present in so many other nations of that day.[88]

The remainder of this work will document the various manners in which the judiciary's rejection of theistic origins has dramatically altered American civilization's approach to law, morality, crime and punishment, and even the role and the form of its government.[89]

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[87] Significantly, dictionaries utilize terms such as "mode of thinking," "morals," "taste," and "manners" to define the word "civilization," and as will be subsequently demonstrated, each would be dramatically altered according to which view of origins is embraced.

[88] For example, George Washington's Farewell Address in which, after comparing American government with the governments in France and across much of Europe, Washington reminded Americans that "[o]f all the dispositions and habits which lead to political prosperity, Religion, and Morality are indispensable supports." George Washington, Address of George Washington 1, 22-23 (Baltimore, Christopher Jackson 1796). Other Framers who made similar comparisons between America's theistic approach and the non-theistic approaches of other nations, such as France, included Gouverneur Morris (penman and signer of the Constitution), Fisher Ames (a Framer of the First Amendment and the Bill of Rights), and Noah Webster (one of the first to call for a Constitutional Convention and the individual most responsible for Article I, Section 8, clause 8, of the Constitution). *See* Gouverneur Morris, *Letter to George Washington on April 29, 1789, in* 2 THE LIFE OF GOUVERNEUR MORRIS 66-69 (Boston, Gray & Bowen 1832); Fisher Ames, *A Warning Voice, in* THE NEW ENGLAND PALLADIUM, Apr. 17, 1804, *reprinted in* 1 WORKS OF FISHER AMES at 223-27 (W.B. Allen ed., Liberty Classics 1983); NOAH WEBSTER, THE REVOLUTION IN FRANCE *passim* (New York, George Bunce and Co. 1794).

[89] Whereas evolution in past generations could mean either theistic or non-theistic origins, as a result of court decisions over the past three decades, evolution is now understood to mean only the non-theistic view. In fact, even theistic evolution is currently called creationism and is seen to be "religious," notwithstanding the fact that many of its proponents—including Darwin, Paine, and Dewey—were not even remotely religious. Therefore, for the remainder of this work, the terms "evolution" and "Darwinism" will, according to their contemporary usage, refer to the non-theistic approach to the origins of man.

VII. UNIQUENESS V. SPECIESISM

From the belief that a creator made human life[90] and that human life was made with design and purpose, proceeds the ancillary belief that human life is, therefore, distinct. Consequently, not only is all human life equal in value,[91] but also, all human life is unique from and more

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[90] According to the Declaration of Independence, "all men are *created*." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

[91] The Declaration of Independence also states that "all men are created *equal*." *Id.* para. 2 (emphasis added). Critics assert that the Framers did not see all life as equal, and they point to slave-holding individuals among the Founders as evidence supporting their charge. This reflects what, regrettably, has become a common approach to the Founding Era: regardless of whether the topic is religion, morality, racism, or wealth, the tendency is to take the exception and portray it as the rule.

For example, on the slavery issue, while some Framers did own slaves, rarely is anything said of the overwhelming majority of Framers who did not own slaves and who rejected slavery. Also, rarely is it acknowledged that slavery was not the product of, nor was it an evil introduced by, the Founders; rather, slavery had been introduced into America nearly a century-and-a-half before the Founders were born and had been strongly forced upon them by British law. In fact, many of the Founders vigorously complained about the fact that every attempt they had made to end slavery and the slave trade in the Colonies (as Virginia had attempted to do in 1767 and Pennsylvania in 1774) had been vetoed by King George III.

Prior to the time of the Framers, there had been few serious efforts to dismantle the institution of slavery. John Jay, an author of the Federalist Papers and the first Chief Justice of the United States Supreme Court, identified the American Revolution as the point at which the change in national attitude toward slavery first began. 3 JOHN JAY, THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 342 (Henry P. Johnston ed., G. P. Putnam's Sons 1891) (letter to the English Anti-Slavery Society in June 1788). Historically speaking, the Founders collectively initiated the first changes against slavery. The Declaration of Independence marked the beginning of that official change.

In fact, many Framers used the occasion of the adoption of the Declaration of Independence and the separation from Great Britain to end slavery in their own States, including Pennsylvania in 1780 and Massachusetts in 1780. *See* COLLISON READ, AN ABRIDGMENT OF THE LAWS OF PENNSYLVANIA (Philadelphia, Read 1801), MASS. CONST. of 1780, art. I. Connecticut ended slavery with an act passed in October 1777. *See* 1 THE PUBLIC STATUTE LAWS OF THE STATE OF CONNECTICUT 623-25 (Hudson and Goodwin, 1808). Rhode Island followed suit by passing an act on February 27, 1784, *see* RHODE ISLAND SESSION LAWS 7-8 (Wheeler 1784). Vermont ended slavery in 1786, *see* VT. CONST., art. I (1786); New Hampshire ended slavery in 1792. *See* N.H. CONSTITUTION (1792); New York ended slavery in 1799 with an act passed on March 29, 1799. *See* LAWS OF THE STATE OF NEW YORK, PASSED AT THE TWENTY-SECOND SESSION, SECOND MEETING OF THE LEGISLATURE 721-23 (Loring Andrews 1799). New Jersey followed in 1804 by passing an act on February 15, 1804. *See* LAWS OF THE STATE OF NEW JERSEY, COMPILED AND PUBLISHED UNDER THE AUTHORITY OF THE LEGISLATURE 103-05 (Joseph Bloomfield ed., James J. Wilson 1811). Additionally, Ohio, Indiana, Illinois, Michigan, Wisconsin, and Iowa never permitted slavery due to a Congressional act. *See* AN ACT TO PROVIDE FOR THE GOVERNMENT OF THE TERRITORY NORTH-WEST OF THE RIVER OHIO (1789), *reprinted in* THE CONSTITUTIONS OF THE UNITED STATES OF AMERICA, at 366-67 (Trenton, Moore and Lake 1813). The Act was authored by Constitution signer Rufus King. *See* Letters, Public Documents, and Speeches of Rufus King, *in* 1 THE LIFE AND CORRESPONDENCE OF RUFUS KING, 1755-1794, at 288-89 (Charles R. King ed., 1894), The Act was signed into law by

President George Washington. *See* AN ACT TO PROVIDE FOR THE GOVERNMENT OF THE TERRITORY NORTH-WEST OF THE RIVER OHIO (1789), *reprinted in* ACTS PASSED AT A CONGRESS OF THE UNITED STATES OF AMERICA, at 104 (Hartford, Hudson and Goodwin 1791).

Furthermore, rarely is mention made of the fact that many of the Founders were leaders of abolition societies. For example, Benjamin Franklin and Benjamin Rush founded America's first anti-slavery society in 1774, John Jay was president of a similar society in New York; and Constitution signer William Livingston, as Governor of New Jersey, heard of the New York anti-slavery society and volunteered to help the work of that society. Other prominent Founding Fathers who were members of societies for ending slavery included Richard Bassett, James Madison, James Monroe, Bushrod Washington, Charles Carroll, William Few, John Marshall, Richard Stockton, and Zephaniah Swift. *See List of the Names of Members that Compose the Society for the Manumission of Slaves, & C. in the City of New York*, THE INDEPENDENT GAZETTEER, May 17, 1787; MINUTES AND PROCEEDINGS OF THE SECOND CONVENTION OF DELEGATES FROM THE ABOLITION SOCIETIES ESTABLISHED IN DIFFERENT PARTS OF THE UNITED STATES ASSEMBLED AT PHILADELPHIA, JANUARY 7, 1795, at 5 (Philadelphia, Zachariah Poulson, Jr. 1795); THE SECOND ANNUAL REPORT OF THE AMERICAN SOCIETY FOR COLONIZING THE FREE PEOPLE OF COLOR OF THE UNITED STATES (Washington, Davis & Force 1819); THE TWELFTH ANNUAL REPORT OF THE AMERICAN SOCIETY FOR COLONIZING THE FREE PEOPLE OF COLOR OF THE UNITED STATES, at 72-74 (Washington, James C. Dunn 1829); THE FOURTEENTH ANNUAL REPORT OF THE AMERICAN SOCIETY FOR COLONIZING THE FREE PEOPLE OF COLOR OF THE UNITED STATES (Washington, James C. Dunn 1831).

Similarly, nothing is said of the prominent anti-slavery positions of so many of the founders, including Charles Carroll, John Dickinson, John Jay, Richard Henry Lee, William Livingston, Luther Martin, George Mason, Joseph Reed, Benjamin Rush, Noah Webster, James Wilson, and John Witherspoon. *See generally*, WILLIAM ARMOR, LIVES OF THE GOVERNORS OF PENNSYLVANIA 223 (Philadelphia, James K. Simon 1872); 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 377 (Washington D.C., Jonathan Elliot 1836) (Luther Martin to Thomas Cockey Deye, Jan. 27, 1788); 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 452 (Washington D.C., Jonathan Elliot 1836) (George Mason, June 15, 1788); 2 JOHN JAY, THE LIFE AND TIMES OF JOHN JAY 174 (New York, J. & J. Harper 1833) (letter to the Rev. Dr. Richard Price, Sept. 27, 1785); Richard Henry Lee, *The First Speech of Richard Henry Lee in the House of Burgesses of Virginia*, *in* 1 RICHARD H. LEE, MEMOIR OF THE LIFE OF RICHARD HENRY LEE 19 (Philadelphia, H.C. Carey and I. Lea 1825); *Letter from William Livingston to James Pemberton* (Oct. 20, 1788), *in* 5 THE PAPERS OF WILLIAM LIVINGSTON 357, 358 (Carl E. Prince et al. eds., 1988); LUTHER MARTIN, THE GENUINE INFORMATION 57 (Philadelphia, Eleazor Oswald 1788); 2 KATE MASON ROWLAND, THE LIFE OF CHARLES CARROLL OF CARROLLTON 320-21 (New York, Knickerbocker Press 1898) (letter to Robert Goodloe Harper, Apr. 23, 1820); BENJAMIN RUSH, MINUTES OF THE PROCEEDINGS OF A CONVENTION OF DELEGATES FROM THE ABOLITION SOCIETIES ESTABLISHED IN DIFFERENT PARTS OF THE UNITED STATES ASSEMBLED AT PHILADELPHIA 24 (Philadelphia, Zachariah Poulson, Jr. 1794); CHARLES J. STILLE, THE LIFE AND TIMES OF JOHN DICKINSON 324 (Philadelphia, J.B. Lippincott Co. 1891) (letter to George Logan, Jan. 30, 1804); NOAH WEBSTER, EFFECTS OF SLAVERY ON MORALS AND INDUSTRY 48 (Hartford, Hudson and Goodwin 1793); 2 JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON 488 (Philadelphia, Lorenzo Press 1804) (lecture on the natural rights of individuals); 7 JOHN WITHERSPOON, THE WORKS OF JOHN WITHERSPOON 81 (Edinburgh, J. Ogle 1815) (from lectures on moral philosophy, Lecture X).

The simple fact is that there was no substantial progress in racial civil rights until the Declaration of Independence, and the work the framers began in the Declaration was

important than other life. Thus, man must be a good steward of the world in which he is placed.[92] Therefore, more is expected from man than from any other being in creation.

Samuel de Pufendorf,[93] one of the chief political theorists on whom the Framers relied and whom they highly recommended to following generations,[94] encapsulated this belief succinctly:

> [T]he Word *humanity*, import[s] that Condition in which Man is plac'd by his Creator, who hath been pleas'd to endue him with Excellencies and Advantages in a high Degree above all other Animate Beings . . . and that 'tis expected that he should maintain a Course of Life far different from that of Brutes.[95]

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carried on for generations afterwards. In fact, the Declaration was invoked authoritatively by individuals such as John Quincy Adams, Abraham Lincoln, and Daniel Webster. *See* JOHN QUINCY ADAMS, AN ORATION DELIVERED BEFORE THE INHABITANTS OF NEWBURYPORT 50 (Newburyport, Charles Whipple 1837); Abraham Lincoln, *Speech at Lewistown, Illinois* (Aug. 17, 1858), *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 544, 545-47 (Roy P. Basler ed., 1953); Daniel Webster, *Address on the Annexation of Texas* (Jan. 29, 1845), *in* 15 THE WRITINGS AND SPEECHES OF DANIEL WEBSTER (1903).

