

## PREFACE

From the first day of classes, students at many American law schools encounter an insistence that systematic and rigorous analysis of the law requires “the separation of law and morality.” In such a basic form, however, this separation thesis—generally understood as the defining characteristic of legal positivism—is ambiguous and misleading. Some interaction between law and morality is beyond dispute. No one doubts that widely shared moral beliefs serve as a source in the development of law—legislators and even judges draw upon moral ideas when making and applying the law. Law has also long served as a source in the development of morality. Aristotle highlighted the dependence of morality on law in the closing pages of his *Nicomachean Ethics*, the most comprehensive treatise on the moral virtues in antiquity.

Law and morality are not, however, coextensive. Some aspects of our lives seem appropriate for moral regulation but not for legal control. Philosophers beginning with Plato have noted a distinction between what is legally or conventionally right and what is naturally (or, as many would say today, morally) right. Indeed, legal norms are often subject to criticism from a moral point of view. The precise contours of the relationship between law and morality are complex and deserve serious discussion. The essays and articles presented here address this relationship from a variety of perspectives.

As has been the *Journal's* tradition for more than a quarter-century, we are pleased to publish highlights from this past year's National Federalist Society Student Symposium. The twelve collected essays approach the theme of “Law and Morality” by discussing moral choices and the Eighth Amendment, government promotion of moral issues, the morality of First Amendment jurisprudence, and same-sex marriage in constitutional theory. Judge William Pryor's keynote address confronts directly the role of religion and morality in the practice of judging, arguing that although particular doctrines may not be used in deciding cases, motivational moral and religious influences may help a judge discharge his duty to protect and defend the Constitution.

We thank the Federalist Society for sponsoring this Symposium, Professor Steven Calabresi for helping to organize its proceedings, and the speakers who shared their reflections first with the student attendees and now with our readers.

The *Journal* is particularly pleased to present Professor Robert P. George's lecture on "Natural Law." Legal thinking during much of the last century was dominated by positivism. A recent revival of interest in natural law, led by scholars like Professor George at Princeton and John Finnis at Oxford, has challenged the hegemony of the conventional positivist account. The most prominent argument asserting the so-called separation of law and morals was provided by H.L.A. Hart in his 1957 Holmes Lecture delivered at Harvard Law School. Fifty years later, in his 2007 Dewey Lecture at Harvard Law School, Professor George offered a constructive account of natural law. His lecture explains why the idea of natural law and natural rights is more plausible than Hart and others have supposed, comparing natural law to competing justificatory accounts of positive law and to competing standards for its critical evaluation.

Professor Harry V. Jaffa, an eminent scholar of Lincoln's political thought, contributes an engaging essay arguing that Chief Justice Taney's *Dred Scott* opinion illegitimately applied the sound jurisprudential doctrine of original intent to advance an "incredible misrepresentation" of the Founding ideals. In rejecting the basic proposition that all men are created equal, Taney "invented" a proslavery Founding, thereby "turning the Founders against the Founding." Professor Jaffa subtly contends that the doctrine of original understanding "presupposes a Constitution based upon the laws of nature." Without this legitimacy, the Constitution would lack intrinsic moral authority and a meaningful claim on our fidelity to original meaning. The principles of the Declaration of Independence, although not explicitly incorporated in the Constitution, are therefore "the necessary ground for distinguishing the Constitution's principles from its compromises."

In an exhaustively researched article responding to the writings of two prominent Christian legal scholars, Professor John M. Breen argues that legal measures designed to regulate and discourage abortion fall squarely within the appropriate

boundaries of law. Relying upon a broad Christian tradition, with particular reference to Catholic teaching, Professor Breen suggests that the rule of law is not simply a safeguard of law's own procedural integrity, but is meant to secure justice for those whom it governs. Although immorality and illegality are not coextensive, law and morality must coincide where a fundamental denial of justice is at stake. Despite recognition that the nature of abortion as a social phenomenon is such that it cannot be eliminated through purely legal means, Professor Breen combines empirical assessment and theoretical analysis in demonstrating law's capacity to teach and influence culture through criminal prohibition.

Reflecting upon fifteen years of experience participating in same-sex marriage litigation, Monte Stewart vigorously argues that constitutional norms of equality and liberty do not require the redefinition of marriage from the union of a man and a woman to the union of any two persons. Contrary to a widely held assumption, he contends that judicial choice between competing marriage facts, and not the standard of review, actually determines the outcome in same-sex marriage cases. After a close examination of these competing marriage "facts"—those matters disputed in litigation other than legal principles and procedures—Mr. Stewart concludes that the factual description of marriage advanced by proponents of man-woman marriage is most accurate. Moreover, government imposition of the radically different genderless marriage institution would in fact replace the contemporary man-woman marriage institution, along with the unique and essential social goods it provides.

We are fortunate to open this year's volume with a 30th anniversary retrospective commemorating the inaugural publication of the *Journal* in 1978. Throughout the course of a remarkable career spent serving as a White House aide, United States Senator, and Secretary of Energy, Spencer Abraham has consistently made time to support the legal publication he founded as a law student. We are enormously grateful for his continuing influence, and for the courage he and others displayed in promoting conservative ideas on the Harvard Law School campus and across the country.

An introduction to this issue would not be complete without acknowledging the tireless work of our entire *Journal* staff in preparing the following essays and articles for publication. I am particularly grateful to Christopher Catizone, Christopher Thomas, and Ryan Caughey for their extraordinary efforts throughout the editorial process. Andrew Bernie performed double-duty as a Managing Editor of the *Journal* and as the National Editor overseeing Federalist Society editors from law schools across the country who assisted in preparing the Symposium essays. Brian Callanan deserves much credit for helping to assemble an impressive lineup of contributors. Finally, Deputy Editor-in-Chief Kevin Hinkley has consistently labored far above and well beyond the call of duty to ensure that the *Journal* maintains its high standards of excellence. His unfailing dedication made publication of this issue possible.

*Robert R. Porter*  
*Editor-in-Chief*