LIBERATION AND EMPOWERMENT: A JUBILEAN ALTERNATIVE FOR STATE v. OAKLEY

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I thank the Western New England College School of Law Review for the honor and opportunity to participate in its twenty-fifth anniversary symposium. It has afforded me a chance, in the context of a challenging case, to explore my own views of lawmaking in contemporary America. Since my ideas on this subject are in the process of forming, I welcome comments from any reader who has suggestions concerning the approach outlined in this essay. My e-mail address is rcole@law.wnec.edu. Finally, because the facts of the Oakley case, as well of surrounding circumstances of Oakley's life, have been elaborated earlier in the symposium, this article will not systematically restate these facts.

I. JUDGE BABLITCH’S LAMENTATION

In his concurring opinion in State v. Oakley Judge William Bablitch lamented: “I am not happy with the result [of this case], but can discern no other result. And the dissents provide none. Accordingly, I join the majority.”1 The judicial opinions in State v. Oakley represent two approaches to lawmaking that are very com-

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mon in contemporary American jurisprudence. In affirming Judge Hazelton’s condition to David Oakley’s parole, that he father no more children until he made substantial efforts to pay his child support debt, the majority attempts to conform Oakley’s behavior to a higher moral standard of conduct. Its goal is to create a purified moral community. In contrast, the dissenters attempt to protect Oakley’s individual rights from infringement by what they consider to be Judge Hazelton’s heavy-handed, and unconstitutional, parole condition. Their goal is to establish the legal basis for a society in which individuals enjoy ample space for freedom of thought and action.

Despite the differing approaches to lawmaking and visions of a good society represented by the judicial opinions in Oakley, Judge Bablitch’s lamentation insightfully recognized important shared premises, and constraints, that shaped all of these judicial opinions. The commonalities include a common framework of legal analysis for the judicial opinions in Oakley, as well as a shared understanding of the nature of human life in modern society. Part II.A of this article will elaborate on both these understandings and how they shaped basic features of all the judicial opinions in Oakley. Within this common framework, Part II.B will then consider the differing approaches to lawmaking, social visions, and concepts of liberty that underlay the majority and dissenting opinions. Part II.B will conclude by suggesting the major limitations of the various judicial opinions in Oakley.

Part III of this article proposes an alternative way lawmakers could deal with Oakley in order to try to liberate him from his cycle of destructive behavior, (harmful to himself, his sexual partners, his children, and his community), and to empower him. The goal of such lawmaking would be to provide enabling conditions to uplift Oakley, so that in the future he could flourish and interact in more positive ways with others, including his children. There are precedents in western history for such an approach to lawmaking, most strikingly in the major religious traditions of the West. A foundational impulse for a jurisprudence of liberation and empowerment in western religion is the Jubilee, a fundamental legal principle in the Judeo-Christian tradition. The great lawgiver of the Old Testa-


3. The purpose of this essay is not to advocate for imposing religious law precedents upon civil law. Instead, as the essay will demonstrate, Jubilean principles devel-
ment, Moses, established the Jubilee as a sabbatical year of liberation and empowerment during which the poor and oppressed would be released from various forms of bondage and land would be restored to its earlier owners. In liberating and empowering citizens, Moses' goals were at once radical and conservative. He hoped to transform people, to create a nation of "priests and prophets," while simultaneously restoring an earlier community of empowered and independent citizens. Moses' aspiration was adopted by the later prophets, most especially Isaiah, who foresaw this transformation of both people and human culture in a future messianic age. When Jesus adopted the Jubilee concept as a cornerstone of His ministry of the kingdom come, He completed a process of transforming the Jubilee from a specific legal arrangement into a general guideline for an immediate and radical transformation of human life and culture.4

Part IV completes the history of the adoption of Jubilean principles of liberation and empowerment by the major religions of western civilization. It briefly traces their adoption into the culture of early Christianity. Although the third major religion in contemporary western civilization, Islam, did not adopt a Jubilee, Part IV concludes with a brief look at examples of liberating and empowering principles in its law.

Part V completes this paper by addressing three issues that would confront contemporary lawmakers who might adopt a Jubilean approach to criminal law. First, how might they apply principles of liberation and empowerment to Oakley, and to criminal deviance generally? Next, this Part argues that a Jubilean principle of liberation and empowerment might profitably be applied to criminal deviance generally in contemporary America. Finally,

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4. André Trocmé first recognized the importance of the Jubilee to Jesus' ministry in a ground-breaking study. ANDRÉ TROCME, JESUS-CHRIST AND THE NONVIOLENT REVOLUTION 41-52 (Martin Shank & Marlin Miller trans., 1973). John Howard Yoder relied heavily upon Trocmé's study. JOHN H. YODER, THE POLITICS OF JESUS (1973) [hereafter YODER II]. See also ROBERT NORTH, SOCIOLOGY OF THE BIBLICAL JUBILEE (1954). Despite the importance of the Jubilee concept in Judeo-Christian thought, there has been relatively little scholarly writing about it in America, and to my knowledge none concerning its implications as a legal concept.
what social vision and concept of liberty underlay Jubillean jurisprudence?

II. STATE V. OAKLEY

A. The Shared Understandings of the Oakley Opinions

Underlying all of the judicial opinions in Oakley is a shared understanding of nature of human life in contemporary America, and that it has somehow gone awry. What is beneath this concern is a view of the historical development of human life in western civilization. Its religious version begins with the Creation in the Garden.  

Though free, a basic theme of the history of the Garden was that humans only flourish when nourished by human bonds within communities. A broad theme of harmonious integration underlies the original vision of human life in the Garden. This integration is within the self, with others including spouses, with nature, and with God. This theme also is at the root of the Genesis story of the origin of human culture. Cain, one of the sons of Adam and Eve, the original parents of the human race, killed his brother Abel out of jealousy. God decreed that Cain would be “a vagrant and wanderer upon the earth,” living a rootless existence, separated from community, and vulnerable to the violence of other men. An anguished Cain protested, “My punishment is too great to bear.” After wandering about the earth Cain ultimately settled “east of Eden” in the land of Nod, married, had a son, and built a city which he named after his son.

This vision of human life flourishing within the community influenced western thought for millennia. But a process of moderni-

5. Judaism, Christianity, and Islam, the three major religions of western civilization, begin in the Garden.
6. This truth is beautifully depicted by Michelangelo’s painting, “The Creation of Adam,” on the ceiling of the Sistine Chapel. In it, Adam, touched by the finger of God, falls gently from His hand and nestles softly upon the earth.
7. God asserted that because it was “not good for the man to be alone,” Genesis 2:18-24, He created woman and decreed that the two “become one flesh.” Id. The Hebrew word in verse 18 is ezer. It connotes the idea “that without which the other cannot be whole.”
8. This integration is demonstrated by another image of Adam, sitting amidst the animals of the earth and birds of the air, and giving them names. Genesis 1:29-30.
9. Id.
ization that has transformed western civilization over the past several centuries has undermined this vision for human life. Because others have described modernization more fully elsewhere, the essay will only summarily review this process and its profound effects upon human life and culture.

Like all major historical movements, the roots of modernization are hard to trace. It may have begun as early as the twelfth century as Europe emerged from the disorder following the breakdown of the Roman Empire. In later centuries, cataclysmic socio-economic changes disengaged millions of persons from the bonds of traditional communities and cast them adrift in an unfamiliar modern world. These changes included the commercialization of economy, the industrialization of the manufacturing process, unprecedented social and geographical mobility of western Europeans, including to the western hemisphere, and the expansion of their descendants across the continents of North and South America. Though in manifold ways modernization freed humans from traditional limitations imposed upon them by their environments and increased the wealth and comforts they enjoyed; it disengaged people from traditional communities. Like Cain they became rootless and vulnerable. The disconnection of human life from community constitutes what C.E. Black called the "agony of modernization."

The etymology of the word "individual" chronicles the "extraordinary" social process of disintegration of human bonds that accompanied modernization in western culture. Individual originally meant "indivisible." But by the seventeenth century the

12. C. E. Black, The Dynamics of Modernization: A Study in Comparative History (1966). A year before the publication of Black's study the Second Vatican Council, in the "Introduction" to Gaudium et Spes, outlined in similar terms the sweeping and disruptive effects of modernization. It included the breakdown of "traditional local communities."


14. The process of modernization continues to go on in countries across the world up to the present time. Black, supra note 12.

15. Id. at 26-34.

16. In medieval theology was used interchangeably with that word, for example, to describe the Trinity, or the union of husband and wife. Raymond Williams, Keywords: A Vocabulary of Culture and Society 133-34 (1976). The roots of the word individual are the negative, in, and dividere, which means divide. Id.
word was being used to suggest the "singular" as opposed to the "general," and thus came to connote the idiosyncratic characteristics of particular persons. By the end of that century the word individual had begun to evolve toward its modern usage, though it continued to be used in relation to a group. It was not until well into the eighteenth century, most notably in Adam Smith’s foundational work of classical economics, *The Wealth of Nations*, that the “crucial shift” to the modern meaning of the word can be clearly seen. In it the noun individual was used to characterize a single person, separated from community, and indeed, from all personalized human bonds.

As they witnessed the process of modernization and its effects upon human life and culture, leading nineteenth-century thinkers insightfully described and critiqued how it had destroyed traditional communities and isolated people. The French observer of antebellum America, Alexis de Tocqueville, described how modernization, in the context of a political democracy, had engendered a new man, the individual, separated from all human bonds, vertical and horizontal. According to the German thinker, Max Weber, the primary basis for human bonds for the new man were contracts, creating “the most impersonalized relationships of practical life into which humans can enter into with one another.” The end result of this process, according to Karl Marx, was alienation. Human beings, abstracted from all social and historical contexts, had become profane and viewed merely as a means.

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17. *See* JOHN DRYDEN, *FABLES ANCIENT AND MODERN* 135 (1700) (stating “[t]hat individuals die, His will ordains, The propagated species still remains.”).

18. *Id.*

19. 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 99 (Henry Reeve trans., 1961). De Tocqueville wrote:

> [A]s social conditions become more equal, the number of persons increases who . . . have . . . retained sufficient education and fortune to satisfy their wants. They owe nothing to any man, they except nothing from any man, they acquire the habit of considering themselves as standing alone, and they are apt to imagine their whole destiny is in their own hands. Thus, not only does democracy make every man forget his ancestors, but it hides his descendants and separates his contemporaries from him.