[92] As Dr. Rachels explains, "In the biblical sources we find not only the idea that man has dominion over nature but also the contrasting notion that all of creation is to be revered as God's handiwork. On this latter conception, man's duty is to be a good steward of nature, not its exploiter." RACHELS, *supra* note 53, at 91. As Peter Singer confirms,

> Religious ideas of man's special role . . . were interwoven with the newer, more benevolent attitude. Alexander Pope, for example, opposed the practice of cutting open fully conscious dogs by arguing that although 'the inferior creation' has been 'submitted to our power' we are answerable for the 'mismanagement' of it.

PETER SINGER, ANIMAL LIBERATION 210-11 (1975) (quoting *article*, THE GUARDIAN, May 21, 1713) [hereinafter ANIMAL LIBERATION].

Singer further notes,

> It has been claimed that the first legislation protecting animals from cruelty was enacted by the Massachusetts Bay Colony in 1641. Section 92 of 'The Body of Liberties,' printed in that year, reads: 'No man shall exercise any Tyranny or Cruelty towards any brute creature which are usually kept for man's use;' and the following section requires a rest period for animals being driven . . . . For a fuller account, see EMILY LEAVET, ANIMALS, AND THEIR LEGAL RIGHTS (Washington: Animal Welfare Institute, 1970).

*Id.*at 213 n. *.

[93] Samuel Pufendorf (1632-1694) was a Dutch educator and public official. As a professor of law and nature at universities in Sweden and Germany, his legal writings have caused him to be titled—along with Hugo Grotius—as one of the two fathers of international law.

[94] *See* ALEXANDER HAMILTON, THE FARMER REFUTED 5 (James Rivington 1775), *in* 1 PAPERS OF ALEXANDER HAMILTON 81, 86 (1961). *See also* 7 JOHN WITHERSPOON, *supra* note 91, at 152.

[95] 1 BARON PUFFENDORF, OF THE LAW OF NATURE AND NATIONS 4 (London, R. Sare 1717).

William Blackstone,[96] in his famous *Commentaries on the Laws of England*,[97] similarly explained,

> IN the beginning of the world . . . the all-bountiful creator gave to man, "dominion over all []the earth; and over the fish of the sea, and over the fowl of []the air, and over every living thing that moveth upon the []earth." This is the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notions may have been started by fanciful writers upon this subject. The earth therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the creator.[98]

Thus, from the belief in a creator came the ensuing belief that man was a unique species, alone endowed with superior rational and moral capacities, and that he held intrinsic worth surpassing that of what John Locke[99] had called "all inferiour creatures,"[100] or all other species. Man's

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[96] Sir William Blackstone (1723-1780) was a British jurist and political philosopher. A professor of law at Oxford, his legal writings had a significant influence on the thinking of America's Framers. In fact, political science professors have documented that Blackstone was one of the three most-frequently-invoked political sources (along with John Locke and Baron Charles Montesquieu) by the Framers in their political writings during the Founding Era (1760-1805). DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 143 (1988).

[97] Blackstone's *Commentaries on the Laws of England* (comprised of four volumes spanning the years 1766-1769) was probably the single most significant legal writing relied upon by the Framers of our documents. In fact, Thomas Jefferson commented that American lawyers used Blackstone's *Commentaries* with the same dedication and reverence that Muslims used the Koran. 12 THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 392 (1904) (referring to Thomas Jefferson's letter to Governor John Tyler, May 26, 1810). Edmund Burke noted that Blackstone's works sold better in America than in England. JOHN WINGATE THORNTON, THE PULPIT OF THE AMERICAN REVOLUTION XXVII (Boston, Gould and Lincoln 1860). Justice James Iredell, appointed to the United States Supreme Court by President George Washington, noted that Blackstone's *Commentaries* was the "manual of almost every student of law in the United States . . . ." Fries, 3 Dall 515 (Pa. 1799) (James Iredell's Charge to the Grand Jury in the Case of Fries). In fact, legal educator Roscoe Pound confirms that Blackstone's *Commentaries* formed the basis of *all* legal studies and bar exams until well into the twentieth century. ROSCOE POUND, SPIRIT OF THE COMMON LAW 150 (1921) [hereinafter SPIRIT OF THE COMMON LAW].

[98] 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 2-3 (Philadelphia, Robert Bell, 1771).

[99] John Locke (1632-1704) was a British educator, diplomat, and political philosopher. He taught at Oxford, and his legal writings were heavily relied upon by America's framers, especially in developing the concepts of social compact and the consent of the governed. In fact, political science professors have documented that Locke was one of the three most-frequently-invoked political sources (along with Sir William Blackstone and Baron Charles Montesquieu) by the framers in their political writings during the Founding Era (1760-1805). LUTZ, *supra* note 96, at 143.

[100] 4 JOHN LOCKE, THE WORKS OF JOHN LOCKE 353 (London, C. and J. Rivington 1824).

life, therefore, had purpose— or, in the words of John Dewey, "the classic notion of species carried with it the idea of purpose."[101]

Darwin changed that view, asserting that man actually was not very special after all. As he explained, "[m]an in his arrogance thinks himself a great work, worthy of the interposition of a deity. More humble and, I believe, true, to consider him created from animals."[102] Regarding this statement, Dr. James Rachels observed that "DARWIN wrote these words in 1838, twenty-one years before he was to publish *The Origin of Species*. He would go on to support this idea with overwhelming evidence, and in doing so he would bring about a profound change in our conception of ourselves."[103]

Independent observers had quickly grasped the ramifications of this change in the value of man. In fact, one critic challenged Sir Charles Lyell (a writer who strongly influenced Darwin) on this very point. As Lyell reported, "one of Darwin's reviewers put the alternative strongly by asking 'whether we are to believe that man is modified mud or modified monkey.' The mud is a great comedown from the 'archangel ruined.'"[104] Because of Darwin, man was now just one of the animals, and as Commager noted,

> The impact of Darwin . . . was a blow to Man rather than to God who, in any event, was better able to bear it, for if it relegated God to a dim first cause, it toppled Man from his exalted position as the end and purpose of creation, the crown of Nature, and the image of God, and classified him prosaically with the anthropoids.[105]

Consequently, since man was now just one of the animals, English scholar Henry Salt urged in 1892 that "we must get rid of the antiquated notion of a 'great gulf' fixed between [animals] and mankind, and must recognize the common bond of humanity that unites all living beings in one universal brotherhood."[106] Since man had now become part of one "universal brotherhood"[107] with all other animals, they all shared the same future. That is, if man had a soul and a spirit, so did the animals; if they did not, neither did man. As Salt explained, "mankind and the lower animals have the same destiny before them, whether that destiny be for immortality or for annihilation."[108] As Dr. Rachels so well

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[101] DEWEY, *supra* note 49, at 9-10.

[102] ANIMAL LIBERATION, *supra* note 92, at 15 (quoting from Charles Darwin's notebooks, 1836-1844).

[103] RACHELS, *supra* note 53, at 1.

[104] *Id.* at 79.

[105] COMMAGER, *supra* note 6, at 83.

[106] HENRY S. SALT, ANIMALS' RIGHTS CONSIDERED IN RELATION TO SOCIAL PROGRESS 8 (New York, MacMillan & Co. 1894).

[107] *Id.*

[108] *Id.* at 9.

summarized, "[a]fter Darwin, we can no longer think of ourselves as occupying a special place in creation— instead, we must realize that we are products of the same evolutionary forces, working blindly and without purpose, that shaped the rest of the animal kingdom."[109]

Dr. Margot Norris, professor at the University of California at Irvine, confirms that "Darwin collapsed the cardinal distinctions between animal and human . . . ."[110] Princeton Professor Peter Singer agrees, observing that because of Darwin's proposals, "[h]uman beings now knew that they were not the special creation of God, made in the divine image and set apart from the animals; on the contrary, human beings came to realize that they were animals themselves."[111] Therefore, as Henry Salt pointed out, "the term 'animals,' as applied to the lower races, is incorrect . . . since it ignores the fact that *man* is an animal no less than they."[112]

Today, the belief that man is in any way different from, or superior to, other animal species is known as "speciesism,"[113] a term coined in 1920 by Oxford psychologist Richard Ryder.[114] Peter Singer, a founder of PETA (People for the Ethical Treatment of Animals) calls speciesism "a form of prejudice, immoral and indefensible in the same way that discrimination on the basis of race is immoral and indefensible."[115] Just as a racist considers those from another race as inferior, a speciesist considers those from another species as inferior. A speciesist is simply a more universal form of a racist.

Dr. Steve Sapontzis, a professor at California State University, argues that since man is not superior to other species, it is therefore wrong to be a speciesist. He asserts that

> it is not membership in any particular species that confers higher value on one's life. It is the possession of intellectual abilities, which could belong to a wide variety of life forms. It is an empirical accident, a fluke of evolution, that only the human species has developed these abilities.[116]

North Carolina State University professor Tom Regan concurs:

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[109] RACHELS, *supra* note 53, at 1.

[110] MARGO NORRIS, BEASTS OF THE MODERN IMAGINATION 3 (1985).

[111] ANIMAL LIBERATION, *supra* note 92, at 214.

[112] SALT, *supra* note 106, at 14-15.

[113] Speciesism is defined in the Oxford English Dictionary as "'discrimination against or exploitation of certain animal species by human beings, based on an assumption of mankind's superiority.'" JEFFREY REIMAN, CRITICAL MORAL LIBERALISM 207 (1997).

[114] *Id.*

[115] ANIMAL LIBERATION, *supra* note 92, at 255.

[116] Steve Sapontzis, *Intellectual Superiority*, *at* http://www.ihc.ucsb.edu/Human-AnimalRFG.html#Intellectual (last visited Nov. 22, 2000) (abstract of a lecture given at the Human-Animal Relationships Research Focus Group at the University of California—Santa Barbara on February 27, 1999).

> it has long seemed to me that far too much moral importance is attached to being a person . . . . That someone is a person is morally relevant, certainly. But that being a person makes one morally superior, or confers on that individual moral rights no other living being can possibly possess: these seem to me to be more in the nature of arrogant dogma than reasoned belief.[117]

Dr. Marc Hauser, professor at Harvard, agrees:

> To admire our species for its qualities is natural. To place us with gods and angels, *above* all the others, is both pompous and boring. It is pompous because it places us on the top of an intellectual pyramid without articulating the criteria for evaluation. It is boring because it ignores differences in thinking, and fails to search for an understanding of how different shades of mind evolved.[118]

Steven Wise, instructor of animal law courses at four universities, ridicules as "imbecilic" the belief that human beings are superior to other animals and charged with dominion over them.[119] Very simply, all species are equal—or, in the words of Ingrid Newkirk, director of a powerful animal rights group, "A rat is a pig is a dog is a boy."[120]

If there is no significant difference in value between the species, then the death of a member of a non-human species is as great a tragedy as the death of one from the human species. As Singer explains,

> [W]hether a being is or is not a member of our species is, in itself no more relevant to the wrongness of killing it than whether it is or is not a member of our race. The belief that mere membership of our species, irrespective of other characteristics, makes a great difference to the wrongness of killing a being is a legacy of religious doctrines . . . .[121]

In fact, in response to the question, "If you were aboard a lifeboat with a baby and a dog, and the boat capsized, would you rescue the baby or the dog?" Dr. Regan answered, "If it were a retarded baby, and bright dog, I'd save the dog."[122]

With the rejection of the theistic approach to origins, all other life forms are now elevated in value to that once uniquely held by humans. This view has resulted in an aggressive animal rights movement. Dr.

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[117] Tom Regan, *Putting People in Their Place*, *at* http://www.ihc.ucsb.edu/Human-AnimalRFG.html#/Putting (last visited Nov. 22, 2000) (abstract of a lecture given at the Human-Animal Relationships Research Focus Group at the University of California—Santa Barbara on February 27, 1999).

[118] MARC HAUSER, WILD MINDS: WHAT ANIMALS REALLY THINK 13 (2000).

[119] STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS 19 (2000).

[120] Stephen Chapman, *Behind the Crusade Against Fur Is A Bizarre Agenda*, CHI. TRIB., Dec. 3, 1989, at C3.

[121] PRACTICAL ETHICS, *supra* note 83, at 150.

[122] The National Animal Alliance Interest, *Animal rights quotes about pets*, at http://www.naiaonline.org/Animalrightsquote.htm (last visited Nov. 22, 2000) (quoting Tom Regan).

