ILLICIT LEGISLATIVE MOTIVATION AS A SUFFICIENT CONDITION FOR UNCONSTITUTIONALITY UNDER THE ESTABLISHMENT CLAUSE—A CASE FOR CONSIDERATION: THE UTAH FIRING SQUAD

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The last temptation is the greatest treason:
*To do the right deed for the wrong reason.***

I. INTRODUCTION

One constitutional commentator has described the question of whether constitutionally illicit motivation[1] can or should play a determinative role in invalidating otherwise permissible legislation as "one of the most muddled areas of our constitutional jurisprudence."[2] Another scholar has noted that "[t]he Supreme Court's traditional confusion about the relevance of legislative . . . motivation in determining the constitutionality of government actions has . . . achieved disaster proportions."[3] Given this disarray of constitutional affairs, one would expect an outpouring of scholarly comment to assist the courts in sorting out the problem of judicial review of illicit motivation. Apart from the two above-mentioned commentators and a few others,[4] however,

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** T.S. ELIOT, MURDER IN THE CATHEDRAL.

1. "Illicit motivation" is defined, for the purposes of this paper, to mean impermissible criteria or objectives that may play a role in the decisionmaking process of legislators when the consideration of legitimate criteria may achieve the same result or justify the result in terms of legitimate objectives. *See* Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 115. This paper thus does not attempt a distinction, sometimes offered, between legislative "motives" and "purposes." For a discussion of the disutility of the motive-purpose distinction, see Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1217-21 (1970); Note, *Legislative Purpose and Federal Constitutional Adjudication*, 83 HARV. L. REV. 1887, 1887 n.1 (1970). *See also* Brest, *supra*, at 100-01, 111, 114.

2. Brest, *supra* note 1, at 99.

3. Ely, *supra* note 1, at 1207.

4. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 835-37 (1978); Brest, *supra* note 1; Ely *supra* note 1; Tribe, *The Supreme Court 1972 Term*, 87 HARV. L. REV. 1, 22-26 (1973);

scholars have not given extensive academic treatment to the subject.[5]

This paucity of scholarly attention may exist because the problem of unconstitutional motivation is largely perceived as a matter of academic interest only; courts have traditionally refused to invalidate legislation solely because it is the fruit of a legislative tree poisoned by inappropriate objectives.[6] Judicial focus is usually directed, or at least is said to be directed, to the constitutionality of the effects of legislation and not to its motivations.[7] A preference for judicial review in terms of effects rather than motives reflects a general reluctance to premise constitutional doctrine on the genetic fallacy; a product of lowly origins is not itself necessarily tainted.

More specifically, four main objections are traditionally raised against the claim that it is sometimes proper to invalidate statutes solely because the legislature acted with improper motivation. First, courts experience great difficulty in ascertaining the legislative motivation of a multimember decisionmaking body.[8] Second, even if courts could dis-

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Note, *Legislative Purpose and Federal Constitutional Adjudication*, 83 HARV. L. REV. 1887 (1970); Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L. J. 123 (1972).

5. *See* Brest, *supra* note 1, at 102.

6. "The established view is that inquiries into motive are not open in the Supreme Court." A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 208 (1962). Professor Bickel distinguishes between "motives" and "purposes." He defines "purpose" as the "Court's objective assessment of the effect of a statute or a conclusionary term denoting the Court's independent judgment of the constitutionally allowable end that the legislature could have had in view." *Id.* at 209. "Motive," on the other hand, refers to an actual subjective legislative state of mind that, theoretically, could be derived only through legislative psychoanalysis. *Id.* at 208-10. The Court has itself often denied scrutiny of legislative motivation as a basis for invalidating legislation. "The decisions of this Court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." United States v. O'Brien, 391 U.S. 367, 383 (1968) (quoting McCray v. United States, 195 U.S. 27, 56 (1904)).