*Id.*


21. KARL MARX, *On The Jewish Question* (1843), in *THE MARX-ENGELS READER* 43 (Robert C. Tucker ed., 1978). To illustrate again how widespread is the perception of the devastating impact of modernization upon human life, Robert Nozick, whose ideology is far from Marxism, observed that a defining characteristic of contem-
The incredibly disruptive effects of the process of modernization upon human life and sociology directly lead to the shared features of the lawmaking of the judicial opinions in *Oakley*. All of them, for example, embody an abstracted view of Oakley. As Professor Papke observed in his *symposium* article, all of the judges viewed Oakley as representative of poor and dissolute males who wantonly father children and then do not adequately support them financially. Each set of judicial opinions further abstracted Oakley, though in different ways. The majority did so by measuring his conduct against a bundle of moral norms, and finding it wanting. By trying to insulate Oakley from violations of his constitutional privacy rights, the dissenters perceive Oakley as an autonomous individual, separated from the bonds of human community.

Having abstracted Oakley from his sociological context, it is not surprising that all of the judicial opinions picture Oakley negatively, as an active wrongdoer. He had persistently fathered children, nine in all, and then willfully failed to support them both financially and emotionally. Still, within this framework of a shared negative perception of Oakley, there is an important variation in how the judges viewed him. The judges who joined the majority emphasized how Oakley’s conduct not only was personally irresponsible, but also harmed his sexual partners, their children, and his community. In the contemporary context of a national “epidemic” of non-payment of child support and reduced state welfare programs, Oakley’s failure to pay child support constituted a primary reason for the impoverished state of his sexual partners and their children. While the dissenters shared the majority’s view of

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23. See *infra* Part II.B. (considering how both the majority and dissenting judges abstract the rational capacity from the rest of human personality).

24. *See Papke, supra* note 22, at 20. Professor Papke makes the point that this was as true of the dissenters as it was of the majority. *Id.* He persuasively shows how, beginning in the mid-1980s, American liberals and conservatives alike came to embrace a negative image of the poor. *Id.*

25. *State v. Oakley, 629 N.W.2d* 200, 215 (Wis. 2001). One of his children, Stephanie, asserted of her father that “[e]ver since we were born he didn’t give us no Christmas presents, no birthday presents, no nothing . . . . He doesn’t deserve [the children] he has now.” She expressed the desire to change her last name. Elizabeth McCright, *Prohibiting Deadbeat Dads From Fathering More Children . . . What’s Next? The Wisconsin Supreme Court’s Decision in State v. Oakley, 86 Marq. L. Rev. 153* (2002).

26. Judge Wilcox observed that “the nonpayment of child support frequently
Oakley as profligate, they also viewed him as weak, vulnerable, and needing legal protection from the heavy-handed government.

The process of modernization also transformed the accepted view of the relationships of the interests of individuals and their communities. An important premise of all of the judicial opinions in Oakley is that there is an unavoidable and irreconcilable collision between the interests of individuals and their communities in contemporary America. In this case the conflict is between Oakley's interest in personal liberty, to choose when to procreate, and the community's economic and moral interests. The community's interests include the interest in raising the moral quality of community life by eliminating Oakley's profligate behavior, while reducing societal poverty and the demands that it places upon society's limited economic resources. Sometimes in modern law judges weigh and balance these interests to achieve some form of maximum utility. But in Oakley, all of the judges agreed that the interests of Oakley and his community could not be reconciled. The majority and dissenting judicial opinions simply chose to protect different interests, the majority opinions the interests of the community; the dissenting opinions, those of Oakley.

The shared perceptions and understandings reviewed in this section were more important in shaping the lawmaking of all of the Oakley judges than were their differences. Nevertheless, the judicial opinions in Oakley reflect important differences in their jurisprudence, and in their visions of the good society and of human liberty within it.

B. The Differences of the Oakley Opinions and Their Limitations

Beneath all lawmaking are visions of what constitutes a good society. For the Oakley dissenters the vision is of a society in which the various parties press single mothers below the poverty line. Oakley, 629 N.W.2d at 204. His opinion includes statistics that in 1997 only $15.8 billion of the $26.4 billion awarded by courts for child support was actually paid. Id. at 203-04.

27. This view is epitomized by Judge Hazelton, who while imposing the contested condition upon Oakley, stated to him: "If you think I'm trampling your constitutional rights, so be it." No Kids Appeal To Be Heard, BELOIT DAILY NEWS Apr. 30, 2001, at 1.

28. Hendrik Hartog, Pigs and Positivism, 1985 Wis. L. Rev. 899 (1985). Hartog also demonstrates that the legal system can be viewed as an arena for competing social visions. Id. (demonstrating the point in the context of a marvelous study of the law concerning the keeping of pigs in New York City during the first half of the nineteenth century).
which each citizen enjoys a wide sphere of freedom of thought and action. The protected sphere of free thought and action allows the individual the breathing space to be creative, and in this way achieve their full human potential. This vision is wonderfully expressed, in terms reminiscent of John Stuart Mill’s romantic vision of individual creativity in chapter three of his famous essay, *On Liberty*, by Justice O’Connor in *Casey v. Planned Parenthood of Southeastern Pennsylvania*. She wrote:

> At the heart of liberty is the right to define one’s concept of existence, of meaning of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State. 29

A creative citizenry, of course, is good for the advancement of society, and indeed, civilization.

In a simpler society individual liberty could be assured by a small government, one that in Jefferson’s felicitous phrase, “tread a noiseless path.”30 But protecting human liberty in a complex modern society, with a more extensive and regulatory government, requires that the judiciary define a wide sphere of individual constitutional rights that will act as a shield against intrusions by runaway majoritarian sentiments or regulatory government. The shield metaphor is related to a view of liberty that is called negative liberty. People enjoy it when they are protected in the exercise of personal freedom from outside intrusions and encumbrances.31

To protect negative liberty in modern society requires a jurisprudence called “liberal constitutionalism.” It characterized the lawmaking of both dissents as they sought to protect Oakley’s privacy right to procreate from what the dissenters viewed as a most intrusive and onerous condition to Oakley’s parole. Judge Bradley’s dissent is clear in its jurisprudence of liberal constitutionalism.32 Most illuminating is a passage she cites from *Eisenstadt v.*

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30. Thomas Jefferson, First Inaugural Address (Mar. 4, 1801).


32. State v. Oakley, 629 N.W.2d 200, 216 (Wis. 2001) (Bradley, J., dissenting) (noting that the condition violates a fundamental liberty right “which the Constitution jealously guards for all Americans.”).
Baird. "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." 33

In many respects the vision of human life and liberty embodied within liberal constitutionalism is appealing. We should take liberal constitutionalism seriously in the modern world in which individuals are separated from the protective bonds of traditional communities. Persecuted minorities across the centuries, from their chains, jail cells, torture chambers, and even their graves, scream out the importance of constitutional rights in protecting persons from intrusions by both powerful and arbitrary governments and malevolent groups of citizens. 34 Individual freedom of thought and action must be a component of any meaningful concept of liberty for citizens of the contemporary world. 35

Nevertheless, the concept of liberty that the dissenters champion, standing alone, does not constitute an adequate basis for human flourishing in the modern world. This can be demonstrated from three perspectives. First, because of the concern of liberal constitutionalism about intrusions by powerful governments upon the autonomy of citizens, it was natural for it historically to focus its legal protection of the individual upon political-legal rights. While the scope of protection that liberal constitutionalism affords to citizens is not irrevocably so narrow, 36 by its very nature negative liberty only affords citizens a shield from outside intrusions upon personal rights. One of the earliest exponents of the concept of negative liberty in modern western culture, the seventeenth-century English thinker, Thomas Hobbes, observed: "Liberty, or freedom, signifieth properly the absence of opposition; by opposition I mean external impediments of motion." 37 This view entirely overlooks

33. Id. at 216 (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).
34. It is not chance that among feminist scholars, Patricia Williams, who represents a long-oppressed minority, has most clearly recognized the importance of liberal constitutionalism. Patricia J. Williams, Alchemical Notes: Reconstructing Ideals from Deconstructed Rights, 22 HARV. C.R.-C.L. L. REV. 401 (1987).
35. Carol Gould, Rethinking Democracy: Freedom and Social Cooperation in Politics, Economy, and Society Ch. 1 (1988). The important point that Gould makes is that freedom of thought and action is one of the necessary conditions for achieving self-mastery. Id.
36. Oakley demonstrates that in modern jurisprudence the scope of liberal constitutionalism has broadened somewhat, and it can encompass the protection of social rights.
the fact that it is more than outside impediments that can prevent humans from exercising genuine free choice. Often critical to human development is the availability of material and social conditions necessary for purposes or plans. These can be called "enabling conditions." For example, even when all citizens enjoy a formal equality of opportunity, persons like Oakley who are so poor that they cannot afford the costs of education are realistically constrained in their life options. The influential American philosopher of the first half of the twentieth century, John Dewey, scoffed at the notion that people, armed with legal rights, could enjoy real freedom, without any regard for their educational backgrounds or socio-economic positions.

The failure of proponents of negative liberty to appreciate the importance of enabling conditions again reflects their abstracted view of the individual. So does their vision of individual creativity. It abstracts the rational from the emotional and spiritual aspects of human personality. Yet again derivative from its abstracted view of human beings, proponents of negative liberty miss the point that humans flourish within the framework of social relationships and communal institutions. The liberal constitutionalism that the dissenters apply in Oakley, protecting the exercise of negative liberty, actually furthers the isolation of the individual from the outside world. This point is symbolized by the privacy rights that the dis-enslavement by others." C. B. MacPherson, Berlin's Division of Liberty, in Democratic Theory: Essays in Retrieval 104 (1973) [hereinafter MacPherson I].