Jack Albright, professor at Purdue University, summarizes the main tenets of the animal-rights non-speciesists:

> [P]roponents of animal rights hold that animals must not be exploited in any manner. In other words, the only interactions humans should have with animals are those that occur by happenstance or those that are initiated by an animal. Animal rights advocates believe that animals have basic rights— many say, the same as people— to be free from confinement, pain, suffering, use in experiments, and death for reason of consumption by other animals (including humans). Thus, animal rights advocates oppose the use of animals for food, for clothing, for entertainment, for medical research, for product testing, for seeing-eye dogs and as pets . . . . The animal rights proponents believe that humans have evolved to a point where they can live without any animal products— meat, milk, eggs, honey, leather, wool, fur, silk, byproducts, etc. These advocates offer a long list of concerns in support of the conclusion that neither medical researchers nor the cosmetic industry has the right to experiment on animals. They also conclude that the animal kingdom is exploited by hunters, zoos, circuses, rodeos, horse racing, horseback riding, the use of simians (small primates) to assist quadriplegics in wheelchairs, and by the keeping of animals as pets.[123]

Under this more "evolved" non-speciesist view, the alleged mistreatment of animals is often described in terms of human brutalities and compared to human atrocities. For example, the co-director of one national animal rights group declared, "Six million people died in concentration camps, but six billion broiler chickens will die this year in slaughterhouses."[124] Others, like Peter Singer, a candidate from the Green Party, make similar comparisons:

> You cannot write objectively about the experiments of the Nazi concentration camp "doctors" on those they considered "subhuman" without stirring emotions; and the same is true of a description of some of the experiments performed today on nonhumans in laboratories in America, Britain, and elsewhere.[125]

Long-time California State University professor Steve Sapontzis agrees:

> Believing that the superior value of human life justifies sport hunting, luxury furs, or veal production presumes a hidden, feudalistic premise. That is an easy presumption, however, when we are sure that we are and will remain at the top of the feudal power pyramid. That is, of

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[123] Jack L. Albright, *Animal Welfare Issues: A Critical Analysis*, *at* http://www.nal.usda.gov/awic/pubs/97issues.htm (last visited Nov. 22, 2000) (discussion paper collected in Animal Welfare Issues Compendium, Sept. 1997).

[124] Chip Brown, *She's a Portrait of Zealotry In Plastic Shoes*, WASH. POST, Nov. 13, 1983, at B1.

[125] ANIMAL LIBERATION, *supra* note 92, at xi.

> course, just what we are sure of in our relation to animals, and why we can with such clear consciences continue to be Nazis to our animals.[126]

Singer also finds similarities with African-American slavery, declaring that what animals have endured "can only be compared with that which resulted from the centuries of tyranny by white humans over black humans."[127] In fact, Dr. Susan Finsen, professor at California State University, believes that those human atrocities and even the current "exploitation of women, gays, third world peoples, etc., is bound up with the exploitation of animals."[128] Singer thus asserts, "It can no longer be maintained by anyone but a religious fanatic that man is the special darling of the whole universe, or that other animals were created to provide us with food . . . ."[129]

Believing, then, that the death of an animal is the equivalent of a Nazi murder, non-speciesists make every effort to bring to bear the full force of the law to protect animals. So strong is the movement resulting from this non-theistic belief of origins that courses on animal law are now being offered at Harvard University, the University of California, Vermont Law School, Georgetown University, John Marshall Law School, Tufts University, the University of Oregon, and a number of other prominent schools.

Seeking to remove any and all distinctions between humans and animals, the effort is underway to obtain not only legal "personhood status" for animals, but also to win for them "[m]any of the 'rights' that humans consider profoundly dear, such as life, liberty, and the pursuit of happiness."[130] Professor Steven Wise of the John Marshall Law School sets forth the goal:

> For centuries, a Great Legal Wall has divided humans from every other species of animal in the West. On one side, every human is a person with legal rights; on the other, every non-human is a thing with no legal rights. Every animal rights lawyer knows that this barrier must be breached.[131]

The difficulties faced in ultimately achieving these legal rights for non-human animals, according to Professor Wise, is that "[s]ince 'animal law' is primarily a matter of state concern, the battle for the legal

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[126] Sapontzis, *supra* note 116.

[127] ANIMAL LIBERATION, *supra* note 92, at ix.

[128] Susan Finsen, *Obstacles to Legal Rights for Animals: Can We Get There From Here?*, 3 ANIMAL L. i, iii (1997).

[129] ANIMAL LIBERATION, *supra* note 92, at 215.

[130] Gwendellyn Jo Earnshaw, *Equity as a Paradigm for Sustainability: Evolving the Process Toward Interspecies Equity*, 5 ANML L. 113, 122 (1999).

[131] Steven Wise, *Animal Thing to Animal Person— Thoughts on Time, Place, and Theories*, 5 ANIMAL L. 61 (1999) (footnote omitted) [hereinafter *Animal Thing to Animal Person*].

personhood of non-human animals will have to proceed on fifty state fronts."[132]

Recognizing that non-human animals "have no more power to bring their own claims [before a court] than do human incompetents,"[133] Wise therefore recommends several methods by which humans might sue on behalf of non-human animals, including actions such as the seeking of guardianship, the use of the Federal Rules of Civil Procedure, and the intervention in a forfeiture action against non-human animals.[134] Significantly, his methods have proven successful.

For example, in 1994, Taro, an Akita dog, was sent to "death row" for attacking and marring a young child, but New Jersey Governor Christine Todd Whitman signed an official state pardon for the dog on the basis of forfeiture intervention.[135] In 1998, the United States Court of Appeals for the District of Columbia granted legal standing to a man suing on behalf of monkeys in a Long Island, New York zoo.[136] In 1993, the Federal Rules of Civil Procedure were extended to a dolphin, with the court declaring that the "rule could 'apply to . . . non-human entities.'"[137]

With attorneys thus "fighting for the rights of the disenfranchised,"[138] an amazing cadre of suits now blurs the distinction between human animals and non-human animals. In fact, the rhetoric surrounding those cases increasingly describes non-human animals in terms that once were limited solely to humans.

For example, a family in Massachusetts, suing the owners of dogs that killed their sheep, sought more than just the traditional recovery for damages to their livestock. As they explain, because they were forced to watch "a lamb grow up without a mother" and to "live with this fear" of dogs, they are seeking "emotional damages and loss of companionship, just as if a child had been killed."[139] In a separate case based on the injury of a pet at a kennel, a family sued for "emotional distress" because they "deem that animal as a part of their family [and] look at the animal

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[132] *Id.* at 62.

[133] *Id.* at 65.

[134] *Id.* at. 65-66.

[135] *See* Exec. Order No. 7 (Jan. 28, 1994) (pardon issued by New Jersey Governor Christine Todd Whitman).

[136] Animal Legal Defense Fund, Inc. v. Glickman, 154 F.3d 426, 445 (D.C. Cir. 1998).

[137] *Animal Thing to Animal Person*, *supra* note 131, at 65-66.

[138] Dana Coleman, *How Lawyers Deal With Clients Who Bark*, THE NEW JERSEY LAWYER, Aug. 24, 1998, at 5.

[139] *Living on Earth*, (NPR radio broadcast, Mar. 3, 2000), *at* http://www.loe.org/archives/000303htm#feature1.

as another person."[140] In fact, damages were even awarded in one case because a dog "cried" when a vet worked on its teeth.[141]

Not only do such cases routinely employ once uniquely human rhetoric, such cases now decide issues for animals based on how similar issues for humans would be determined. In fact, courts even acknowledge that in cases settling disputes over the possession of animals, they may "analogize it to a child custody case, inquiring into what was in the 'best interests'"[142] of the animal, a term usually reserved for children in divorce proceedings. Therefore, in a "custody dispute" over a cat, the court made its determination based on what was in the "cat's best interests," thereby allowing the cat to remain where it had "lived, prospered, loved and been loved" for the previous four years.[143]

Also reflective of the use of traditional human descriptions is that of placing animals in adoptive homes,[144] of seeking damages for the loss of the "companionship, loyalty, security, and friendship"[145] of animals killed in "wrongful death" scenarios, and even of comparing the handling of a deceased pet in terms of "the anguish resulting from the mishandling of the body of a child."[146]

Clearly, many distinctions between humans and animals, legally speaking, are blurring, as evidenced by the language in this ruling from a 1994 Texas case:

> [Dogs] represent some of the best human traits, including loyalty, trust, courage, playfulness, and love . . . . At the same time, dogs typically lack the worst human traits, including avarice, apathy, pettiness, and hatred.
>
> Scientific research has provided a wealth of understanding to us that we cannot rightly ignore. We now know that mammals share with us a great many emotive and cognitive characteristics, and that the higher primates are very similar to humans neurologically and genetically. It is not simplistic, ill-informed sentiment that has led our society to observe with compassion the occasionally televised plights of stranded whales and dolphins. It is, on the contrary, a recognition of a kinship that reaches across species boundaries.
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> The law must be informed by evolving knowledge and attitudes.[147]

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[140] Nichols v. Sukaro Kennels, 555 N.W.2d 689, 691 (Iowa 1996).

[141] Richard Willing, *Under Law, Pets are Becoming Almost Human*, USA TODAY, Sept. 13, 2000, at 1A.

[142] Morgan v. Kroupa, 702 A.2d 630, 631 (Vt. 1997).

[143] Raymond v. Lachmann, 695 N.Y.S.2d 308, 309 (N.Y. App. Div 1999).

[144] *See* Porter v. DiBiasio, 93 F.3d 301 (7th Cir. 1996).

[145] Jankoski v. Preiser Animal Hosp., Ltd., 510 N.E.2d 1084, 1085 (Ill. App. Ct. 1987); *see also* Brousseau v. Rosenthal, 443 N.Y.2d 285 (N.Y. Civ. Ct. 1980).

[146] La Porte v. Associated Indeps., Inc., 163 So. 2d 267, 269 (Fla. 1964).

[147] Bueckner v. Hamel, 886 S.W.2d 368, 377 (Tex. App. 1994) (Andell, J., concurring).

Notice the adoption of the legal position that there is a "kinship" between man and other animals, and that the "kinship" reaches "across species boundaries" because of our "evolving knowledge and attitudes."[148]

This language diminishing legal distinctions between species—that is, between "human animals" and "non-human" animals—is a direct result of the non-theistic approach to the origins of man. Clearly, Darwinism has changed the face of American law.

Each of the previous cases, and the new type of American civilization they represent, proceeds from acceptance of Darwin's statement that "the differences between human beings and animals are not so great as is generally supposed."[149] Science certainly seems to confirm Darwin's thesis—as well as the position held by non-speciesists—for there is "scientific evidence suggesting that chimpanzees and humans diverged from the same evolutionary path and that their DNA is nearly 98.5 percent identical."[150] Yet, as explained by Chapman University Professor Tibor Machan, it is not the similarities that are the most consequential element of the comparison between man and animals:

> Indeed, while humans share about 97% of their DNA structure with some higher non-human animals, those last 3% are so vital that all of human civilization, religion, art, science, philosophy and, most importantly, their moral nature depends upon it. And this is attested to by most vegans [vegetarians]—e.g., when they appeal to human beings to deal with other animals in considerate ways rather than to other animals to do this. None of them turn to a lion, for example, to implore it not to kill the zebra or to do it more humanely.[151]

It is the three-percent difference in DNA structure that distinguishes the theistic view of man's origin from the non-theistic view, as well as from the various societal and cultural consequences distinguishing each belief. As John Quincy Adams warned long ago, without a belief in theistic origins—or, said another way, in that three-percent difference in DNA structure—"Man will have no conscience, he will have no other law than that of the tiger and the shark . . . ."[152]

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[148] *Id.*

[149] ANIMAL LIBERATION, *supra* note 92, at 214.

[150] Gary Dorsey, *Animal Rights Movement Spawns New Discipline: Animal Law*, DETROIT NEWS, Feb. 9, 2000, *available at* http://detnews.com/2000/religion/0003/01/03010010.htm.

[151] Tibor R. Machan, *Does Having Interest Mean Having Rights?*, *at* http://www.ich.ucsb.edu/Human-AnimalRFG.html#Intellectual (Feb. 27, 1999).

[152] JOHN QUINCY ADAMS, LETTERS OF JOHN QUINCY ADAMS TO HIS SON ON THE BIBLE AND ITS TEACHINGS 23 (James M. Alden 1859) (referring to a letter dated September 15, 1811).

VIII. TRANSCENDENCE V. RELATIVISM

If the human species is superior to other species, then, morally speaking, more should be expected from him than from other species. But what should be the standard for determining man's morality? What should be the authority for establishing the moral standards for man? Should those standards be established objectively or subjectively? The answers to these questions vary dramatically depending on whether a theistic or non-theistic approach is applied.