7. The Supreme Court has never "held that a legislative act may violate equal protection soley because of the motivations of the men who voted for it." Palmer v. Thompson, 403 U.S. 217, 224 (1971). In reference to certain cases that at first blush appear to rest entirely on legislative motivation as a basis for unconstitutionality, the *Palmer* Court noted that "the focus in those cases was on the actual effect of the enactments [rather than on motivation]." *Id.* at 225. *See also* United States v. O'Brien, 391 U.S. 367, 383-84 (1968).

8. Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void

cern illicit motivation in a given case and invalidate the tainted legislation merely because of such motivation, the legislature could simply reenact the same measure for proper purposes, thus making the invalidation an exercise in futility.[9] Third, to void for improper motivation a law that achieves a desirable goal is counterproductive.[10] Finally, scrutiny of legislative motivation calls into question the good faith and integrity of the legislative branch, thus implying judicial disrespect to a separate branch of government.[11]

Despite these objections, some commentators have argued that public policy and certain substantive legal doctrines require invalidation of legislation designed to serve illicit objectives. For example, the standard of review under the establishment-of-religion clause invites scrutiny of legislative motivation.[12] It appears, however, that no court has ever held violative of the establishment clause a statute lacking significant religious effect simply because the measure was the product of improper religious motivation.[13] Furthermore, no one has analyzed in depth the doctrinal merits of the problem of illicit motivation as grounds for invalidating legislation under the establishment clause. The scant scholarly opinion that does exist is divided over the wisdom and legality of invalidating statutes simply because the legislation is religiously motivated.[14] The claim that religious motivation justifies in-

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essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

United States v. O'Brien, 391 U.S. 367, 383-84 (1968) (footnote omitted). *See also* Palmer v. Thompson, 403 U.S. 217, 224 (1971).

9. [T]here is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature . . . repassed it for different reasons.

Palmer v. Thompson, 403 U.S. 217, 225 (1971).

10. *See* Bogen, *The Supreme Court's Interpretation of the Guarantee of Freedom of Speech*, 35 MD. L. REV. 555, 561-62 n.24 (1976); Ely, *supra* note 1, at 1215-17.

11. *See* A. BICKEL, *supra* note 6, at 208-21; Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1091-1101 (1969).

12. *See* Brest, *supra* note 1, at 100; Ely, *supra* note 1, at 1209-11.

13. Epperson v. Arkansas, 393 U.S. 97 (1968), is perhaps the case that comes closest to invalidating a religiously motivated statute merely because of its origins without any attention to its religious effect. Although the Court clearly invalidated the *Epperson* statute solely because of religious motivation, *see* Ely, *supra* note 1, at 1318, it is also clear that the statute in *Epperson* had the effect of aiding fundamentalist Christianity by prohibiting the teaching of evolutionary theory in the public schools of Arkansas. *See* 393 U.S. at 106-10. For an extensive discussion of *Epperson*, see notes 176-92 *infra* and accompanying text.

14. For a view favoring invalidation simply because of illicit legislative motivation, see Brest,

validation, therefore, is controversial and largely conjectural.

This article tests the thesis that the religious motivation of legislators, apart from the religious effects of their legislation, is sometimes a legally and philosophically sufficient basis for striking down legislation under the establishment clause. The inquiry will focus on the legality of the Utah firing squad. Constitutional assessment of shooting as a mode of execution is itself a matter of considerable practical interest and importance;[15] worldwide attention focused on the firing squad

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supra note 1. For a view that favors invalidation for illicit motive only in cases of "random" or "discretionary" legislative choices, see Ely, *supra* note 1. Ely would find illicit legislative motivation sufficient grounds for invalidating statutes in some establishment cases, *e.g.*, where the legislature has "discretion" to regulate school curricula and excises evolutionary theory to aid fundamentalist Christianity, but not in other establishment cases, *e.g.*, Sunday Closing Laws where legislative choice is not simply a matter of "discretion" but can be rationally justified in terms of legitimate secular goals. *Id.* at 1318, 1324-27. For a view that suggests sectarian motivation never may be sufficient grounds for invalidation under the establishment clause, see Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260, 278 (1968). Professor Choper's position is that legislative "purpose," as distinguished from "motive," is a relevant establishment clause inquiry, but purpose is derived from the objective effects of the legislation rather than from the subjective intent of the legislature. *Id.*