38. See generally MacPherson I, supra note 37.
39. Carol Gould characterizes such conditions as "essential to freedom." Gould, supra note 35, at 32, 35. C. B. MacPherson seems to be suggesting the same idea, in a negative formulation, when he states: "A man's power, in the sense required in democratic theory, is to be measured in terms of absence of impediments to using his human capacities." C. B. MacPherson, Problems of a Non-Market Theory of Democracy, in Democratic Theory: Essays in Retrieval 58 (emphasis in original) [hereinafter MacPherson II].
41. John Dewey, On Experience, Nature, and Freedom 270-71 (Richard J. Bernstein ed., 1960) (writing that "[t]he notion that men are equally free to act if only the same legal arrangements apply equally to all—irrespective of differences in education, in command of capital, and the control of the social environment which is furnished by the institution of property—is a pure absurdity . . . ").
42. See Gould, supra note 35, at 33-34.
43. Professor Glendon made this point about rights ideology, observing that what sets it apart is "its starkness and simplicity, its prodigality in bestowing the rights label, its legalistic character, its exaggerated absoluteness, its hyper-individualism, its insularity, and its silence with respect to personal, civic, and collective responsibilities." Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse xi (1991).
senters champion. Some feminist scholars have pointed out that privacy rights suggest the metaphor of legal boundaries that surround and protect, but also isolate, individuals from the outside world. As Dewey recognized, negative liberty incorrectly views human flourishing as founded solely upon "the original moral and psychological structure of individuals."45

However creative isolated individuals are, their lives nevertheless appear singularly unappealing. According to the modern English scholar C. B. MacPherson, they are characterized by "possessive individualism." This concept conceives of human beings as "asocial, egoistic individuals whose fundamental motivation is the satisfaction of their own interests." They are absorbed by a love of freedom and self-interest, and rigorously act according to rational calculation intended to further self-interest. Separated from traditional communities, the life of such a person is devoid of the warmth of human bonds. Instead, it is composed of a series of unrelated incidents, and its social relations "consist of exchanges between proprietors." Max Weber pictured the contractual relations of egocentric individuals "whose fundamental motivation in acting is the satisfaction of their own interests" as extraordinarily impersonalized. No wonder the English contemporary of Weber, T. H. Green, characterized the freedom of the possessive individual, doing as he will, as that of the "wandering savage." The essential point is that had the dissenters prevailed and afforded Oakley protection of his right to procreate, his social circumstances, and presumably the way he treated his female lovers and children, would have remained unchanged.

In contrast to the social vision of the dissenters, community is at its core of the vision of the judges who joined the majority. Indeed, their lawmaking can be interpreted as an attempt to resurrect community, if not an earlier community at least a renewed one,

45. DEWEY, supra note 41, at 272.
47. WEBER, supra note 20, at 194 (noting that the end of these human relations became who could cheat whom).
from the wreckage wrought upon it by the process of modernization. The vision is of a purified moral community in which an extensive body of regulatory law, like Judge Hazelton's condition, provides moral guidance for derelicts, and punishes those, like Oakley, who remain steadfastly wayward.

Consistent with their vision of a purified community, the majority, again in contrast to the dissenters, perceive of human beings as having an inherently social nature. They flourish living within close-knit communities. This is also why human conduct affects the well-being of other. These judges therefore viewed Oakley's conduct not just as a profligate exercise of his own will, but as hurtful to the women, children, and community affected by it. To prevent such harmful conduct human beings, these judges support imposing upon citizens legal duties that they owe to one another. This is true even for institutions like the family, and for relations like reproduction, that liberal constitutionalists have long considered to be so private that they exist beyond the ken of legal regulation. To the judges who joined the majority, family relationships are sufficiently crucial to the moral fabric of contemporary culture, and the failure of parents to provide for the material needs of children sufficiently important to the economics of government; that law can regulate familial relationships in substantial ways. The willingness of the majority's judges to use law aggressively to regulate the morality of human conduct warrants calling their jurisprudence "moral legalism."

Though the majority's social vision is communitarian and its jurisprudence regulatory, these judges embrace a concept of human liberty that has far deeper roots in the history of western thought than the negative liberty concept beneath the dissenting opinions. It has been called positive liberty because its goal is to provide conditions for persons that will liberate them from the bondage of harmful forms of behavior. The majority's particular way to liberate Oakley is by imposing upon him a rational and moral code of conduct that suppresses his dissolute way of life.49

Important elements of the majority's moral legalism and its related social vision of a purified moral community are admirable. It appreciates the connectedness of human relations and activities, and the vital importance of community to human life. Judge Wilcox

49. Berlin, supra note 31, at 196 (noting that suppressing what is perceived to be passionate conduct by reasoned regulation has been a common approach for advocates of positive liberty throughout the history of the West).
and those who join him evince an appropriate concern for the effects of Oakley's behavior upon his sexual mates and their children. Their vision of a morally purified community is appealing.

However, other important elements of the majority opinions are questionable or positively unsettling. In the questionable category is the view of the majority, and indeed of all the judges, that Oakley is an active wrongdoer. As discussed already, this characterization is based upon an abstraction of Oakley from his cultural context. Part I of Professor Papke's symposium article wonderfully recreates the outlines of Oakley's life within its social and economic context. Papke shows that Oakley's context, while not entirely constraining, nevertheless significantly narrowed his range of options compared to those available to middle- or upper-class Americans. From this perspective, while Oakley is not without personal responsibility for his actions, he does not appear as so entirely a miscreant as the judges portray him. Another way to reach a less critical view of Oakley is to view him not so much as active manipulator, but as a man in bondage to his own passions.

Further, the moral legalism of the Oakley majority opinions is flawed by two deep contradictions. First, in light of its recognition of the connectedness of social relations and the importance of community, it is odd that the majority would uphold a condition that constrains Oakley in the exercise of a foundational human relationship. Second, although the majority's end, renewing a purified community, is high-minded, the means it employs for achieving this end is to suppress a basic human activity. Judge Hazelwood's condition is blatantly paternalistic. The condition attempts to impose upon Oakley a rational form of conduct that will suppress his unbridled passions, purportedly in his best interest.

This form of paternalism has always been justified as conferring upon people a "higher" positive liberty by freeing them from the bondage of their own passions. This justification for Judge Ha-

50. Papke, supra note 22, at Part I.
51. Levi, supra note 2, at 87-91 (pointing out that upholding Judge Hazelton's condition is also anomalous, for the law does not permit its imposition upon incarcerated criminals).
52. See Berlin, supra note 31, at 157 (concluding “[p]aternalism is despotic, not because it is more oppressive than naked, brutal, unenlightened tyranny . . . but because it is an insult to my conception of myself as a human being, determined to make my own life in accordance with my own . . . purposes, and, above all, entitled to be recognized as such by others.”). See also MacPherson I, supra note 37, at 105-06 (describing this as the “[i]dealist road (or slippery slope) which ends in coercion; the individual is forced to be free”).
zelwood's condition is proffered by Judge Wilcox when he suggested that the intent of the condition was to rehabilitate Oakley, or at least coerce him to change his behavior. There are two important points to notice about this approach to lawmaking. As with the dissenters, the majority is separating the rational and emotional sides of human personality, though now trying to use one to suppress the other. Next, at the end of the day Judge Hazelwood's condition will be unavailing, and can even yield results that further undermine the goal of renewing moral community. Both human history and psychology suggest that regulatory lawmaking, like that embodied in Judge Hazelwood's condition, will at most coerce a begrudging outward conformity in the behavior of Oakley. It will leave Oakley's inner man untouched, except for the resentment against its coerciveness that it engenders in him. Further, as Judge Bradley points out, Judge Hazelwood's condition could very well provoke other forms of undesirable evasive activity, like abortions, that are deeply destructive of moral community.

The greatest flaw of Judge Hazelwood's coercive condition, and the concept of "higher" liberty associated with it, is that they do not accord a sufficient respect for the inestimable dignity of each person that is the bedrock tenet of genuine democracy. Nor is it adequate to assert that since Oakley committed a crime he yields ordinary rights of citizenship. Judge Sykes forcefully responded to this argument by asserting that Judge Hazelton's condition essentially criminalizes the birth of a child by a convicted felon. Judge Bradley concurred by rightly reminding that such reasoning constitutes a slippery slope posing grave dangers to a democratic society.

The limitations of both the moral legalism of the majority and the liberal constitutionalism of the dissenters, confirm Judge Bab-

53. State v. Oakley, 629 N.W.2d 200 (Wis. 2001).
54. Berlin, supra note 31, at 204, 208, 224 (Berlin observed that for advocates of positive liberty, the "dominant self is then variously identified with reason . . . the real self may be conceived of as something wider than the individual . . . as a social 'whole' of which the individual is an element or aspect . . . . This entity is then identified as being the 'true' self which . . . will upon its recalcitrant 'members,' achieve[ ] its own, and therefore . . . 'higher' freedom.").
55. Oakley, 629 N.W.2d at 220 (Bradley, J., dissenting).
56. Id. at 221.
57. Id. at 216 (observing that "[u]ltimately, the majority's decision may affect the rights of every citizen of this state, man or woman, rich or poor."). Papke believes that the female dissenters in Oakley may have been worried that upholding Judge's condition represented a first step toward the sterilization of promiscuous women. Papke, supra note 22, at 21.
litch's dissatisfaction with the options offered to him by them. But did he and his colleagues suffer from a failure of the judicial imagination? Is there an alternative approach to lawmaking that could better deal with the case presented to the court by Oakley and other parents who do not properly support their spouses and children materially and emotionally?

III. THE HISTORICAL DEVELOPMENT OF THE JUBILEE CONCEPT OF LIBERATION AND EMPOWERMENT AS A LEGAL AND MORAL PRINCIPLE

A. The Original Jubilee in Mosaic Law

Moses is the great liberator of Old Testament Judaism. His career as a liberator began when he became the leader of the movement to free the Jewish people from slavery in Egypt. It culminated as Moses led the people through the wilderness for forty years and took Jethro's advice to become their lawgiver.58 Both because the experience of Egyptian slavery had sensitized Moses and the people to the value of liberation, and because the years wandering in the wilderness made clear that true liberation was not a once-for-all experience, it became a central theme of Mosaic law.59 The centerpiece of liberation in Mosaic law is the Jubilee Year, most coherently stated in Leviticus 25.60

The Jubilee Year occurred every fiftieth year (seven times the sabbatical seventh year). "When, on the day of atonement ... the ram's horn" would be sounded "all through your land ... : You shall then consecrate the fiftieth year and proclaim a release through the land to all its inhabitants. It shall be a jubilee to you, and each of you shall return to his own property."61 Simultaneously, masters were to free their slaves and creditors their debtors.62 Thus, the Jubilee represented the liberation of those oppressed by the most common forms of bondage of the ancient Middle East63

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58. Exodus 18:20. Jethro counseled: "[T]hen teach them the statutes and the laws; and make known to them the way in which they are to walk and the work they are to do." Id.

59. "Liberation" in Hebrew came to have a similar connotation to "redemption," to buy back, and "deliverance," to get out. All of them suggest being extricated from some form of bondage. This again links the experience in Egypt with liberation in Mosaic law. Michael Walzer, Exodus and Revolution 24-25 (1985).