Under the theistic approach, man is not the source of the moral standards by which his conduct is governed. As James Wilson[153] explained,

> When we view the inanimate and irrational creation around and above us, and contemplate the beautiful order observed in all its motions and appearances; is not the supposition unnatural and improbable— that the rational and moral world should be abandoned to the frolicks of chance, or to the ravage of disorder? What would be the fate of man and of society, was every one at full liberty to do as he listed, without any fixed rule or principle of conduct, without a helm to steer him— a sport of the fierce gusts of passions, and the fluctuating billows of caprice?[154]

Blackstone had identified the source of what Wilson termed the "fixed rule[s] or principle[s] of conduct" which were to "steer" man:[155]

> MAN, considered as a creature, must necessarily be subject to the laws of his creator, for he is entirely a dependant being. A being independant of any other, has no rule to pursue, but such as he prescribes to himself; but a state of dependance will inevitably oblige the inferior to take the will of him on whom he depends, as the rule of his conduct . . . . And consequently, as man depends absolutely upon his maker for every thing, it is necessary that he should in all points conform to his Maker's will.
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> THIS will of his maker is called the law of nature.[156]

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[153] James Wilson (1742-1798) was a signer of both the Declaration of Independence and the Constitution, one of only six Framers to hold that distinction. He was the second most active member of the Constitutional Convention, speaking on the floor of the Convention 168 times, and was subsequently appointed to the United States Supreme Court as an original Justice by President George Washington. Wilson is credited with starting the first organized legal training in America for law students and authored several legal works, including a 1792 Commentary on the Constitution of the United States of America and a three-volume set of legal lectures delivered to law students while Wilson was sitting as a Justice on the Court. Wilson was a leading figure in the development of American constitutional law and was, perhaps more than any other individual, responsible for laying the foundation for a purely American system of jurisprudence.

[154] 1 WILSON, *supra* note 91, at 113-14.

[155] *Id.*

[156] 1 BLACKSTONE, *supra* note 98, at *39.

> THIS law of nature, being co-eval 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.[157]

This "law of nature"—the "natural law" of which our Framers so often spoke, and which they incorporated into our founding documents—was to be the basis for man's moral standards. As Zephaniah Swift, author of America's first legal text, explained, "[T]he transcendent excellence and boundless power of the Supreme Deity . . . impressed upon [mankind] those general and immutable laws, that will regulate their operation through the endless ages of eternity. . . . These general laws . . . are denominated the laws of nature."[158]

Other Framers were in strong agreement that man's moral conduct was to conform to the "natural law" established by the creator. For example, Samuel Adams wrote that "[i]n the supposed state of nature, all men are equally bound by the laws of nature, or to speak more properly, the laws of the Creator . . . ."[159] John Quincy Adams concurred: "the laws of nature and of nature's God . . . of course presupposes the existence of a God, the moral ruler of the universe, and a rule of right and wrong, of just and unjust, binding upon man, preceding all institutions of human society and of government."[160] Noah Webster, a legislator and judge from the Framers' era, defined the "'[*l*]*aw of nature*' [a]s a rule of conduct arising out of the natural relations of human beings established by the Creator, and existing prior to any positive precept [or human law] . . . . These . . . have been established by the Creator . . . ."[161]

The natural law embodied transcendent values—values and truths which our Framers described with adjectives such as "immutable,"[162] "fixed,"[163] "superior in obligation,"[164] "paramount,"[165] and "binding upon

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[157] *Id.* at *41.

[158] 1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 6-7 (Windham, John Byrne 1795).

[159] 4 SAMUEL ADAMS, THE WRITINGS OF SAMUEL ADAMS 356 (Harry Alonzo Cushing ed., 1908) (to the Legislature of Massachusetts on January 17, 1794).

[160] JUBILEE OF THE CONSTITUTION, *supra* note 78, at 13-14.

[161] NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828) (citing definitions of law #3 and #6).

[162] SWIFT, *supra* note 158.

[163] 1 WILSON, *supra* note 91, at 113-114.

[164] 1 BLACKSTONE, *supra* note 98, at *39.

[165] Rufus King, Letter to C. Gore on February 17, 1826, *in* 6 THE LIFE AND CORRESPONDENCE OF RUFUS KING 276 (Charles R. King, ed., 1900).

man."[166] These were principles and truths that, according to Montesquieu,[167] "do not change."[168] In the words of Declaration of Independence signer Dr. Benjamin Rush, these values comprised a set of principles and laws "certain and universal in its operation upon all the members of the community."[169] Commager summarized this view and its effect on American government and civilization:

> [T]he laws of England, happily transferred to America, were patterned on the laws of nature. A generation bathed in the Enlightenment pledged its lives, its fortunes, and its sacred honor to the conviction that the laws of Nature and Nature's God required American independence and justified faith in the unalienable rights of life, liberty, and the pursuit of happiness. It was not surprising that Americans wrote natural law into their constitutions, enshrined it in their Bills of Rights, and pronounced it from their judicial tribunals.
>
> According to the philosophy of natural law, laws are discovered, not made. They are deduced from the nature of things rather than patterned on the needs of man.[170]

Therefore, under transcendent values, there were objective standards for morality: that is, murder (as opposed to justifiable homicide or self-defense) was always wrong, as was theft, perjury, and so many other immutable values enshrined in the traditional common law. Darwin's views, however, embodied a converse approach to values. As Professor James Rachels explains, Darwinism poses

> a problem for traditional morality. Traditional morality, no less than traditional religion, assumes that man is a "great work". It grants to humans a moral status superior to that of any other creatures on earth. It regards human life, and only human life, as sacred, and it takes the love of mankind as its first and noblest virtue. What becomes of all this, if man is but a modified ape?[171]

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[166] JUBILEE OF THE CONSTITUTION, *supra* note 78, at 13-14.

[167] Baron Charles Secondat de Montesquieu (1689-1755) was a French elected official (president of the French parliament) and a political philosopher. He authored numerous essays on law, government, the military, taxation, and economics. His theories of checks and balances and separation of powers between the branches became an integral part of American constitutional philosophy. In fact, political science professors have documented that Montesquieu was the single most-frequently-invoked political source by the Framers in their political writings during the Founding Era (1760-1805). *See* LUTZ, *supra* note 96, at 143 (1988).

[168] 5 GEORGE BANCROFT, HISTORY OF THE UNITED STATES FROM THE DISCOVERY OF THE AMERICAN CONTINENT 24 (Boston, Little, Brown and Co. 1859);. *see also* 1 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 18 (Worcester, Isaiah Thomas, Jr. 1802).

[169] 1 BENJAMIN RUSH, *To David Ramsay, in* LETTERS OF BENJAMIN RUSH 454 (L. H. Butterfield ed., 1951).

[170] COMMAGER, *supra* note 6, at 367.

[171] RACHELS, *supra* note 53, at 1.

Dr. David Wigdor,[172] an analyst at Human Sciences Research, similarly affirms Darwin's converse approach to values:

> Natural law theorists argued that there were absolute, unchanging principles to which temporal laws must correspond. This doctrine of a higher law provided an alternative to the moral neutrality of the command theory, which accepted the legitimacy of any existing pattern of legal obligation . . . . Darwinism had undermined [natural law's] mechanical, formalistic elements, and apologists for business had discredited its claims to superior morality.[173]

Leading legal theorists who acknowledged their debt to Darwin's ideas quickly interjected into the legal arena (and, therefore, throughout society and culture) a new approach that rejected transcendent values. For example, Justice Benjamin Cardozo (1870-1938) declared that law must no longer "work from pre-established truths of universal and inflexible validity"[174] because principles must "vary with changing circumstances, [and] must be declared to be essentially relativistic."[175] Legal educator Roscoe Pound (1870-1964) similarly advocated that legal "principles are not absolute, but are relative to time and place"[176] because "'nature' did not mean to antiquity what it means to us who are under the influence of the idea of evolution."[177]

Objective standards for morality were therefore replaced by new values that, according to Justice Oliver Wendell Holmes (1841-1935), would now be based on "[t]he felt necessities of the time, the prevalent moral and political theories . . . [and] the prejudices which judges share with their fellowmen."[178] Quite simply, under the non-theistic paradigm, transcendent, immutable values do not exist because, as explained by Singer, "they draw on presuppositions—religious, moral, metaphysical—that are now obsolete."[179]

So, if man is not a unique species superior to the other species, and if there are no transcendent values to govern his behavior, what, then, is the standard for measuring his morality? From what source are his values to be derived? Man's values are to be derived from the standards

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[172] Dr. David Wigdor earned his doctorate at the University of Missouri in Columbia. He served in Vietnam as a combat historian and afterwards taught United States History and American Studies at Lindenwood College in St. Charles, Missouri. He was an analyst at Human Sciences Research in McLean, Virginia as well as a program officer at the National Endowment for the Humanities.

[173] DAVID WIGDOR, ROSCOE POUND PHILOSOPHER OF LAW 118 (1974).

[174] ANDREW L. KAUFMAN, CARDOZO 206 (1998).

[175] Moses J. Aronson, *Cardozo's Doctrine of Sociological Jurisprudence*, *reprinted in* J. OF SOC. PHIL. 4, 36 (1938).

[176] SPIRIT OF THE COMMON LAW, *supra* note 97, at 172.

[177] ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 31 (1922).

[178] O. W. HOLMES, JR., THE COMMON LAW 5 (Boston, Little, Brown and Co. 1881).

[179] ANIMAL LIBERATION, *supra* note 92, at 193.

of behavior demonstrated by non-human animals—at least so say psychologists such as Dr. David Buss of the University of Texas, Dr. Randolph Neese of the University of Michigan, and Dr. Douglas Kenrick of Arizona State, from the emerging field known as evolutionary psychology.[180]

Robert Wright, an award-winning writer of *The Sciences* magazine who has studied in depth the works and writings of evolutionary psychologists, summarizes their findings on what man can learn about his own behavior based, for example, on the sexual behavior of animals:

> By studying how the process of natural selection shaped the mind, evolutionary psychologists are painting a new portrait of human nature, with fresh detail about the feelings and thoughts that draw us into marriage—or push us out . . . . According to evolutionary psychology, it is "natural" for both men and women—at some times, under some circumstances—to commit adultery or to sour on a mate, to suddenly find a spouse unattractive, irritating, wholly unreasonable . . . . The premise of evolutionary psychology is simple. The human mind, like any other organ, was designed for the purpose of transmitting genes to the next generation; the feelings and thoughts it creates are best understood in these terms . . . . Feelings of lust, no less than the sex organs, are here because they aided reproduction directly . . . . According to evolutionary psychologists, our everyday, ever shifting attitudes toward a mate or prospective mate—trust, suspicion, rhapsody, revulsion, warmth, iciness—are the handiwork of natural selection that remain with us today because in the past they led to behaviors that helped spread genes . . . . [And] while both sexes are prone under the right circumstances to infidelity, men seem much more deeply inclined to actually acquire a second or third mate—to keep a harem. They are also more inclined toward the casual fling. Men are less finicky about sex partners . . . . There is no dispute among evolutionary psychologists over the basic source of this male open-mindedness. A woman, regardless of how many sex partners she has, can generally have only one offspring a year. For a man, each new mate offers a real chance for pumping genes into the future . . . . Lifelong monogamous devotion just isn't natural.[181]

By lowering the status of man to that of the animals, Darwin lowered the standard for human morality. As acknowledged by Professor James Rachels of the University of Alabama at Birmingham, "The whole

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[180] Evolutionary psychology is a rapidly growing field with numbers of highly credentialed academics, including not only those listed above, but also evolutionary psychologists such as Dr. Donald Symons of the University of California at Santa Barbara, Dr. Martin Daly and Dr. Margo Wilson of McMaster University in Ontario, Canada, and numerous others. *See, e.g.*, the list of contributors in HANDBOOK OF EVOLUTIONARY PSYCHOLOGY: IDEAS, ISSUES, AND APPLICATIONS (Charles Crawford and Dennis Krebs eds., 1997).

[181] Robert Wright, *Our Cheating Hearts: Devotion and Betrayal, Marriage and Divorce: How Evolution Shaped Human Love*, TIME DOMESTIC, Aug. 15, 1994, at 45-47, 51.

idea of using animals as psychological models for humans is a consequence of Darwinism. Before Darwin, no one could have taken seriously the thought that we might learn something about the human mind by studying mere animals."[182]

Consider the implications of Darwin's theory: if man is to establish his moral standards based on those displayed by the animals, then not only will monogamy become the exception rather than the rule, but also our laws on theft and murder eventually must be discarded, for in nature, "might makes right"[183]— possession is based solely on whatever can be taken and held by force. The implications are frightening for a civilization governed by the "values" of evolutionary morality rather than by the transcendent, immutable values derived from theistic origins.

IX. GOD-GIVEN, INALIENABLE RIGHTS V. MAN-CREATED, ALIENABLE RIGHTS

From the belief that there were immutable and transcendent values proceeded the belief that there were corresponding immutable and transcendent rights— what the Framers called inalienable rights. As Constitution signer John Dickinson explained, an inalienable right was a right "which God gave to you, and which no *inferior Power* has a Right to take away."[184] John Adams similarly attested that the inalienable rights of man were rights "antecedent to all earthly government— *Rights*, that cannot be repealed or restrained by human laws, *Rights*, derived from the great Legislator of the universe."[185] It was from among such inalienable— or natural— rights that the Framers specifically identified the right to life, liberty, property, self-protection, and pursuit of happiness.

Since, as John Adams explained, natural rights were not to be "repealed or restrained by human laws,"[186] it was, therefore, under the theistic view, the purpose of government to protect the natural rights that had been bestowed on man by his creator. As James Wilson confirmed, our governing documents were drafted solely "to acquire a new security for the possession or the recovery of those rights, to . . . which [we] were previously entitled by the immediate gift or by the unerring law, of our all-wise and all-beneficent Creator."[187]

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[182] RACHELS, *supra* note 53, at 221.

[183] *See, e.g.*, AESOP'S FABLES.

[184] JOHN DICKINSON, LETTERS FROM A FARMER xiii (1903).

[185] 3 JOHN ADAMS, THE WORKS OF JOHN ADAMS 449 (Charles Francis Adams ed., Boston, Charles C. Little and James Brown 1851) (citing John Adams' Dissertation, 1765).

[186] *Id.*

[187] 2 WILSON, *supra* note 91, at 454.

Wilson, therefore, concluded that "every government, which has not this in view, as its principal object, is not a government of the legitimate kind."[188] Thomas Jefferson also asserted that government was "to declare and enforce only our natural rights and duties and to take none of them from us."[189] In fact, Jefferson even queried, "[C]an the liberties of a nation be thought secure when we have removed their only firm basis: a conviction in the minds of the people that these liberties are of the gift of God?"[190]

American government was built around the belief that it was the purpose of government to protect inalienable rights, and those rights were protected so that man was free to enjoy the pursuit of happiness. As John Quincy Adams explained,

> That bestowed as [natural rights] were by God, their creator, [humans] never could be divested of them, even by themselves, and much less could they be wrested from them by the might of others . . . .
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> . . . .
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> . . . And hence the rights derived from it are declared to be inalienable . . . . And thus the acknowledgment of the unalienable right of man to life, liberty, and the pursuit of happiness, is at the same time an acknowledgment of the omnipotence, the omniscience, and the all-pervading goodness of God. Man thus endowed is a being of loftier port, of larger dimensions, of infinitely increased and multiplied powers, and of heavier and deeper responsibilities than man invested with no such attributes or capacities.
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> . . . .
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> Now the position to which I would invite your earnest and anxious consideration is this: That the form of government founded upon the principle of the natural equality of mankind, and of which the unalienable rights of individual man are the cornerstone, is the form of government best adapted to the pursuit of happiness as well of every individual as of the community . . . . [A]nd I think I am fully warranted in adding that in proportion as the existing governments of the earth approximate to or recede from that standard, in the same proportion is the pursuit of happiness of the community and of every individual belonging to it, promoted or impeded, accomplished or demolished.[191]

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[188] *Id.* at 466.

[189] Letter CXXXII from Thomas Jefferson to Francis W. Gilmer (June 7, 1816), *in* 4 THOMAS JEFFERSON, MEMOIR, CORRESPONDENCE, AND MISCELLANIES 278 (Boston, Gray and Bowen 1830).

[190] THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 237 (Philadelphia, Mathew Carey 1794).

[191] JOHN QUINCY ADAMS, AN ORATION DELIVERED BEFORE THE CINCINNATI ASTRONOMICAL SOCIETY 12-15 (Cincinnati, Shepard & Co. 1843).

However, under the new Darwinian view, the belief that there were certain rights of man which were to remain untouched by government was to change dramatically. In fact, Darwinian legal theorists began to assert that "[t]he fundamental weakness of conventional legal theory was its attempt to erect a closed system of immutable principles."[192] As Roscoe Pound asserted, "[l]egal principles are not absolute but are relative to time and place, and . . . the fiction [of absolutes] should be discarded."[193] As he explained, "We are thinking of interests, claims, demands, not of rights . . . ."[194]

Since it was thus deemed that there were no natural rights pertaining to man, then the natural law theory of absolute rights and wrongs came under attack. Vocal opponents like Justice Oliver Wendell Holmes "did not just refuse to acknowledge the influence of natural law; he attacked natural law jurisprudence repeatedly and effectively . . . . His intellectual activity contributed to the decline of natural law theory in this century."[195] With natural law discarded, there was no longer an inviolability for particular rights.

Perhaps the most perceptible illustration of this change in the role of government is seen in its approach to human life. As Dr. James Rachels insightfully observes,

> The big issue in [Darwinism] is the value of human life. Darwin's early readers—his friends as well as his enemies—worried that, if they were to abandon the traditional conception of humans as exalted beings, they could no longer justify the traditional belief in the value of human life. They were right to see this as a serious problem. The difficulty is that Darwinism leaves us with fewer resources from which to construct an account of the value of life.[196]

The consequence is that, according to Rachels, not only will views toward life *vis-a-vis* abortion change but also a "revised view of such matters as suicide and euthanasia . . . will result."[197]

Formerly, a right to life was inalienable because it was bestowed upon man by a creator who had established that right superior to intrusion by government.[198] Currently, however, the right to life,

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[192] WIGDOR, *supra* note 173, at 187.

[193] SPIRIT OF THE COMMON LAW, *supra* note 97, at 172.

[194] COMMAGER, *supra* note 6, at 378.

[195] MICHAEL HOFFHEIMER, JUSTICE HOLMES AND THE NATURAL LAW 11 (1992).

[196] RACHELS, *supra* note 53, at 197.

[197] *Id.* at 5.

[198] The framers were so convinced that all life came from God that they even called suicide "self-murder" since man was terminating a life that he had not created and it was not his to give or take. *See generally* 4 BLACKSTONE, *supra* note 98, at *189; JOHN HAYWOOD, A MANUAL OF THE LAWS OF NORTH CAROLINA 190 (Raleigh, J. Gales 1814); THOMAS JEFFERSON, THE JEFFERSONIAN CYCLOPEDIA 599 (John P. Foley ed., 1900) (referring to entry 5585); 1 RICHARD WATSON, THEOLOGICAL INSTITUTES 227 (New York,

regardless of its stage of development or age, from conception to advanced seniority, is subject to the discretion of government. As a result, not only has abortion become acceptable but so has infanticide. Academicians are now advocating—and logically so—not only euthanasia, but also the termination of those whose lives are considered to be below "normal." How are such policy positions reached?

First, it must be accepted that man, rather than a creator, has the right to determine the outcome of life for humans. Once that proposition is accepted, then a distinction is made between "humans" and "persons." That is, although someone may be human, does not mean he is a person, and only persons, rather than humans, should have a right to life. As a common example, the fact that a human fetus or a human embryo is acknowledged to be a human is not pertinent to the decision of whether it should be destroyed, for it clearly is not a "person."

As Dr. Michael Tooley, professor at Colorado University, explains, "The fact that a foetus developing inside a human female belongs to the biological species, *Homo sapiens*, is not *in itself* morally significant . . . [and] does not in itself make it wrong to destroy it."[199] American University professor Jeffrey Reiman agrees that being a human does not automatically guarantee a protection for life because "the assumption that being a human individual is enough to earn one moral protection of one's life smacks of *speciesism*."[200]

After accepting that fetuses are not persons and, therefore, are not entitled to a right to life, it is next insisted that even newborns are not

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Carlton & Porter 1857). This view was held for centuries, and even millennia, under the theistic origins approach. As Professor James Rachels documents,

> St[.] Augustine, whose thought shaped much of our tradition, argued that 'Christians have no authority for committing suicide in any circumstances whatever.' His argument was based mainly on an appeal to authority. The sixth commandment says 'Thou shalt not kill'. Augustine pointed out that the commandment does not say 'Thou shalt not kill *thy neighbour*'; it says only 'Thou shalt not kill', period. Thus, he argued, the rule applies with equal force to killing oneself.

RACHELS, *supra* note 53, at 89.

> Kant [said] "[b]ut as soon as we examine suicide from the standpoint of religion we immediately see it in its true light. We have been placed in this world under certain conditions and for specific purposes. But a suicide opposes the purpose of his Creator; he arrives in the other world as one who has deserted his post; he must be looked upon as a rebel against God."

Id. at 90. Perhaps Blackstone best summarized the framers overall view toward life in these words: "[I]f any human law should allow or enjoin us to commit it [the taking of an innocent life], we are bound to transgress that human law . . . ." 1 BLACKSTONE, *supra* note 98, at *43.

[199] MICHAEL TOOLEY, ABORTION AND INFANTICIDE 303-04 (1983).

[200] REIMAN, *supra* note 113, at 193.

persons and thus have no guaranteed right to life. As Dr. Tooley explains:

> [T]he empirical evidence makes it most unlikely that newborn humans are quasi-persons, let alone persons.
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> . . . [A]n entity cannot be a person unless it possesses, or has previously possessed, the capacity for thought. And the psychological and neurophysiological evidence makes it most unlikely that humans, in the first few weeks after birth, possess this capacity.
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> No attempt was made to determine the precise time at which humans in general become persons or quasi-persons. I did suggest that in view of a number of quite significant developments clustering together at around ten to twelve weeks, it may be that humans become quasi-persons at about that time.[201]

Since a human after its birth is still not a person, it has no innate or intrinsic value. Princeton's professor of bioethics, Dr. Peter Singer, explains:

> A week-old baby is not a rational and self-conscious being, and there are many nonhuman animals whose rationality, self-consciousness, awareness, capacity to feel, and so on, exceed that of a human baby a week or a month old. If the fetus does not have the same claim to life as a person, it appears that the newborn baby does not either, and the life of a newborn baby is of less value to it than the life of a pig, a dog, or a chimpanzee is to the nonhuman animal . . . .[202]
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> . . . .
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> If we can put aside these emotionally moving but strictly irrelevant aspects of the killing of a baby we can see that the grounds for not killing persons do not apply to newborn infants . . . .[203]
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> . . . .
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> Killing them, therefore, cannot be equated with killing normal human beings, or any other self-conscious beings.[204]

Professor Reiman agrees that since infants are not "persons," they therefore do not "possess in their own right a property that makes it wrong to kill them."[205] Consequently, he argues that there are "permissible exceptions to the rule against killing infants that will not apply to the rule against killing adults and children."[206]

However, even if a human infant eventually acquires sufficient age to achieve the status of a "person," the human infant's life still does not need to be protected if it is a "flawed" person. As Singer argues,

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[201] TOOLEY, *supra* note 199, at 421.

[202] PRACTICAL ETHICS, *supra* note 83, at 169.

[203] *Id.* at 171.

[204] *Id.* at 182.

[205] REIMAN, *supra* note 113, at 203.

[206] *Id.* at 203.

> Parents may, with good reason, regret that a disabled child was ever born. In that event the effect that the death of the child will have on its parents can be a reason for, rather than against, killing it . . . . [K]illing a disabled infant is not morally equivalent to killing a person. Very often it is not wrong at all.[207]

Professor Reiman agrees:

> I think (as do many philosophers, doctors, and parents) that ending the lives of severely handicapped newborns will be acceptable because it does not take from the newborns a life that they yet care about and because it is arguably compatible with, rather than violative of, our natural love for infants.[208]

Certainly if it is not wrong to kill a "flawed" child-person, then neither is it wrong to dispose of a "flawed" adult-person:

> It may still be objected that to replace either a fetus or a newborn infant is wrong because it suggests to disabled people living today that their lives are less worth living than the lives of people who are not disabled. Yet it is surely flying in the face of reality to deny that, on average, this is so.[209]

How, then, can the argument be resisted that the elderly who are becoming senile or who have diminished mental capacities are not also "flawed" adult-persons? After all, even though they

> were once persons capable of choosing to live or die, but now, through accident or old age, have permanently lost this capacity . . . .
>
> In most respects, these human beings do not differ importantly from disabled infants. They are not self-conscious, rational, or autonomous, and so considerations of a right to life or of respecting autonomy do not apply. If they have no experiences at all, and can never have any again, their lives have no intrinsic value.[210]

When man can set arbitrary standards for deciding who lives and who dies by deciding which humans are "persons" and which persons are "flawed," then who might not become a disposable individual?