60. Leviticus 25:8-10. See also Exodus 22:25-26; Deuteronomy 15:2.


63. Debt and slavery were pervasive in the ancient Middle East. North, supra note 4, ch. 2.
and an empowerment of those who had been in bondage and who were impoverished.\textsuperscript{64} It therefore necessitated a radical reforming of society and economy.\textsuperscript{65} The Jubilee also entailed a psychological release, the verb form suggesting a time of fecundity and abundance associated with exultant joy.\textsuperscript{66}

The Jubilee, then, was a means of human liberation. But the conception of liberty that animated the Jubilee was very different from that of modern liberal constitutionalism, or even of moral legalism. During the long trek in the wilderness some of the freed slaves longed to return to Egypt, and some also adopted the corrupt ways of Egypt.\textsuperscript{67} From this experience Moses came to understand that liberation required more than the freeing of the people from the encumbrance of Egyptian slavery. \textit{True liberation required the empowerment of the people, so that they would become independent. The ultimate goal of liberation and empowerment was the moral transformation of the person.} This view of liberation was the foundation of Moses' vision of the Jewish people becoming a nation of liberated and empowered priests and prophets. Since such a moral transformation of people was not easy, the Jubilee was recurrent.

How would this human transformation occur? It began with liberation from material forms of bondage. It then required investing everyone with land. Since it was the means of production in pre-industrial society, being endowed with it provided the material base for human empowerment. But true liberation, which led to the transformation of the person, was not only material but moral. It therefore required adhering to moral law, based upon a covenant of the people with God. Submission to law demonstrates this liber-
ating transformation was not an individual, but a communal, experience. As in the Garden, in the Promised Land human life would flourish within the personal bonds of a caring community. Everyone in the new community was bound together in covenant, and it required acceptance of the laws of the community. A central principle of this law was that everyone had an obligation to care for and to try to empower other members of the community. This idea was distilled in concept of mitzvah. Mitzvah literally meant commandment, or more accurately, incumbent obligation. The duty arose because it was based upon a principle of torah, and so it entailed joyful service to God. For example, it was a mitzvah for a father to provide an education for his sons.

In every respect, then, the concept of liberty that animated the Jubilee was positive liberty. It linked liberation with empowerment, and ultimately with a transformation of the person. The root words for the Jubilant “release” in “To proclaim release to the captives” in Hebrew is shemitta, and in Greek, aphasis. These words do suggest that the downtrodden are to be “let alone” or “to let rest,” a point also made by the fact that the Jubilee was a sabbatical year. But they also suggest a positive process of liberation from the shackles of various forms of bondage. Further, the transformation of persons required both their empowerment, and their submission to the laws of the community.

B. A New Law: The Jubilee in Old Testament Judaism

The Jubilee concept had a mixed reception in the religious culture of Old Testament Israel. Despite the growing importance of

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68. This is why Moses became the great lawgiver, and indeed, it was in this way that he ultimately became viewed in Jewish culture as the great liberator. This conception of liberation was distilled in the covenant. God had covenanted with Abraham, the father of the Jewish people. He renewed the covenant with the people liberated from Egyptian bondage, declaring that if they kept his laws and the covenant they would be His people. Exodus 19:5.

69. Its premise was that “one who acts out of obligation is the closest thing there is to a Jewish definition of completion as a person within the community.” Robert Cover, Obligation: A Jewish Jurisprudence of the Social Order, 5 J.L. & RELIGION 65, 75 (1987).


71. This is why Judaism had something approaching universal education for males two millennia ago.

72. TROCMÉ, supra note 4.

73. Id.
law to Judaic religion, the Jubilee was never regularly practiced during the entire period of the Old Testament. Indeed, by the time of Jesus, Jewish legal scholars had marginalized its place within contemporary Judaic law. But the Jubilee concept did not pass out of Judaic religious culture. Instead, the prophets, namely Isaiah, made it a prominent feature of the law of a later messianic age. In the process, Isaiah, faithful to Moses' vision of a nation of priests and prophets, began to transform the Jubilee from a specific legal arrangement into a broader moral guideline for a transformation of the human condition.

From the time of Moses to the end of the period of Old Testament, law became increasingly foundational, in a way unique to the legal culture of the ancient Mideast, to the relationship established between God and the Israelites in their covenant. After returning from the physically and culturally destructive experience of captivity in Babylon, law became the essential binding force of Jewish identity, and of the relationship of the Jewish people with God. As glossed by commentaries in what became known as the Talmud, law conveyed "all that God has made known of His nature, character, and purpose, and of what He would have man be and do." Nevertheless, over time the year of Jubilee concept became marginalized as part of the living body of Jewish law. There were at most sporadic and ephemeral examples of the application of the Jubilee concept in Old Testament Israel. Further, Hillel, the great Jewish legal scholar and contemporary of Jesus, invented a legal instrument called the Prosbul that allowed a debtor to contract away his Jubilean right of debt forgiveness. Meanwhile, commentaries upon Jewish law in the Mishna and Talmud did not address

75. Id. at 59-64.
76. 1 G. F. Moore, Judaism 263 (1927). See also H. Wheeler Robinson, Law and Religion in Israel, in Law and Religion 50-53 (Edwin Rosenthal, ed., 1938). A constant theme of the Psalms is that law was not a burden, but one of God's great gifts to the people. Psalms 1:2; 19; 40:8; 119. See Achtemeier I, supra note 74, at ch 4.
77. See, e.g. Jeremiah 34. With conquest by the Babylonians imminent, in order to renew the covenant, King Zedekiah liberated the slaves of Jerusalem. Id. But, very soon the owners of the freed slaves re-enslaved them. Id.
78. North, supra note 4, at 90-91 (writing that though Hillel developed this instrument to encourage lenders to lend as the Jubilee Year approached, the inevitable consequence of its use was to undermine the Jubilee's liberation principle).
the Jubilee concept.\(^\text{79}\)

But as the Jubilee concept dropped out of contemporary Judaic law, the prophets adopted it as a central feature of the law and culture of the future messianic age. Isaiah most clearly affirmed that Jubilean principles would be important to this future age. He writes:

\begin{quote}
The Spirit of the Lord God is upon Me
Because the Lord has anointed me
To bring good news to the afflicted
He has sent Me to bind up the brokenhearted
To proclaim liberty to the captives
And freedom to prisoners
To proclaim the favorable year of the Lord.\(^\text{80}\)
\end{quote}

In expressing concern for the poor and oppressed, and for the restoration of community,\(^\text{81}\) Isaiah worked within the framework of the Mosaic formulation of the Jubilee in foreseeing that Jubilean principles would characterize the messianic age. This formulation, of building upon traditional foundations for describing a new and utopian messianic age, is typical in the Old Testament prophets. In it, there would be a new Exodus; a new Covenant; and a new Torah.

Nevertheless, a synthesis of Isaiah’s and Jeremiah’s conceptions of law in the messianic age suggest that Isaiah intended to broaden Jubilean principles of liberation and empowerment beyond

\begin{itemize}
\item \(^\text{79}\) Leviticus 25:10 (linking Jubilee to the land by explaining that the Exile, having separated the people of Israel from the land, abrogated the Jubilee). Ironically, the Book of Jubilees, probably written sometime between 135 and 105 B.C, by a Pharisee, the greatest advocates of Jewish legalism, provides important evidence of its decline. Though its purpose was to demonstrate the universal application of Mosaic law from the time of the creation unto the messianic age, the emphasis of the author is upon the Jubilee’s sabbatical reckoning of time, not upon its provisions for liberating and empowering people. It should not be overlooked that even as the Jubilee became marginalized in Jewish law, in their critique of this law the prophets continued to assert that believers should act in liberating and empowering ways that recalled the Jubilee. For example, Ezekiel described the “righteous” person as one who “does not oppress anyone, but restores to the debtor his pledge . . . gives his bread to the hungry, and covers the naked with clothing . . . does not lend money on interest or take increase . . . he walks in My statutes and My ordinances.” Ezekiel 18: 7-9. Conversely, the evil person “oppresses the poor . . . [and] lends money on interest and takes increase.” Id. at 18:12-13.
\item \(^\text{80}\) Isaiah 61:1-2 (concluding “[a]nd the day of vengeance of our God, To comfort all who mourn.”).
\item \(^\text{81}\) See Isaiah 58:7 (emphasizing the importance of the Jubilean concept to “divide your bread with the hungry.”). This passage culminated in verse twelve with a Jubilean description of restoration of earlier community. Isaiah 58:7. See also Isaiah 61:4 (reiterating that same theme).
\end{itemize}
the specifics of the year of Jubilee concept stated earlier by Moses. Central to this transformation would be a new covenant. As described by Jeremiah, it would be “unconditional and writ upon the heart of every citizen . . . they will all know Me, from the least of them, to the greatest of them.”

Not only would all the people of Israel have the new law within their hearts, in his description of the Suffering Servant as a great lawgiver Isaiah foresaw both an ethnic and moral expansion of Jubilee liberation:

\[
\begin{align*}
\text{Behold, My Servant, whom I uphold;} \\
\text{My chosen one in whom My soul delights.} \\
\text{I have put My Spirit upon Him;} \\
\text{\textit{He will bring forth justice to the nations} . . .} \\
\text{He will not be disheartened or crushed} \\
\text{Until He has established justice in the earth;} \\
\text{And the coastlands will wait expectantly for His law.} \text{83}
\end{align*}
\]

This passage foresees that in the messianic age the blessings of the law would go forth to all nations, even to the Gentiles. Further, the root word for \textit{justice} used in the passage suggests that Isaiah foresaw law, including Jubilee liberation, as becoming an encompassing guide to human conduct. The new law would transcend traditional categories of covenant and law. Further, it would involve all aspects of human life, intellectual, emotional, material, and ethical.

Some of the minor prophets amplified upon the vision of the transformation of human beings and their culture suggested by the new covenant outlined by Isaiah and Jeremiah for the messianic age. The fourth chapter of the book of Micah begins by describing how “in the last days . . . Many nations will come” and be gathered in “the mountain of the Lord,” and learn His law. The Lord would become the judge of the nations. In Zion the Lord would gather the lame, outcasts, and afflicted as a remnant, to walk in the ways of the Lord and live forever in peace. “They will hammer their swords

82. \textit{Jeremiah} 31:31-34.
83. \textit{Isaiah} 42:1, 4 (emphasis added).
84. \textit{See also Id.} at 2:3 (describing how the Lord will \textit{“teach us concerning His ways . . . that we may walk in His paths, For the law will go forth from Zion.”}); \textit{Micah} 4:2 (using similar language).
85. W. D. Davies, \textit{Paul and Rabbinic Judaism} 17-18 (1948) (citations omitted). \textit{See Jeremiah} 31:31, 33 (illustrating this point). \textit{See also W. D. Davies, Torah in the Messianic Age and/or the Age to Come} 7 (1952).
into plowshares." In a famous passage Joel prophesied that in Zion every believer would become a priest and prophet.

It will come about after this
That I will pour out My Spirit on all mankind
And your sons and daughters will prophesy
Your old men will dream dreams
Your young men will see visions
Even on the male and female servants
I will pour out My Spirit in these days.