If the right to life is not inviolable, then neither are any of the other formerly inalienable rights. Princeton professor Robert George, a long-time member of the United States Commission on Civil Rights, explains why the right to life, therefore, must always remain inalienable:

> Our most basic rights—including the right to life—are *inherent* and in no way contingent on a grant from the state or any other merely human source. As an *inherent* right, the right to life, which, properly specified, is a right not to be killed either as an end in itself or a means to any other end, comes into being for us *when we come into being*. It is not a privilege that we earn by achieving a certain level of consciousness or intelligence or other ability; it is not something that

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[207] PRACTICAL ETHICS, *supra* note 83, at 183, 191.

[208] REIMAN, *supra* note 113, at 203.

[209] PRACTICAL ETHICS, *supra* note 83, at 188.

[210] *Id.* at 191-92.

> comes or goes with age, size, stage of development, or condition of disability or dependency; it is certainly not something that depends on whether someone else happens to "want" us or would prefer, all things considered, that we not exist.[211]

Supreme Court Justice Joseph Story explained the danger in permitting government to disregard or even reject the transcendent, inalienable rights secured in our documents. Justice Story declared,

> There can be no freedom, where there is no safety to property, or personal rights. Whenever legislation . . . breaks in upon personal liberty, or compels a surrender of personal privileges, upon any pretext, plausible or otherwise, it matters little whether it be the act of the many or the few, of the solitary despot, or the assembled multitude; it is still in its essence tyranny. It matters still less what are the causes of the change; whether urged on by a spirit of innovation, or popular delusion, or State necessity, (as it is falsely called), it is still power, irresponsible power, against right . . . .[212]

Inalienable rights—the rights derived from that view of civilization which embraces a belief in theistic origins—were formerly shielded against the encroachments of civil government with the declaration enshrined in our documents that "[w]e hold these truths to be self-evident, that all men . . . are endowed by their creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness . . . . [And] that to secure these rights, governments are instituted among men."[213]

X. PERSONAL ACCOUNTABILITY V. IRRESISTIBLE BIOLOGICAL DETERMINISM

Under the Framers' theistic approach, it was possible for man to be morally self-restrained, not only because he could conform to the transcendent values established by his creator but also because he would ultimately be accountable to his maker for his behavior. Even Darwin himself explained that,[214] without man's knowledge of his own

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[211] The Born Alive Infants Protection Act: Hearing on H.R. 4292 Before the Sub. Comm. on the Constitution of the House Comm. on the Judiciary, 107th Cong. 1 (2000) (testimony of Robert P. George, McCormick Professor of Jurisprudence at Princeton University).

[212] JOSEPH STORY, A DISCOURSE PRONOUNCED UPON THE INAUGURATION OF THE AUTHOR 14 (Boston, Hilliard, Gray, Little, and Wilkins 1829).

[213] THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

[214] It is significant that many who today embrace what Darwinism has become blatantly ignore what Darwin himself said both on morality and in support of intelligent design. As Dr. James Rachels, a Darwin supporter and a professor at the University of Alabama at Birmingham, observes, "Darwin himself had a good bit to say about morality and religion. But his remarks on these subjects are often ignored, or treated as only marginally interesting." RACHELS, *supra* note 53, at 5. Ironically, many of Darwin's own words on morality and religion are now unacceptable under modern Darwinism.

accountability to his creator, he would be no more responsible for his acts than any other animal:

> A man who has no assured and ever present belief in the existence of a personal God or of a future existence with retribution and reward, can have for his rule of life, as far as I can see, only to follow those impulses and instincts which are the strongest or which seem to him the best ones. A dog acts in this manner . . . .[215]

The Founders had previously set forth this principle. As John Quincy Adams explained, "I have at all times been a sincere believer in the existence of a Supreme Creator of the world, [and] of an immortal principle within myself, responsible to that Creator for my conduct upon earth . . . ."[216]

Very simply, the belief in a creator to whom man was answerable produced in man a self-restraint and instilled in society an expectation of individual accountability. However, today it has become an acceptable thesis in many quarters that man is not accountable for his behavior and also that he is not even responsible for it. In fact, this view is frequently set forth by defendants in criminal proceedings and is especially demonstrated through their heavy reliance on The Diagnostic and Statistical Manual of Mental Disorders (DSM).

The DSM describes itself as providing "a classification of mental disorders"[217] that represents the "manifestation of a behavioral, psychological, or biological dysfunction in the individual."[218] The DSM reflects what the Michigan Supreme Court describes as "the medical approach to understanding crime."[219] The crux of this approach is that if a defendant has a legitimate mental disorder, then he should not be held responsible for his crime.[220] But how can it be ascertained whether a defendant has a "legitimate" mental disorder?

Interestingly, what constitutes a "legitimate" DSM "mental disorder" is determined either by the vote of a committee of psychiatrists or by majority vote of member psychiatrists at a given meeting.[221] Consequently, the "mental diseases" in the DSM are added, "removed, or

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[215] DARWIN, *supra* note 54, at 94.

[216] Entry from Diary of John Quincy Adams (Mar. 19, 1843), *in* THE SELECTED WRITINGS OF JOHN AND JOHN QUINCY ADAMS, at 397 (Adrienne Koch & William Peden eds., 1946).

[217] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS xxiv (4th ed. 2000).

[218] *Id.* at xxxi.

[219] People v. Allen, 420 N.W.2d 499, 553 (Mich. 1988).

[220] American law has long espoused this view.

[221] People v. Phillips, 175 Cal. Rptr. 703, 713-714 (Cal. Ct. App. 1981).

modified based on the [vacillating] opinions of the psychiatric community."[222]

Nevertheless, the DSM has become the authoritative voice in legal proceedings. In fact, whenever a mental disorder is raised as a defense, if it is not listed in the DSM, it is not given much credence. In States such as California, a mental disorder must be in the DSM to be considered a legitimate "mental disorder."[223] With such a heavy reliance on the DSM, it is not surprising that this author's recent search of a legal database found the DSM cited in legal cases in approximately 1,500 separate instances, usually to explain why defendants were not responsible for their behavior.[224]

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[222] Plough v. State, 725 S.W.2d 494, 498 (Tex. Crim. App. 1987).

[223] Ioakimedes v. Chambers, 139 Cal. Rptr. 357, 361 (Cal. Ct. App. 1977); *see also* People v. Triplett, 192 Cal. Rptr. 537, 541 (Cal. Ct. App. 1983).

[224] For example, the DSM was invoked to explain why the defendant should not be found guilty for his criminal act in the following cases:

1. Shooting three victims because he was suffering from DSM's "dependent personality disorder" and "recurrent alcoholic breakouts due to alcohol and substance abuse." State v. McCarroll, 1989 WL 155215, * (Ohio App. 10 Dist.).

2. Shooting his wife because he was "unable to understand the nature of his acts" since he suffered from DSM's "Organic Mood . . . Disorder." State v. Blasus, 445 N.W.2d 535, 537 (Minn. 1989).

3. First-degree murder because he was suffering from DSM's "chronic cocaine use" which leads to DSM's "antisocial" and "maladaptive behavior." People v. Bell, 778 P.2d 129, 150 (Cal. 1989).

4. Kidnapping and aggravated assault because he was suffering from an "anxiety disorder" aggravated by "voluntary intoxication." State v. DeMoss, 770 P.2d 441, 443 (Kan. 1989).

5. Eight sexual offenses involving younger children because he had "a pedophiliac diagnosis, a mental disorder defined in" DSM. In re Michael B., 566 A.2d 446, 452 (Conn. 1995); *see also* State v. Clements, 734 P.2d 1096, 1104 (Kan. 1987) (reversing conviction for aggravated sodomy on the grounds that admission of defendant's prior court-martial conviction involving sodomy with children was reversible error).

6. Misapplying trust property in the amount of $600,000 because he suffered from DSM's "compulsive gambling." *Id.*; *see also Clements*, 734 P.2d at 1104.

7. Attempted murder and the use of a handgun in a crime of violence because he suffered from "Dysthymic Disorder," a mental illness characterized by a "disturbance of mood" in DSM. Djadi v. State, 528 A.2d 502, 504 (Md. Ct. Spec. App. 1987).

8. Second-degree forgery because he suffered from "methadone withdrawal," an "opioid organic mental disorder" in DSM. People v. Morino, 743 P.2d 49, 52 (Colo. Ct. App. 1987).

9. Murder with malice because he suffered from "intermittent explosive disorder," a "major psychiatric illness" in DSM. Hicks v. State, 352 S.E.2d 762, 773 (Ga. 1987).

There are seemingly countless other similar examples. In fact, national columnist John Leo, who has studied such cases, concludes that

> uncontrollable forces have been piling up at a record rate . . . . [W]e have Pete Rose's disorder (pathological gambling, 312.31 in the Diagnostic and Statistical Manual of Mental Disorders), Marion Barry's disease (alcoholism, 303.90), and [American University President Richard] Berendzen's impulse (telephone scatologia, 302.90) . . . . The dread disease of caffeinism (305.90, supine dependence on cola or coffee) has already been cited in a criminal case or two. We have inhalant dependence (304.60, reliance on aromatic hydrocarbons) and solemn listings for difficulties of ordinary life (arithmetic and reading problems) . . . .
>
> Law plus nutrition gives us many variations of the Twinkie defense (sugar made him kill). Law plus some dubious psychiatry gives us the promising anabolic-steroid defense. (A bodybuilder broke into six Maryland homes, set fire to three of them and stole cash and jewelry. A judge ruled him guilty but not criminally responsible because his frenzied use of anabolic steroids for weight lifting left him "suffering from organic personality syndrome." No jail time.) Law plus the sociological excuse in disguise offers us the "homosexual panic" defense. (A man killed a homosexual who made a pass at him in San Francisco, then tried to argue in court that this violence was an involuntary triggering of sexual attitudes induced in him by his sheltered, small-town Texas upbringing.)
>
> In Los Angeles, a hacker named Kevin Mittnick copped a plea after being accused of breaking into a corporate computer system and stealing an expensive security program . . . . [The judge] saw him as the victim of an insidious Space Age ailment called computer addiction and sentenced him to a year's treatment for this "new and growing" impulse disorder . . . . [W]e are probably in for a heavy wave of biological determinism. As gene mapping proceeds and the physiological correlates of behavior are discovered, we will hear even more arguments about irresistible forces . . . .
>
> The problem with all this is that you can't run a society or cope with its problems, if people are not held accountable for what they do.[225]

Interestingly, in 1920, Princeton professor Walter Stace forewarned of the consequences of the "irresistible forces" and "biological determinism"[226] introduced through Darwinism:

> If there is really no higher and lower, there is no better and no worse. It is just as good to be a murderer as to be a saint. Evil is the same as

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10. Second-degree murder because he suffered from "irresistible impulse," a "borderline personality disorder" in DSM. Godley v. Commonwealth, 343 S.E.2d 368, 370 (Va. Ct. App. 1986).

[225] John Leo, *The It's-Not-My-Fault Syndrome*, U.S. NEWS & WORLD REP., June 18, 1990, at 16.

[226] *Id.*

> good . . . . [A]ll these values of higher and lower are mere delusions, 'the human way of looking at things.'[227]

Commager confirms that the effect of Darwinism "could be traced in the realm of criminal law, where it shifted attention from the criminal to the crime and ultimately to the social background of crime."[228] Defense attorney Clarence Darrow fully understood this implication of Darwinism, and he consequently consoled the inmates in Chicago's prison system by explaining to them that they were merely victims of nature itself. He told them that

> [t]here is no such thing as crime as the word is generally understood. I do not believe there is any sort of distinction between the real moral condition of the people in and out of jail. One is just as good as the other. The people here can no more help being here than the people outside can avoid being outside. I do not believe that people are in jail because they deserve to be. They are in jail simply because they can not avoid it on account of circumstances which are entirely beyond their control and for which they are in no way responsible.[229]

Under the theistic approach, however, man not only is responsible for his behavior, but he also has a duty to treat others consistent with their own natural rights. According to John Quincy Adams,

> If then it be true that man is born with unalienable rights, among which are life, liberty, and the pursuit of happiness, it is equally true that he is born under the deepest and most indispensable duties . . . of exercising, maintaining, and supporting them, by all the faculties, intellectual and physical, with which he has been provided . . . of holding and enjoying these rights, with the inviolate respect and observance of the same rights in others.[230]

Locke similarly declared:

> [F]or men being all the workmanship of one omnipotent and infinitely wise Maker . . . ought he, as much as he can, to preserve the rest of mankind, and may not, unless it be to do justice to an offender, take away or impair the life, or what tends to the preservation of life, the liberty, health, limb, or goods of another.[231]

According to Blackstone, the creator

> has laid down only such laws as were founded in those relations of justice, that existed in the nature of things antecedent to any positive precept [of human law]. These are the eternal, immutable laws of good

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[227] W.T. STACE, A CRITICAL HISTORY OF GREEK PHILOSOPHY 310 (1934).

[228] COMMAGER, *supra* note 6, at 380.

[229] CLARENCE S. DARROW, CRIME AND CRIMINALS, AN ADDRESS DELIVERED TO THE PRISONERS IN THE CHICAGO COUNTY JAIL 5-6 (1907).

[230] JOHN QUINCY ADAMS, AN ORATION DELIVERED BEFORE THE CINCINNATI ASTRONOMICAL SOCIETY, ON THE OCCASION OF LAYING THE CORNER STONE OF AN ASTRONOMICAL OBSERVATORY, ON THE 10TH OF NOVEMBER, 1843, *at* 14-15 (Shepard & Co. 1843).

[231] 4 LOCKE, *supra* note 100, at 341.

> and evil, to which . . . he has enabled human reason to discover, so far as they are necessary for the conduct of human actions. Such among others are these principles: that we should live honestly, should hurt nobody, and should render to every one his due.[232]

Since man was designed by his creator to "live honestly, hurt nobody, and render to every one his due,"[233] not to "destroy one another"[234] but rather to "preserve the rest of mankind,"[235] not to "take away or impair the life, or what tends to the preservation of life, the liberty, health, limb, or goods of another"[236] but to "exercis[e], maintain, and suppor[t]"[237] the "life, liberty, and the pursuit of happiness"[238] in ourselves and in others, man, therefore, is responsible to his creator for whether he has fulfilled the purpose for which he has been designed. As James Wilson explained, "[t]hat our creator has a supreme right to prescribe a law for our conduct, and that we are under the most perfect obligation to obey that law, are truths established on the clearest and most solid principles."[239]

The belief in irresistible forces that cause individuals to be powerless over their own cognitive choices is simply another confirmation that the issue in *Scopes* was indeed "a death struggle between two *civilizations*."[240]

XI. A REPUBLIC V. A DEMOCRACY?

One final consequence arising from a rejection of the belief in theistic origins is literally an altering of our form of government. That is, our Framers, because of their belief in the transcendent values and inalienable rights derived from theistic origins, established America as a republic rather than as a democracy. While many today believe that there is no difference between the two, the Framers knew that there was a very important distinction between the two. They specifically rejected a democracy and deliberately chose a republic.[241]

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[232] 1 BLACKSTONE, *supra* note 98, at *40.

[233] *Id.*

[234] 4 LOCKE, *supra* note 100, at 341.

[235] *Id.*

[236] *Id.*

[237] *Id.*

[238] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[239] Lecture by James Wilson on The Law of Nature, *in* 1 THE WORKS OF THE HONOURABLE JAMES WILSON, *supra* note 91, at 108.

[240] WORLD'S MOST FAMOUS COURT TRIAL, *supra* note *, at 74 (quoting Clarence Darrow, second day of the trial, July 13, 1925) (emphasis added).

[241] "[D]emocracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and have, in

While few today can define the difference between a democracy and a republic, the difference rests in the origin of its rights. A democracy is ruled solely by majority, what the Framers described as a "mobocracy."[242]. A republic is ruled by law, but not laws built solely on the vacillating whims of the people; rather, the laws were grounded in the transcendent values and inalienable rights established by the creator. Several Framers expressed the vital importance of transcendent values forming the basis of government.[243]

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general, been as short in their lives, as they have been violent in their deaths." THE FEDERALIST NO. 10 (James Madison).

"Remember, democracy never lasts long. It soon wastes, exhausts, and murders itself. There never was a democracy yet that did not commit suicide." JOHN ADAMS, *Letter from John Adams to John Taylor*, *in* 6 THE WORKS OF JOHN ADAMS, *supra* note 185, at 484.

"A democracy is a volcano, which conceals the fiery materials of its own destruction. These will produce an eruption, and carry desolation in their way." FISHER AMES, SPEECH ON BIENNIAL ELECTIONS (1788), *in* 1 WORKS OF FISHER AMES, *supra* note 88, at 21.

"The known propensity of a democracy is to licentiousness, [excessive license] which the ambitious call, and ignorant believe to be liberty." FISHER AMES, THE DANGERS OF AMERICAN LIBERTY, *in* 1 WORKS OF FISHER AMES, *supra* note 88, at 384.

"We have seen the tumults of democracy terminate . . . as [it has] everywhere terminated in despotism . . . ." GOUVERNEUR MORRIS, AN ORATION DELIVERED ON WEDNESDAY, JUNE 29, 1814, at 10 (New York, Van Winkle and Wiley 1814).

"Democracy! Savage and wild. Thou who wouldst bring down the virtuous and wise to thy level of folly and guilt!" *Id* at 22.

"[T]he experience of all former ages had shown that of all human governments, democracy was the most unstable, fluctuating and short-lived . . . ." JUBILEE OF THE CONSTITUTION, *supra* note 78, at 53.

"A simple democracy . . . is one of the greatest of evils." 1 BENJAMIN RUSH, *To John Adams*, *in* LETTERS OF BENJAMIN RUSH, *supra* note 169, at 523.

"In democracy . . . there are commonly tumults and disorders . . . . Therefore a pure democracy is generally a very bad government. It is often the most tyrannical government on earth . . . ." NOAH WEBSTER, THE AMERICAN SPELLING BOOK 103-04 (Boston, Isaiah Thomas and Ebenezer T. Andrews 1801).

"Pure democracy cannot subsist long, nor be carried far into the departments of state— it is very subject to caprice and the madness of popular rage." Lecture 12, *in* 7 THE WORKS OF JOHN WITHERSPOON, *supra* note 91, at 101.

"It may generally be remarked, that the more a government resembles a pure democracy, the more they abound with disorder and confusion." 1 SWIFT, *supra* note 158, at 19.

[242] *See* 1 BENJAMIN RUSH, *supra* note 169, at 498.

[243] James Wilson, signer of the Constitution and a Supreme Court Justice, commented, "Human law must rest its authority, ultimately, upon the authority of that law which is divine." Lecture by James Wilson on The Law of Nature, *in* 1 THE WORKS OF THE HONOURABLE JAMES WILSON, *supra* note 91, at 104-05. Alexander Hamilton stated that "the law . . . 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 . . . ." 1 HAMILTON, *supra* note 94, at 41 (quoting 1 BLACKSTONE, *supra* note 98, at *41). Rufus King maintained that "[the] law established by the Creator, which has existed from the beginning, extends over the whole globe, is everywhere, and at all times, binding upon mankind . . . and is paramount to all human control." King, *supra* note 91, at 276.

The Framers understood that transcendent values formed the basis of a republic and that the purpose of a republic was to protect inalienable natural rights. A democracy, however, based neither on transcendent values nor inalienable rights, was, as James Madison explained, "incompatible with personal security"[244] and, according to Fisher Ames, tended toward "licentiousness."[245]

So convinced were the framers of the superiority of a republic over a democracy that Article IV of the Constitutions requires that every State maintain a republican—as opposed to a democratic—form of government.[246] This distinction was another of the specific characteristics of the nature of American government deliberately established in our governing documents. To reject the theistic origins of man is literally to reject the philosophy of inalienable rights upon which our form of government was constructed and which forms the basis of a republic.

XII. AN ORGANIC, LIVING DOCUMENT

Even though dramatic societal and governmental upheavals have been occasioned by the rejection of the theistic view of the origins of man originally incorporated in our documents, the argument raised today against continuing those values is that "times have changed" and, therefore, original intentions should be modernized. In the language of former Chief Justice Earl Warren (1891-1974) in *Trop v. Dulles*, constitutional interpretation "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[247]

The fact that governments need to change ("evolve") and to incorporate social adjustments (i.e., ending slavery, giving women the right to vote, etc.) makes the argument to "modernize" the governing documents appealing to many. Thus, many followers of Darwin urge the need for the Constitution and other governing documents to be flexible, living, and organic—to evolve.

Perhaps the first individual successfully to champion this belief was Christopher Columbus Langdell (1826-1906), dean of the Harvard Law School. Langdell reasoned that since man evolved, his laws must also

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[244] THE FEDERALIST NO. 10 (James Madison).

[245] 1 AMES, *supra* note 88, at 384. Interestingly, the Framers often spoke of the French government as a democracy rather than the republic that the French themselves called their government. In the minds of the Framers, simply titling a government a republic did not make it so if it lacked transcendent values or immutable rights or was ruled as a "mobocracy." As Fisher Ames, a Framer of the Bill of Rights, explained, "[I]t was only in *name* that [France] ever was republican . . . ." Fisher Ames, *Dangerous Power of France, No. II in* 1 WORKS OF FISHER AMES, *supra* note 88, at 323.

[246] "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ." U.S. CONST. art. IV, § 4.

[247] 356 U.S. 86, 101 (1957).

evolve. Deciding that judges should guide the evolution of the Constitution, Langdell introduced the case law study method under which students would study the wording of judges' decisions rather than the wording of the Constitution.

Under Langdell's case law approach, history, precedent, and even many of the principles specifically enshrined in the governing documents, were deemed hindrances to the successful evolution of society. John Dewey summarized Langdell's approach: "[t]he belief in political fixity, of the sanctity of some form of state consecrated by the efforts of our fathers and hallowed by tradition, is one of the stumbling blocks in the way of orderly and directed change."[248]

Justice Holmes also agreed, urging that "the lawyer's task . . . was to participate actively in freeing the law from those archaic doctrines that prevented the law from consciously fulfilling its role of promoting social policy,"[249] because "the justification of a law for us cannot be found in the fact that our fathers always have followed it. It must be found in some help which the law brings toward reaching a social end . . . ."[250]

Justice Cardozo lent his support to Langdell's cause, declaring that "[i]f there is any law which is back of the sovereignty of the state, and superior thereto, it is not law in such a sense as to concern the judge or lawyer, however much it concerns the statesman or the moralist."[251]

Justice Louis Brandeis (1856-1941) urged the Court to break new ground and lead society in new directions, stating, "If we would guide by the light of reason, we must let our minds be bold."[252]

Even though individual Justices and legal educators had encouraged evolutionary law, it was not until Earl Warren became Chief Justice that there was finally a majority of Justices on the Court willing to embrace that view. One of those Justices (now in the majority) was William Brennan (1906-1997), champion of what he termed "the evolving understanding of the Constitution,"[253] "the 'living' Constitution,"[254] "the freedom to reinterpret constitutional language,"[255] "a malleable

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[248] JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 34 (1927).

[249] HOFFHEIMER, *supra* note 195, at 5.

[250] OLIVER WENDELL HOLMES, JR., *The Law in Science—Science in Law, in* COLLECTED LEGAL PAPERS 210, 225 (1920).

[251] BENJAMIN CARDOZO, THE GROWTH OF THE LAW 49 (1924).

[252] New State Ice Co. v. Leibmann, 285 U.S. 262, 311 (1932) (Brandies, J., dissenting).

[253] William J. Brennan, Jr., *My Life on the Court, in* REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE 17, 18 (E. Joshua Rozenkranz & Bernard Schwartz eds., 1997).

[254] *Id.*

[255] *Id.* at 19.

Constitution,"[256] the Constitution's "power of adaptation,"[257] and "the Constitution's 'suppleness.'"[258]

Consequently, during Warren's sixteen-year tenure, the Court became a powerful societal force, striking down numerous long-standing historical practices while acknowledging that it was doing so without any previous precedent.[259] In short, the Court publicly affirmed that it had finally arrived at its fully evolutionary aspiration, no longer bound by history or precedent.

Under this current theory, judges are solely responsible for the evolution of the Constitution, and it is living and organic according to their decree. As Justice Cardozo acknowledged, "I take judge-made law as one of the existing realities of life."[260] Chief Justice Charles Evans Hughes similarly declared, "We are under a Constitution, but the Constitution is what the judges say it is . . . ."[261]

Harvard Professor Steven Wise points out that this radical revolution in legal theory occasioned by the adoption of Darwin's principles started slowly but changed the legal landscape rapidly.[262] Yet, is the fact that the Constitution is now a living, malleable, evolving

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[256] *Id.*

[257] *Id.* at 18.