At last the long journey from Eden through Egypt and the wilderness to Zion would be completed, and Moses' vision of a liberated and transformed people would come to fruition. But in the prophets this vision of a liberating transformation of human life would only be fulfilled in a future messianic age. Bringing the Jubilee concept to fullness would be left to Jesus.

C. Jubilee Principles in their Fullness: Jesus' Ministry of the Kingdom Come

In the widely-read hymn that opens the gospel of John, John the Baptist characterized Jesus' ministry in the following way:

For of His fullness we have all received,
and grace upon grace.
For the law was given through Moses;
grace and truth were realized through Jesus Christ.

This passage describes how Jesus adopted and developed the Jubilee concept in His ministry of the kingdom come.

The gospel of Luke records that Jesus publicly announced His ministry in His home synagogue in Nazareth after returning from the temptation in the wilderness. In doing so Jesus read the passage from Isaiah 61 quoted above, in which Isaiah had foretold that the Jubilee would be a central principle of the future messianic age. Lest there be any doubt concerning Jesus' adoption of Jubilee

88. John 1:16-17.
89. See Trocmé, supra note 4, at 41-52. Until Trocmé's ground-breaking study, biblical scholars had not appreciated the importance of Jubilean principles to Jesus' ministry. Id.
90. He changed some of the categories of persons to be liberated. They continued to include the captives, but now also included the poor, the blind, and the oppressed.
principles of liberation and empowerment, Jesus would very soon restate similar themes to His disciples when He addressed them in the famous Sermon on the Plain. Interestingly, John the Baptist, who viewed his work as a preparation for Jesus’ ministry, also seems to have adopted Jubilee principles in his ministry.

In many ways Jesus’ concept of Jubilee liberation and empowerment built upon Old Testament precedents. For example, in His Sermon on the Plain Jesus expressed empathy, not condemnation, for the poor and indebted. As with Isaiah, Jesus did not restrict the application of Jubilee principles to His followers. He extended them to all believers without regard to any boundaries of race, ethnicity, gender, or culture. This is symbolized by Jesus’ ministry to the Samaritans in chapter four of John’s gospel. Further, He adopted, but more concretely spelled out, Isaiah’s suggestion that Jubilee principles of liberation and empowerment were to be applied to all forms of material and spiritual bondage. Both Jesus’ thought and ministry were holistic. As He traveled about the little towns of ancient Israel, Jesus ministered to both the spiritual and

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91. Some scholars have challenged both the authenticity and significance of this passage. Concerning its authenticity, they point out that neither Matthew nor Mark’s accounts of Jesus’ visiting His synagogue in Nazareth report Him quoting from Isaiah 61. Concerning the significance of Jesus’ quoting from Isaiah 61, some have claimed that Jesus did so only because that was required by lectionary tradition. But Jesus’ statement that today the scripture is fulfilled suggests that for Him reading this passage had a special significance. See Colin Kruse, New Testament Models for Ministry: Jesus and Paul 19-21 (1985) (discussing and rejecting claims debunking the significance of the Jubilee principle to Jesus’ ministry); Yoder II, supra note 4, at 34-35 (discussing and rejecting claims debunking the significance of the Jubilee principle to Jesus’ ministry).

92. Luke 6:30 (stating that Jesus admonished His listeners to “[g]ive to everyone who asks of you, and whoever takes away what is yours, do not demand it back.”). See Id. at 6:34. This statement is reminiscent of Exodus which admonishes those who lend to the poor “not to act as a creditor to him.” Exodus 22:25. It is even more reminiscent of Deuteronomy which implores those who lend to their neighbors to release the loans if their debtors are unable to pay, and to give freely to the poor. Deuteronomy 15:2-7. See also Matthew 5:40, 42.

93. Luke 3:10-11 (recounting that when those who heard John announce that “the axe is already laid to the trees” asked: “Then what shall we do?” John replied: “The man who has two tunics is to share with him who has none, and he who has food is to do likewise.”).

94. See Luke 6:20 (expressing an attitude similar to His parable of the Prodigal Son: “Blessed are you who are poor, for yours is the kingdom of God.”).

95. See also Luke 24:47 (commanding the disciples that the gospel “be proclaimed in His name to all the nations.”).

96. See generally Alison, supra note 11 (explaining the holistic character of Jesus’ thinking and ministry); Yoder II, supra note 4 (describing of the sociological and political implications of Jesus’ ministry).
material needs of those who heard Him. Jesus also seems to have connected the forgiving of material and moral debts in the Lord’s Prayer and also in some of His preaching and parables.

Jesus also adopted the Jubilean social vision of Moses and the prophets. That is, real liberation required human empowerment and entailed a transformation of the whole person. John’s gospel is especially clear on these points. Jesus connected human flourishing with a positive conception of liberty, freeing believers from all forms of bondage. Speaking to a group of sympathetic Jews, Jesus asserted that He had come to liberate believers by teaching them the truth: “You shall know the truth and the truth will make you free.” When His listeners protested that they were not enslaved, Jesus responded, “[E]very one who commits sin is the slave of sin, And the slave does not remain in the house forever; the Son does remain forever. So if the Son of Man makes you free, you will be free indeed.” Jesus not only freed His followers, He consciously empowered them. This point is made by one of the central metaphors of John’s gospel, that of the vine (Jesus), and the branches (His followers).

97. Luke 7:20, 22. (summarizing an encounter of Jesus with several disciples of the Baptist, after John had been imprisoned. He sent the disciples to ask Jesus, once and for all, if He was the “Expected One, or do we look for someone else[,]” to which Jesus replied that they should tell John that “the blind receive sight, the lame walk, the lepers are cleansed, and the deaf hear, and the dead are raised up, the poor have the gospel preached to them.”).

98. In the passage of the Lord’s Prayer, “Forgive us our” the following word is translated either “debts” or “trespasses.” The Aramaic word is hohha, which suggests both meanings, and the Greek word is opheliema, suggesting material debts. Matthew’s rendition of the Lord’s Prayer clearly suggests material debts. Matthew 6:12. Luke’s rendition, true to the meaning of hohha, suggests both meanings. Luke 11:4. See William D. Spencer & Aida B. Spencer, The Prayer Life of Jesus 28 (1990); Trocmé, supra note 4, at ch 2; Yoder II, supra note 4, at ch. 3; Charles Fenham, The Legal Background of Matthew, Novum Testamentum, at 16 (1960). This view is furthered by the Hebrew word ratsan, which is translated “favorable” year of the Lord. One of the meanings of ratsan is to “pay a debt.” Trocmé, supra note 4, at 30.

99. This point clearly is made in Jesus’ Sermon on the Plain, Luke 6:20. It is also made in His parable of the unforgiving servant Luke 16:9. This holistic process of forgiveness was liberating for the forgiver as well as the forgiven. There are parallels to Jesus’ connection of moral and material liberation in the ministry of John the Baptist. He preached the baptism of repentance for the apfesis, or release, of sins. He also urged people to share their wealth. Matthew 3:8; Luke 3:11.

100. John 8:32-36.

101. John 15:5 (stating “I am the vine, you are the branches; he who abides in Me and I in him, he begets much fruit.”).
that My joy may be in you, and that your joy may be complete.”

Jesus made clear that the result of genuine liberation and empowerment would be human transformation when He informed Nicodemus that “unless one is born again, he cannot see the kingdom of God.”

As in Mosiac law and the prophets, for Jesus liberation and empowerment would occur within a community which itself would be radically transformed by the adoption of Jubilean principles. Jesus gathered about Him a group of disciples and followers that formed a model of the new community. It was radically egalitarian, liberating its members, even women, from existing hierarchies. The egalitarian nature of Jesus' community was demonstrated again by the metaphor of vine (Jesus), and the branches (His followers). All of the followers were equal branches. Jesus nourished them all, constantly trying to empower His disciples.

Though in most respects Jesus' concept of the Jubilee built upon Old Testament precedents, in one critical respect His view of it was entirely distinctive. Jesus announced that Jubilean liberation and empowerment immediately applied to believers who received His gospel. This was the essence of Jesus' ministry of the kingdom come. Therefore, when Jesus read the passage from Isaiah that announced His ministry, He concluded: “Today, this Scripture has been fulfilled in your hearing.” The gospel of John repeatedly emphasizes that Jesus' ministry of the kingdom come, including the Jubilee, was immediate.

Jesus, then, had made Jubilean principles of liberation and empowerment in their fullness, as a “new law” embodying a broad

102. John 15:11. Earlier Jesus had proclaimed: “I am come that you may have life, and have it abundantly.” John 10:10.
103. John 3:3.
104. Luke 13:30 (describing that “[i]n the kingdom, “some are last who will be first, and some are first who will be last.”); John 11:27 (indicating that the community shared wealth; that women were prominent among Jesus’ followers; and presenting women as enlightened and empowered in ways equal to men; for example, Martha was one of the first persons to recognize the divinity of Jesus).
105. John 5:15.
106. See, e.g., Luke 10:1-20; 24:27, 44-45 (instructing His disciples, interpreting for them the meaning of His parables and the significance of Old Testament scriptures, and empowering the disciples to go out and themselves minister to the people).
107. This is perhaps what Jesus meant when He asserted that, “[t]he Law and the Prophets were proclaimed until John; since that time the gospel of the kingdom of God has been preached . . . it is easier for heaven and earth to pass away than for one stroke of a letter of the Law to fail.” Luke 16:16-17.
principle for human life, a foundation stone of a ministry that had already brought the kingdom to believers. Did His immediate followers recognize this and adopt Jubilean principles as a vital part of the new religion of Christianity?

IV. LIBERATION AND EMPOWERMENT IN EARLY CHRISTIAN AND ISLAM

A. Early Christianity

The reception of liberation and empowerment as both a legal and moral principle in early Christianity is a difficult subject. One reason for this is the diversity of the earliest Christianity. Another is that the reception worked upon two planes that had a complex inter-relationship. On one plane was the reception of Scripture and what ultimately became scriptural canon. It concerned primarily the adoption of liberation and empowerment as a moral principle. Here Paul’s conception of the church is also relevant. The other plane related to the attitude of early Christians to law, including Mosaic law, and to the adoption of liberation and empowerment as a legal principle. The emphasis of early Christians upon revealed truth, through the Holy Spirit, affected both issues. In the end, early Christians clearly adopted liberation and empowerment as a moral principle, and, in a limited sense, also adopted it as a principle of their moral law.

The reception of scripture for Christians had two phases. The first was by the earliest Christians, during the generation immediately following the death of Jesus, (referred to as the apostolic age). Since most of the earliest Christians were Jews, early Christian Scripture included the “law and prophets.” Though there was not yet a compilation of Jewish Scripture, Mosaic law, which had for centuries been read in synagogues every Sabbath, was the cen-


terpiece of Jewish law. Early Christian Scripture also included oral tradition of what Jesus had taught, called the "word of the Lord." Among the earliest Christians these two sources of Scripture, the "law and prophets, and the "word of the Lord," formed a seamless whole, without an Old and New Testament. Early Christians’ Scripture was seamless because the "word of the Lord" was the measuring rod for the validity of all scripture, and because Christians believed that all scripture emanated from "the Spirit of the Lord." This seamless view of Scripture, of "the law and the prophets" and the "word of the Lord," assured that the earliest Christians adopted Jublean principles of liberation and empowerment, at least as a moral principle.

There are other indications that the earliest Christians adopted liberation and empowerment as a broad moral principle within the community of believers. Two seem particularly important. One is the emphasis upon the Holy Spirit as not only comforting, but empowering. An example of the Spirit empowering believers was provided almost immediately, at Pentecost. The Johanine church also emphasized the Spirit’s empowering influence for believers, especially as a source of truth. Another notable example of the influence of empowerment as a moral principle in early Christianity is Paul’s vision for the communities of believers. It was of a close community, in which all members were to act in ways that edified brother and sister believers. In urging believers to act in accordance with the principle of edification Paul intended believers to use their spiritual gifts not for individual gratification, but to build up other

114. In assuring non-believers who witnessed what had happened that Jesus’ followers were not drunk with wine, Peter asserted that this anointing of believers fulfilled Joel’s prophecy of the last days, when all believers would be transformed into prophets. *Acts* 2:15-18.
115. For example, Jesus describes the Spirit as a “Helper” and as the “Spirit of truth,” who “will guide you into all truth.” *John* 14:16-17; 16:13.
116. Paul most fully articulated his conception of close Christian community in 1 *Corinthians* 12.
believers, and thereby also the church body.\textsuperscript{117}

Nevertheless, after the death of the first generation of leaders of Christianity, (in what became known as the sub-apostolic age), there emerged a strong impulse not to rely upon oral traditions, and to write down Scripture. This impulse would culminate with what became orthodox Christianity, as early as the second century, beginning to establish a canon for what would be accepted Scripture.\textsuperscript{118} A variety of impulses led to Christians to establish a canon for Scripture, including believers who relied heavily upon revealed truth, but most especially in response to the Gnostic heresy.\textsuperscript{119}

The process of writing down the oral tradition, and of establishing a canon for accepted Scripture, cast doubt upon Christianity’s acceptance of Jubilean principles in two ways. First, as Gentiles began to be more numerous among those who were Christians, criticisms of Scripture based upon Jewish sources increased.\textsuperscript{120} The most anti-Jewish of the new Gentile Christians, the Gnostics, intensified attacks upon Jewish Scripture, including upon Moses and Mosaic law, and the assault culminated during the middle decades of the second century with the famous heresy of Marcion.\textsuperscript{121} Although some Gnostics would have retained some Mosaic

\textsuperscript{117} For example, in his first letter to the Thessalonians Paul wrote: “Therefore encourage one another, and build up one another.” 1 Thessalonians 5:12. In Corinthians Paul urged: “Let all things be done for edification.” 1 Corinthians 14:26. A central metaphor for the concept of edification illustrates its connection to empowerment. Edification is associated with the hearth, so the igniting of a fire, suggesting liberation and empowerment of those who were edified, became the metaphor for the process of building up others and the corporate body. Samuel Johnson, A Dictionary for the English Language (1725); Webster’s Third New International Dictionary (1993).

\textsuperscript{118} This process of deciding what books would become part of what became known as the new testament, however, did not become fully settled until at least several centuries later. Ehrman I, supra note 109, at ch. 11.

\textsuperscript{119} Of those who relied heavily upon revealed truth, Montanus, and several female followers, were most important. As we will see, however, the work of Marcion was truly instrumental in forcing those who became viewed as orthodox Christians to establish their own canon. Id. at 150-151, and ch. 11.

\textsuperscript{120} Paul Achtemeier, The Old Testament, the Lord, and the Apostles, in Orthodoxy and Heresy in Early Christianity 195, 201 (Walter Bauer, ed., with second English translation eds., Robert Kraft & Gerhard Krodel, 1971) [hereafter Achtemeier II].

Marcion proposed a scriptural canon that would have entirely excluded what became the Old Testament, including Mosaic law, and would have included only one gospel, which he himself collected, and ten of Paul’s letters. In response to Marcion’s attack, however, the nascent Christian church maintained the position that Scripture included “the Law and the Prophets and the Lord,” (though it now for the first time acceded to separating Jewish Scripture and putting it into the Old Testament).

But since in earliest Christianity the “word of the Lord” constituted ultimate authority, the more important question for its adoption of Jubilean principles was what became the canon for Jesus’ teachings. During the last generation of the first century many versions of Jesus’ ministry and teachings surfaced. The content of these versions varied greatly. A considerable number of these made no mention of the Jubilee, while others did not emphasize its principles of liberation and empowerment. Two that did link Jesus’ ministry to Jubilean principles of liberation and empowerment, however, were the Gospels of Luke and John. Major leaders of the early Roman church, however, rejected Luke and John as canon, and some even doubted John’s authenticity. Nevertheless, by the

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122. For example, the Valentinian Ptolemy took a more moderate position relative the adoption of Mosaic law by Christians. (Jesus adopted the “pure legislation” but rejected laws “intertwined with evil,” and ceremonial laws were local.) Achtemeier cites from Eusebius and other early sources illustrating attacks upon the validity of the Old Testament. ACHTEMEIER II, supra note 122, at 197-201.

123. It is reported that Marcion did not believe that the God of Jewish Scripture was consistent with the loving God of what became the New Testament. At its root Gnosticism was a philosophical religion, concerned with the origin of the cosmos and the believer’s place within it. Gnostics tended to view Jewish Scripture as too focused upon the specifics of the history of the Jewish people. EHRMAN II, supra note 121, at ch. 6.

124. Marcion found Mosaic law to be conceptually inferior to Jesus’ ethics. For example, while Mosaic law called for an eye for an eye, Jesus espoused the gospel of love. While Mosaic law rigorously enforced the Sabbath, Jesus freed His followers from such strictures. Id. at 103-10.

125. This was the formulation of Hegesippus, though Achtemeier warns that this view is too neat to represent the diversity of views in the early church. ACHTEMEIER II, supra note 122, at 196.

126. At this time there were many gospels, most of which were not accepted ultimately as canon. For example, Jewish Christians had the gospel of the Nazarene and of Ebionites, as well as the gospel of Hebrews. Of the gospels that became canon, they preferred that of Matthew. BROWN & MEIER, supra note 109, at 203; EHRMAN II, supra note 121.

127. Papias took this position, presumably because of the use of these gospels by heretic groups, (although admittedly every gospel had some use by groups that became viewed as heretics). BROWN & MEIER, supra note 109, at 204-05.

128. For example, Justin either rejected John outright, or completely submerged
beginning of the third century, first *Luke* and then *John* had become accepted as canon. With their adoption Christianity officially accepted Jesus’ conception of Jubileean principles of liberation and empowerment as a moral principle for human conduct.

If it is clear that by the third century Christians accepted Jubileean liberation and empowerment as a broad moral principle for human conduct, much less clear is its status as a legal principle. With the suppressing of the Gnostic heresy orthodox Christianity recognized Mosaic law as part of Scripture. But two forces that we have already encountered worked, often in tandem, to reduce its significance upon the emerging Christianity. One was the resistance of many Christian Gentiles to adhere to the full panoply of Mosaic laws, including those regulating diet, cleansing, the Sabbath, and circumcision. Important leaders of earliest Christianity, notably Peter and Paul, came to view these laws as, “Placing upon the neck of the disciples a yoke, which neither our fathers nor we have been able to bear.”

The other was again the acceptance of the power of revealed truth, through the Holy Spirit, among early Christians. It led some early Christians to an ardent anti-legalism, or even to antinomianism. Though widely diverse attitudes existed among early Christians concerning both of these issues, the consistent resolution of them was to take a middle posi-

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its rendition of Jesus’ life and teachings to the renditions of the synoptic gospels. Some early leaders of the church in Rome believed that *John* was a forgery by the heretic Corenthus. *Id.* at 205-11.

Achtemeier attributes this to the influence of Asian church leaders, and the receding of the threat of heretics by this period. Interestingly, he also argues that it is resistance to *Luke* and *John*, rather than chronological order of their composition, explains why *Luke* and *John* are the last two gospels in the New Testament. ACHTEMEIER II, supra note 122, at 211-12.


A number of important features of John’s Gospel manifest its anti-legalism. In the hymn that opens this gospel, John is asserting a new covenant in which a high Christology replaces the authority of the law. *John* 1:14-18. Reflective of its generally anti-Jewish tone, it has passages suggesting a distinction between “their law” and the law of believers. *John* 10:34, 15:25. Nicodemus, a Pharisee and member of the Sanhedron, did not understand Jesus’ new ministry. *John* 3. In the new era, the Spirit replaces the law as the source of truth to believers. *John* 14:16-17, and 16:13. Consistent with this, in *John* there are no moral imperatives comparable to the Sermon on the Mount of Matthew or Sermon on the Plain of Luke. Further, in the first letter of John the imitation of Christ becomes the litmus test for the life of believers. 1 *John* 2:6 (extolling “walk in the same manner as He walked”), and 1 *John* 3:3 (counseling “purify yourself just as He is pure”). See generally I. DE LA POTTERIE, LE VERITE DANS SAINT JEAN (1977).

The existence of this position among some members of the Johannine church can be inferred from attacks upon it in the first epistle of John.
tion that rejected both a strict legalism and antinomianism. This resolution reinforced empowerment as a moral principle among early believers by accepting the Spirit as a source of truth. Further, downplaying what Christians viewed as the legalistic aspects of Mosaic law, while still retaining it as scriptural canon, suggests the possibility that early Christians even recognized Jubilean liberation and empowerment as a legal principle, albeit in a weak and perhaps mostly negative form.