[258] *Id.* at 19.

[259] *See* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 220-21 (1963).

[260] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 10 (1921).

[261] Speech of Charles Evans Hughes at Elmira (May 3, 1907), *in* THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 144, 144 (David J. Danelski & Joseph S. Tulchin eds., 1973).

[262] Wise observes:

> "To understand the strong normative appeal of evolutionary models, one must first appreciate that American law, like biology at the time of Darwin, faces the problem of providing a theory of creation which does not invoke a Supreme Being." [E Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38, 91 (1985).] Elliott, who believes that the manner in which law is affected by the ideas that it routinely borrows from other disciplines has been largely unexplored, sets sail by chronicling how the Darwinian idea of evolution has affected the jurisprudential work of such legal scholars as Holmes, Wigmore and Corbin. *Id. See also* Jan Vetter, *The Evolution of Holmes, Holmes and Evolution*, 72 Cal. L. Rev. 343, 362 (1984) ("Holmes' *The Common Law* is first of all an account of legal change, and its object in this respect is to exhibit the workings of Darwinian evolution in law"). Evolutionary jurisprudence was often shunned during the middle half of the twentieth century due to that period's association of evolution with Spencer's racist and reactionary Social Darwinism. [E. Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38, 91 (1985).] It is shunned no longer. *Id. See* Roger D. Masters, *Evolutionary Biology, Political Theory and the State, in* LAW, BIOLOGY & CULTURE—THE EVOLUTION OF LAW 171 (Margaret Gruter & Paul Bohannon eds., 1983).

Nonhuman Animals, *supra* note 27, at 41 n.156.

document, necessarily bad? After all, society does change and should not necessarily be bound by decisions made two centuries ago.

Significantly, the Framers agreed with this thesis—they understood that times would change and, therefore, so should the Constitution. However, they would have vehemently disagreed with the mechanism by which this change occurs today.

The Framers made clear that when the meaning, and thus the application, of any part of the Constitution was to be altered, it was to be at the hands of the people themselves, not at the feet of the judiciary or through the usurpation of any legislative body. For this reason, Article V[263] was placed in the Constitution to establish the proper means whereby the people might "evolve" their government. As Samuel Adams explained,

> [T]he people *alone* have an incontestible, unalienable, and indefeasible right to institute government; & to reform, alter, or totally change the same when their protection, safety, prosperity, and happiness require it. And the Federal Constitution, according to the mode prescribed therein, has already undergone such amendments in several parts of it as from *experience* has been judged necessary.[264]

George Washington also warned Americans to adhere strictly to this manner of changing the meaning of the Constitution:

> If, in the opinion of the people, the distribution or the modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates: but let there be no change by usurpation; for through this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed.[265]

Alexander Hamilton echoed this warning, declaring that the "Constitution is the standard to which we are to cling. Under its banners, *bona fide* [without deceit], must we combat our political foes,

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[263] The pertinent part of Article V reads:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for Proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . .

U.S. CONST. art. V.

[264] Speech by Samuel Adams to the Legislature of Massachusetts (Jan. 19, 1796), *in* 4 SAMUEL ADAMS, THE WRITINGS OF SAMUEL ADAMS *supra* note 159, at 386, 388.

[265] Washington, *supra* note 88, at 22.

rejecting all changes but through the channel itself provides for amendments."[266]

Already, the people have "evolved" their Constitution twenty-eight times for such purposes as abolishing slavery, granting full suffrage without regard to race or gender, replacing capitation taxes with progressive taxes, imposing term limits on presidents, reducing the voting age for youth, and requiring Congress to face the electorate before a congressional pay raise can take effect.

It is this method of "evolving" government, set forth in the Constitution, which must be jealously guarded and followed. Therefore, if the belief in theistic origins, transcendent values, inalienable rights, or any other political doctrine established in our documents, is to change, it must be done by the people themselves, according to the process established in Article V. Any other method of change is an abuse of power and a usurpation of the rights of the people.

The real danger of societal evolution rests, then, not in the fact that corrections are needed, but rather in the fact that those corrections are made by a small, elite, and unaccountable group—and often by individuals whose personal values do not reflect those of "we the people."[267] In fact, in a number of recent cases, the courts have unilaterally reversed the outcome of direct elections wherein the people clearly expressed their will.[268]

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[266] Letter from Hamilton to Bayard (Apr. 1802), *in* 6 ALEXANDER HAMILTON, WORKS OF ALEXANDER HAMILTON 540, 542 (New York, John F. Trow 1851).

[267] U.S. CONST. preamble.

[268] In *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996), *rev'd, Washington v. Glucksberg*, 521 U.S. 702 (1997), and *Quill v. Vacco*, 85 F.3d 716 (2d Cir. 1996), *rev'd*, 521 U.S. 793 (1997), the Court reversed the results of elections in Washington and New York in which the citizens had voted to forbid physician-assisted suicides.

In *Missouri v. Jenkins*, although citizens voted down a proposed tax-increase, the court nevertheless ordered the tax to be levied. 495 U.S. 33 (1990).

In *Yniguez v. Arizonans for Official English*, the court reversed the results of the vote by Arizona citizens declaring English as the official language of that State. 69 F.3d 920 (9th Cir. 1995).

In *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995), and *Gregorio T. v. Wilson*, 59 F.3d 1002 (1996), the courts suspended the results of the California vote to withhold State-funded taxpayer services from those who are illegally in the country.

In *Carver v. Nixon*, the court set aside the results of a statewide election wherein Missouri citizens voted to approve campaign financing reform by setting limits on candidate contributions by individuals. 72 F.3d 633 (8th Cir. 1995).

In *U. S. Term Limits v. Thornton*, 514 U.S. 779 (1995), and *Thorsted v. Munro*, 75 F.3d 454 (9th Cir. 1996), the courts overturned the results of elections in which citizens in Arkansas and Washington had voted to limit the terms of their elected officials.

In *Romer v. Evans*, the court overturned a constitutional amendment approved by Colorado citizens to forbid awarding special, rather than just equal, rights to homosexuals. 517 U.S. 620 (1996).

There are numerous other examples[269] demonstrating that courts now reject the principle of "the consent of the governed"[270] originally established in our governing documents and long held to be a core political doctrine in America. In fact, President George Washington, a Federalist, declared that "the fundamental principle of our Constitution . . . [requires] that the will of the majority shall prevail."[271] President Thomas Jefferson, an Anti-Federalist, echoed President Washington's sentiments: "the will of the majority [is] the Natural law of every society [and] is the only sure guardian of the rights of man. Perhaps even this may sometimes err. But it's [sic] errors are honest, solitary and short-lived."[272]

Very simply, the allegedly evolving values of the nation have not been reflected in the Court's evolution of the Constitution. The people have shown no inclination to alter either the view of theistic origins incorporated in our documents or the type of civilization that proceeds from that belief. Until the people make that change, it is judicial tyranny to impose contrary beliefs on the people. Despite any well-meaning intentions that might rest behind such efforts, those other means are, as George Washington explained, "the customary weapon by which free governments are destroyed."[273]

Allowing the federal judiciary to be the final authoritative voice in determining what the people "need" not only smacks of elitism, but also places America under what President Thomas Jefferson so aptly described as "the despotism of an oligarchy."[274]

XIII. CONCLUSION: SOCIETAL EFFECTS OF THE PARADIGM SHIFT

With the judicial rejection of the theistic view inculcated in our governing documents, the legal view of the concept of human uniqueness has changed, as has the legal status of man, specifically his worth, value, and dignity; the legal concept of transcendent rights and wrongs; the

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[269] *See, e.g.*, Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981) (overturning an election where voters approved campaign contribution limits); Lucas v. Colorado Gen. Assembly, 377 U.S. 713 (1964) (overturning statewide vote approving redistricting plan); Spokane Arcades v. Ray, 449 F. Supp. 1145 (E.D. Wash. 1978) (overturning a statewide vote approving a moral nuisance law to regulate adult businesses).

[270] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[271] RICHARDSON, *supra* note 76, at 164 (1899) (from President Washington's Sixth Annual Address, November 19, 1794).

[272] Response from Thomas Jefferson to the citizens of Albemarle on (Feb. 12, 1790), *in* 16 THE PAPERS OF THOMAS JEFFERSON 178, 179 (Julian P. Boyd ed., 1961).

[273] ADDRESS OF GEORGE WASHINGTON, *supra* note 88, at 22.

[274] Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), *in* 15 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 97, at 277.

belief in inalienable rights with the role of government being the protector of man's natural rights; and the concept of moral accountability. In short, a new paradigm for American government and culture has been established. Only those in denial of the obvious can claim that the controversy over evolution is still merely a scientific debate rather than a civilization debate. Even defenders of evolution do not make such a naive claim.

For example, Harvard professor Chauncy Wright (1830-1875) observed that evolution is applied to "every field of study from biology and cosmology to sociology and philosophy of history."[275] English biologist and zoological professor Sir Julian Huxley (1887-1975), grandson of Sir Thomas Huxley, "Darwin's bulldog,"[276] confirms that "subjects like linguistics, social anthropology, and comparative law and religion, began to be studied from an evolutionary angle, until today we are enabled to see evolution as a universal and all pervading process."[277] Molleen Matsumura, network project director for the National Center for Science Education (NCSE), similarly attests that Darwinism is now used "to solve problems in medical research, agriculture, conservation, and . . . . all public discourse . . . ."[278] Steven Wise agrees, declaring that "Darwin's earthquake rumbled not just through science, but theology, philosophy, sociology, and inevitably, political science and the law."[279] As Commager correctly concludes, "Every institution was required to yield to [evolution's] sovereign claims: the church, the state, the family, property, law; every discipline was forced to adapt itself to its ineluctable pattern: history, economics, sociology, philology, art, literature, religion, ethics."[280]

Based, therefore, on the far-reaching effect of evolution on every discipline and aspect of society, a work edited in part by Sir Julian Huxley asserts that, by way of simple definition, evolution properly may be considered a religion: "A religion is essentially an attitude to the world as a whole. Thus evolution, for example, may prove as powerful a principle to co-ordinate men's beliefs and hopes as God was in the past."[281]

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[275] PHILIP P. WIENER, EVOLUTION AND THE FOUNDERS OF PRAGMATISM 6 (1949).

[276] ENCYCLOPÆDIA BRITANNICA, *Huxley, T.H.*, *at* http://www.britannica.com (last visited Jan. 23, 2001).

[277] Richard L. Overman, Comparing Origins Belief and Moral View: Remarks at Fourth International Conference on Creationism (Aug. 3-8, 1998), *at* http://www.icr.org/research/ro/ro-r01.htm.

[278] Benen, *supra* note 66.

[279] *Nonhuman Animals*, *supra* note 27, at 41.

[280] COMMAGER, *supra* note 6, at 83.

[281] GROWTH OF IDEAS: KNOWLEDGE, THOUGHT, IMAGINATION 99 (Sir Julian Huxley, et al eds., 1965) [hereinafter GROWTH OF IDEAS].

It appears that even the Supreme Court agrees with such a characterization. In seeking to extend the provisions of explicitly theistic language in statutory laws and constitutional documents to include non-theists, the Court introduced a new standard for defining religion that would provide "religious" protections to non-theists. Thus, in *United States v. Seeger*, the Court declared that "the test of belief 'in a relation to a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its [non-theistic] possessor parallel to that filled by the orthodox belief in God . . . ."[282] The same position apparently was taken in *Welsh v. United States*,[283] because, as one court of appeals observed about that case, the "Justices who addressed the constitutional issue concluded that 'religion' should *not* be confined to a Theistic definition."[284]

Since for many the belief in non-theistic evolution is "an attitude to the world as a whole"[285] and is a conviction that "occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God,"[286] then non-theistic evolution would certainly seem to qualify as a "religion" under the Court's own standard. The choice, then, of which philosophy will direct American civilization is actually between two "religious" views: the traditional theistic view embraced by the people or the non-theistic "religious" view imposed by the courts.

The non-theistic approach rejected in the *Scopes* trial, but subsequently established through federal court decisions, unquestionably encompasses an approach to American civilization different from that specified by our governing documents. Yet, what America's civilization is or becomes, should be the choice of the people, not the edict of the judiciary.

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[282] 300 U.S. 163, 165-66 (1965).

[283] Welsh v. United States, 398 U.S. 333 (1970).

[284] Malnak v. Yogi, 592 F.2d 197, 205 (3d Cir. 1979) (emphasis added).

[285] GROWTH OF IDEAS, *supra* note 279, at 99.

[286] *Seeger*, 300 U.S. at 166.