B. Islamic Law

Islam is the third great religion of the West. Since Muhammad's intent in establishing a new religion, Islam, was to restore the original religion and correct the corruptions that had crept into Judaism and Christianity, Islam recognizes Moses, the Judaic prophets, and Jesus as spiritual figures. But Islam did not adopt Mosaic law or the Jubilee, in which periodically slaves and debtors were liberated and the original distribution of land restored. Nevertheless, there are resonances in Islamic law of a concept of

133. Chapter 15 of Acts records the first council of Christians, held in Jerusalem. At the forefront of the agenda of this council was whether or not new believers had to adhere to all of "the Law of Moses." Acts 15: 5. The council resolved this vexing question by choosing Judas and Silas to deliver a letter to believers in Antioch. It stated: For it seemed good to the Holy Spirit and to us to lay upon you no greater burden than these essentials: that you abstain from things sacrificed to idols and from blood and from things strangled and from fornication. Acts 15: 28-29.
134. The first letter of John rejects antinomianism, reminding believers that those who are filled with the Spirit will live according to Jesus' commandments. The letter states that "He who has My commandments and keeps them is the one who loves Me." John 14:21. One of the central themes of the first letter of John, which Brown believes to have been written within a decade of the writing of the Gospel, is to reject the antinomianism that some members of the Johannine church had adopted. Thus, immediately after the verse imploring believers to purify themselves even as Jesus was pure, the writer equates sin and lawlessness. 1 John 3:4. At a number of points the writer asserts that those who love Jesus, and abide in Him, will keep His commandments. 1 John 3:24; 2:3-5, 7-8 (though the last cited verses make the point that Jesus replaced old commandments with new ones). On the dating of the first letter of John, see Brown, supra note 109, at 389.
135. Many of Islam's adherents live outside of the West. Islam has a far greater following in the Far East than either Christianity or Judaism, as well as a substantial following in parts of Africa. Fazur Rahman, Islam, 1-26 (2d ed. 1979).
137. The concept of mujaddid, literally renewer, in Islam is that "[a]t the beginning of every hundred years God will send a renewer of my community." The New Encyclopedia of Islam 327 (Cyril Glasse, ed., 2001). But this renewal is purely moral, and so seems distant from the Jubilee.
liberation and empowerment of the poor and dispossessed. Further, Islam replicates the social vision of Judaism and Christianity. It equates human liberation with freedom from bondage and empowerment, and associates it with a believer’s submission to the moral law of the Islamic community.

An important example of a Jublean resonance of liberation in Islam is that its holy texts encourage creditors to forgive debts that cannot be paid, or at least to provide the debtor with an extension of time.138 Further, slavery was prevalent in seventh century Arabia, and the Qur’an accepts it but also makes clear that “Liberating the neck” is the “uphill path.” It therefore encourages slave owners to enter into contracts with any slaves have the ability and wish to purchase their way out of slavery. It also encourages slave owners not to force female slaves into prostitution.139

Further, Muhammad expressed great solicitude for a concept of social and economic justice that would preserve all forms of economic resources of the poor from being “devoured” by persons of means. Many passages of the Qur’an warn against devouring another’s property, unless by a consensual contract.140 One way to take another’s property wrongly was by riba.141 This is a complex concept in Islam, encompassing sales of goods as well as loan transactions, which, broadly defined, can best be viewed as a concept regulating unserious transactions.142 Riba is not as demanding as the system of just price articulated by some medieval Christian thinkers, but at least one of its purposes was to avoid commercial exploitations and to prevent a perpetual division of classes of rich and poor citizens or groups.143

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138. Qur’an 2:280 (offering that “[if] [the debtor] is in difficulty, [then grant] a delay until a time of ease; if you were to remit [the debt] by way of charity it would be good for you—if you but knew.”).
139. Id. at 24: 33; 90:10-16.
140. E.g. Id. at 24:33; 90:10-16. There is a frequently quoted warning that those who devour the property or orphans will “soon endure a blazing flame.” Id. at 4:29-30.
141. Id. at 4:60 and 9:34.
142. See Frank Vogel & Samuel Hayes, III, Islamic Law and Finance: Religion, Risk, and Return 73-74, 78, 83 (1998) (explaining that the classic case of riba in Islamic law involves excess or delay in exchanges of certain types of property).
143. E.g., Qur’an 59:7 (requiring distribution of booty to the needy and orphan “so that it may not [merely] make a circuit among the wealthy of you.”). An important reason why Muhammad encountered resistance to his religious message in his hometown of Mecca was that the established wealthy of the city perceived it as a challenge to their position. Esposito, supra note 136, at 7. The social order he proposed was reformist, if not revolutionary. Id. at 29 (comparing Muhammad to the Jewish prophets, Amos and Jeremiah).
Muhammad also expressed concern that the taking of "the property of a man is not permissible except by his finding it good."\textsuperscript{144} The foundational principle of Islam concerning property, repeated in the \textit{Qur'an}, is that "the earth belongs to Allah."\textsuperscript{145} Therefore, property is "sacred" and a gift from Allah to "His servants."\textsuperscript{146} Though Islamic texts do not direct any particular form of distribution of land, and indeed countenance unequal distributions of it,\textsuperscript{147} from the beginning Islam took steps to protect everyone from a loss of property rights except through consensual commercial agreements. Islam's solicitude for the retention of land by the poor is perhaps best illustrated by the practice in early Islamic law to allow the imprisonment for debtors, rather than a direct execution upon their land by creditors. In addition, a Muslim state could not take property except for public utility, and then only with adequate compensation.\textsuperscript{148}

The social vision of Islamic holy texts also parallels that of traditional Judaism and early Christianity. It was founded upon an ordered and moral community.\textsuperscript{149} This vision reflects two foundational themes of the \textit{Qur'an}: first, the "creative orderliness of the cosmos," and second, God's "interest in man and his betterment."\textsuperscript{150} Again, Islam espouses that submission to law is critical human flourishing.\textsuperscript{151} Islam conceived of law as inherently moral. This is shown by its association with the concept of Shari'a. It originally meant "the path or the road leading to the water," and came to represent "the highway to the good life." This represents a positive concept of liberty. Islam equated the way to enlightenment, and therefore freedom, with submission to law. As in Judaism, following the law became an encompassing commitment, at once mental, physical, and spiritual. It was "a total way of life."\textsuperscript{152}

\begin{itemize}
\item \textsuperscript{144} Vogel & Hayes, \textit{supra} note 142, at 57 (quoting language is quoted from Muhammad's Farewell Address).
\item \textsuperscript{145} E.g. \textit{Qur'an} 6:165; 7:129; 27:62; 35:39.
\item \textsuperscript{146} Id. at 7:128 (stating that "He giveth it as a heritage to those whom He wills of His servants.").
\item \textsuperscript{147} Id. at 4:32 (explaining "Do not covet the bounties which God bestowed more abundantly on some of you than of others.").
\item \textsuperscript{149} \textit{Qur'an} 3:110 (explaining "[y]ou are the best community evolved for mankind, enjoining what is right and forbidding what is wrong.").
\item \textsuperscript{150} Rahaman, \textit{supra} note 135, at 34-35.
\item \textsuperscript{151} Id.
\item \textsuperscript{152} Rahaman, \textit{supra} note 135, at 68, 100-01.
\end{itemize}
V. LIBERATION AND EMPOWERMENT LAWMAKING APPLIED TO OAKLEY AND ITS BROADER IMPLICATIONS

This Part addresses a number of practical and theoretical questions that arise if lawmakers were to adopt a Jubilean approach to lawmaking. Section A considers how lawmakers might apply principles of liberation and empowerment in \textit{State v. Oakley}. It will also argue that lawmakers might profitably apply principles of liberation and empowerment in trying to prevent criminal deviance, and to rehabilitate those who have committed crimes. Section B will consider the social vision and concept of liberty that underlay a jurisprudence of liberation and empowerment.

A. \textit{The Jubilee} Approach Applied to Oakley and Criminal Deviance

How might Wisconsin's lawmakers try to liberate and empower Oakley, so that he could escape his poverty and the bondage of his sexual practices and self-centeredness\footnote{That various forms of bondage are causally related to criminal behavior is suggested by the high rates of alcohol use among persons convicted of crimes in the United States. For example, of the 5.3 million convicted offenders under the jurisdiction of correction officers in 1996, about two million, or nearly thirty-six percent, were drinking at the time of their offenses. The rate of drinking at the time of committing violent crimes is often higher than this figure. For example, forty-one percent of those in local jails and thirty-eight percent of those in state prisons were drinking at the time of committing violent crimes (although the parallel figure for inmates of federal prisons, while still considerable, is only twenty percent). United States Department of Justice, Bureau of Justice Statistics, Criminal Offender Statistics, \textit{available at www.ojp.usdoj.gov/bjs/crimoff.htm} (last modified Aug. 17, 2003) (last visited July 10, 2004). I use social statistics to link a Jubilean approach to Oakley with legal realism. Use of social statistics to support its proposals goes back at least to the Brandeis brief in \textit{Muller v. Oregon}, 208 U.S. 412 (1908).} and hopefully become a better father and citizen? As Professor Papke suggests, lawmakers from all of the branches of Wisconsin's government must work in tandem in attempting to liberate and empower Oakley and other persons in similar circumstances\footnote{Papke, supra note 22. Professor Hurst's marvelous studies of the legal history of Wisconsin demonstrate that such coordination of lawmakers has been rare in the history of Wisconsin lawmaking, and I am sure, in that of other American jurisdictions as well. JAMES WILLARD HURST, \textit{LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN}, 1836-1915 (1964).} While the Supreme Court judges can only address Oakley's particular case, legislators can more broadly attack problems of social dependency and deviance. It is at these two levels, individual and societal, that the Jubilee concept has always liberated and empowered per-
sons. As has also always been true of Jubilee lawmaking, in considering how to empower Oakley, lawmakers must break through legal abstractions. They must view Oakley within his sociological, economic, and larger-cultural contexts. It is only within a richly contextual view of Oakley that lawmakers can make wise and humane judgments about how to liberate and empower him.

If lawmakers choose to adopt this course, how might they proceed? Demonstrating how Oakley, and similarly situated poor persons, lack options in many aspects of their lives, including options for jobs, Professor Papke has already proffered a number of promising suggestions for larger societal reforms helpful to poor persons like Oakley. Building upon Papke's treatment of this issue, I would emphasize that affording Oakley expanded educational opportunities is critical to efforts to liberate and empower him. In the Mosaic world in which the Jubilee operated, land constituted the means of production, and ownership of it was critical to one's economic and social independence. This process of modernization transformed social and economic structures, and so today land is no longer the primary basis of economic independence. Instead, education is what empowers persons to become economically independent in modern society. In it education is analogous to land in preindustrial society as a basis for human empowerment and independence.

155. See discussion supra Part III.A.

156. At this juncture the Jubilee approach to lawmaking converges with the general approach of the modern American jurisprudence of legal realism, emphasizing how lawmaking affects human beings within their particular personal and sociological circumstances. Roscoe Pound was a foundational thinker in the development of legal realism. See generally Roscoe Pound, Mechanical Jurisprudence, 8 Colum. L. Rev. 605 (1908); and Roscoe Pound, The Scope and Purpose of Sociological Jurisprudence, 25 Har. L. Rev. 489 (1911). See also David Widger, Roscoe Pound: Philosopher of Law 185-90 (1974). Pound's approach to lawmaking is vital today. The United States Supreme Court emphasized historical practice and sociological context in deciding the most important cases before it during the most recent term. See, e.g., Grutter v. Bollinger, 123 U.S. 2325 (2003); Lawrence v. Texas, 123 U.S. 2447 (2003).

157. See generally John Noonan, Persons and Masks of the Law (1975) (illustating how abstractly formalistic jurisprudence can lead lawmakers astray).

158. Papke, supra note 22, at 13-14. Those convicted of crimes suffer from high rates of unemployment. For example, thirty-six percent of the inmates of local jails in the United States were unemployed during the month preceding their arrest for their current offense. Sixteen percent of these persons were not even looking for a job at the time of their arrest. United States Department of Justice, Bureau of Justice Statistics, Criminal Offender Statistics, available at www.ojp.usdoj.gov/bjs/crimoff.htm (last visited July 10, 2004).

159. The English philosopher and social reformer of the late nineteenth century,
It could inject some joy into the dreary routine of the life of a poor person like Oakley.

The judges of the Wisconsin court who decided Oakley's case had only limited options in trying to liberate and empower him. They might have required Oakley to enter a job training program that would widen his options for employment. The limited options afforded the Oakley judges suggests that our society should recognize that in today's world everyone, including the poor, need to enjoy genuine opportunities to acquire higher education. Affordable higher education, at least in community colleges, would be very helpful in helping poor persons to receive training for meaningful jobs. If community colleges are the only education that is affordable for the poor, then educators should make certain that the curriculum of community colleges is not solely practical. It should include some culturally-enriching courses that students must take to receive their degree. Expanding the opportunities of all persons to attend state-funded colleges would also be highly desirable. If these options were readily available, then judges could, for example, require persons like Oakley to attend college as a condition of their parole.

I have a further suggestion for dealing with a person like Oakley that is Dickensonian in nature. Oakley might benefit from programs that would increase his empathy for others. In this context, the judges might have mandated that Oakley do a substantial amount of community service work, especially with children. Working in orphanages and similar institutions that would require him to work with children who lack parents might be especially enlightening to Oakley. It would expose him to the suffering of children who lack the emotional and financial support provided by committed parents. Such service itself would be humbling, and therefore, ultimately liberating.

People want to be uplifted. Nevertheless, it must be recog-

T. H. Green, was therefore right to emphasize educational reforms for the working class of England. Green, supra note 48, at 1-52.

160. It might encourage Oakley, for example, to read, listen to music, and travel.

161. Since Oakley has a history of absenteeism that has interfered with his holding a job, helping Oakley to obtain a car would increase his opportunity to attend work regularly.

162. Judges must be delicate in fashioning such mandates, for at this point liberation and empowerment can easily fade into a regulatory paternalism. Nevertheless, there is a distinct difference, especially at the level of purpose, between lawmaking that tries to empower persons, and that which seeks to conform personal conduct to a rational norm of behavior.
nized that even with opportunities to be uplifted, Oakley may remain steadfast in his antisocial behavior. After the legal system has exhausted its options for trying to liberate and empower Oakley, it can consider more coercive measures aimed at protecting the interests of his sexual partners, their children, and the community. But until the legal system has exhausted its options in attempting to liberate and empower Oakley, it should stay its hand from punishing him. In contrast to the frustration expressed by some of the judges in dealing with Oakley, this patient approach comports with the ethic of forgiveness preached by Jesus, and with the respect that both western religions and democratic theory accords to each and every person.

If the reader can accept this proposed approach for liberating Oakley, there remain two important concerns. First, for Oakley, and all poor persons, to become educated will require a major allocation of both human and economic community resources. Next, while society might exercise a patient approach in dealing with those, like Oakley, who are morally deviant, it could not afford to take this approach for those prone to commit crimes of violence. These are important concerns, and interestingly, social science statistics suggest that they are inter-connected.

The first set of statistics that suggest this linkage is that demonstrating the high incidence of persons committing crimes who have little education. The other set of statistics reveals the incredible,
and apparently uncontrollable, rise of costs of penology over the past twenty years.\(^{168}\) At the same time, there is an alarming rate of criminal recidivism in contemporary America.\(^{169}\) Since recidivists are constantly demanding the resources of all facets of the criminal system in the United States, it is fair to conclude that criminal recidivism is an important impulse for the upward spiral of costs of the present penology.

The obvious conclusion that can be drawn from these statistics is the following. Setting aside all moral considerations, society would benefit economically if it could reduce, even modestly, the percent for the inmates in federal prisons. United States Department of Justice, Bureau of Justice Statistics, Criminal Offender Statistics, available at www.ojp.usdoj.gov/bjs/crimoff.htm (last visited July 10, 2004).

\(^{168}\) See James Stephan, *State Prison Expenditures*, 1996, United States Department of Justice, Bureau of Justice Statistics. In 1996 the American states and the District of Columbia spent $22 billion on adult prisons, and the Federal Bureau of Prisons spent another $2.5 billion on federal prisons. \(\textit{Id.}\) Each jail inmate cost about $20,000 per year to maintain. \(\textit{Id.}\) Between 1985 and 1996, these costs rose at a very steep rate. \(\textit{Id.}\) For example, national expenditures on state correctional facilities during that period rose one hundred and fifteen percent. \(\textit{Id.}\) Although, of course, Government spending for education and public welfare is far higher than spending for prisons, the rate of growth of expenditures upon prisons during this period was far greater than upon either education or welfare. \(\textit{Id.}\) These costs only represent a portion of the total costs that all levels of American governments spend upon trying to prevent, to apprehend and prosecute, and to punish, criminal activity. For example, the correctional costs cited in the previous paragraph constituted only about eighty percent of state correctional expenditures in that year. \(\textit{Id.}\) Another twenty percent were devoted to juvenile justice activities, probation and parole services, and community-based corrections. \(\textit{Id.}\) The availability of the death penalty also raises costs of the system or prosecuting those accused of homicides, an estimated $1.7 billion per year. This estimate is extrapolated from a two-year study of capital trials in North Carolina. \textit{Phillip Cook & Donna Slawson, The Costs of Processing Murder Cases in North Carolina} (1993).

\(^{169}\) Based upon a study of prisoners in fifteen states, the percent of released prisoners rearrested within three years in 1983 and 1994, listed by general categories of offenses allegedly committed:

<table>
<thead>
<tr>
<th></th>
<th>All Released Prisoners</th>
<th>Violent</th>
<th>Property</th>
<th>Drug</th>
<th>Public-order</th>
</tr>
</thead>
<tbody>
<tr>
<td>1983</td>
<td>62.5%</td>
<td>59.6%</td>
<td>68.1%</td>
<td>50.4%</td>
<td>54.6%</td>
</tr>
<tr>
<td>1994</td>
<td>7.5</td>
<td>61.7</td>
<td>73.8</td>
<td>66.7</td>
<td>62.2</td>
</tr>
</tbody>
</table>

The rates of persons actually reconvicted and returned to prison within three years are lower than the rate of persons rearrested, but still strikingly high. And, of course, there are some who commit crimes who manage to avoid arrest for them. \textit{See Recidivism of Prisoners Released in 2004}, (Jun., 2002), Bureau of Justice Statistics, Criminal Offenders Statistics. These high rates of recidivism seem to confirm my view that the imposition of the judges' condition upon Oakley will at most only extract a grudging outward conformity from him, and may confirm the dissenters' suspicion that it might encourage Oakley to engage in other forms of undesirable behavior. \textit{See supra} Part I.B.
original impulse to commit crime, or at least criminal recidivism.\textsuperscript{170} This suggests that society might more than recoup, in reduced criminality and increased personal productivity, the money that it invests in expanding opportunities for higher education. Returning to a moral perspective, the old Jewish concept of \textit{mitzvah} also suggests that such an undertaking, reflecting the recognition of a societal obligation to empower all members of the polity, would increase our sense of bonding as a community and provide opportunities for the development and flourishing of every citizen.

B. \textit{The Social Vision and Concept of Liberty of Liberation and Empowerment Lawmaking}

Part II.B. articulated and critiqued the social visions and concepts of liberty that inform the \textit{Oakley} opinions. So what alternative social vision and concept of liberty underlay the Jubilean approach to lawmaking proposed in this essay?

The social vision is that of a liberated and empowered citizenry, enjoying a wide sphere of liberty and yet flourishing within a close community based upon voluntary human bonds. In it the community would seek to enable every citizen, to the extent that it could, to enjoy many options in both work and leisure, and these two forms of human activity would become less distinct than they are for most people today. Everyone would also enjoy ample opportunities actively to participate in community life. The rhythm of daily activities for each citizen would be energizing, sometimes enriching, and done within a context of fulfilling human relationships. Recalling Moses' vision of a nation of priests and prophets and the radically new community of Jesus and His followers, the end of all Jubilean lawmaking would be a renewed community of uplifted people.

The concept of liberty embodied in this social vision, of course, is the traditional one of positive liberty. It is measured in terms of self-mastery, a freedom from all forms of bondage that hinder people from the development of their full human personalities. This includes not only the rational capacity focused upon by classic liberal thinkers, but also their emotional and spiritual capacities. One way to define human flourishing is when all of these capacities are creatively and synergistically animating a person's thoughts, feelings, and activities.

\textsuperscript{170} This recalls the old adage that "an ounce of prevention is worth a pound of cure."
Lawmaking that helps to move human life toward this social vision and its concept of liberation will not be easy. Empowering lawmaking can imperceptibly cross the line into an unacceptable paternalism that has characterized so much lawmaking in western history. Further, all human communities require a measure of ordering. If we define coercion realistically, then no human relationship, or community, is entirely devoid of it. Finally, to renew community in so pluralistic and atomistic a society as contemporary America will be most difficult.

These are admittedly formidable obstacles to the adoption of a new jurisprudence of Jubilean liberation and empowerment. While not minimizing them, lawmakers should not lose sight of the following realities. As Judge Bablitch recognized, existing forms of lawmaking sometimes leave us deeply unsatisfied. Community is essential to human flourishing, as every person who has experienced the isolation of living in modern society can easily appreciate. And the best communities, the only ones worth living in, are founded upon liberated and empowered citizens.

171. See supra Part V.A.


173. The philosopher Isaiah Berlin was so fearful of the paternalistic and authoritarian possibilities of lawmaking according to positive liberty that, despite his own deep critique of negative liberty, he ultimately retreated back into acceptance of it as the safer of the two concepts of liberty.