15. While the firing squad possesses historically significant religious connotations, its current religious effects are probably little more than symbolic. *See* text accompanying notes 18-110 *infra*. Nevertheless, there are at least two classes of plaintiffs who might wish to see the firing squad struck down under the establishment clause: citizens who resent the state's retention of religiously motivated legislation, and advocates of the abolition of capital punishment who envision invalidation of the firing squad as a means towards the ultimate abolition of capital punishment itself. "[To defenders of capital punishment] in Utah, with its Mormon traditions, the biblical doctrine of 'a life for a life' epitomizes the seeming justice of executing [offenders]." H. BEDAU, THE COURTS, THE CONSTITUTION, AND CAPITAL PUNISHMENT 121 (1977). By establishing that it is legally inappropriate to support the firing squad by religious considerations, the abolitionist will have removed what has been, at least historically, an emotionally charged element underpinning Utah capital punishment law. Adoption of an alternative to the firing squad would force the legislature to focus entirely on secular considerations in enacting the new law. Thus, the possibilities for rational debate about capital punishment itself, as well as methods of imposing it, will be enhanced. For an indication that those favoring capital punishment for nonrational reasons may be converted through rational discourse to the abolitionist point of view, see Sarat & Vidmar, *Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171.

It is likely that citizens would have standing to challenge the constitutionality of Utah's use of the firing squad. The United States Supreme Court has liberally granted standing to federal taxpayers to bring suits in federal court under the establishment clause. *See* Flast v. Cohen, 392 U.S. 83 (1968). Most state courts have also permitted such suits by taxpayers. R. MORGAN, THE SUPREME COURT AND RELIGION 96 (1972). Because volunteers who participate in firing squads are paid modest fees from state funds, Salt Lake Tribune, Sept. 16, 1974, § B, at 1, col. 4, taxpayers should have standing to attack the firing squad. In Engel v. Vitale, 370 U.S. 421 (1962), the Court in dictum quoted approvingly the following statement of James Madison:

[I]t is proper to take alarm at the first experiment on our liberties. . . . That the same

when the State of Utah executed Gary Gilmore,[16] ending the lengthy moritorium on capital punishment and again establishing the death penalty as a reality of American life. But apart from the inherent import of constitutional scrutiny of the firing squad, examination of Utah capital punishment law affords particularly rich possibilities for considering the broader issue of whether religiously motivated statutes are unconstitutional simply because of their illicit origins. Utah is fertile ground for discovering and documenting religiously motivated legislation and thus provides a laboratory for testing the establishment clause hypothesis examined in the article. Representatives of a uniquely homogeneous religious culture, which drew virtually no lines between church and state, founded Utah. At the present time, over half the people in the State are members of The Church of Jesus Christ of Latter-day Saints, the Mormon Church.[17] Not surprisingly, Utah law often reflects the religious heritage of its past and the present religious preference of the majority of its citizens. The Utah firing squad law is an example of a law originally enacted, at least in large part, to effectuate sectarian objectives. The passage of time and modification of Mormon doctrine have weakened the religious effect of the firing squad, and today its religious significance is largely symbolic. The Utah firing squad thus provides a useful vehicle for testing the proposition that sectarian

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> authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

Id. at 436 (quoting J. MADISON, *Memorial and Remonstrance against Religious Assessments*, in II WRITINGS OF MADISON 183, 185-86 (S. Padover ed. 1953)).

It may not even be necessary that a party be a taxpayer to have standing in a constitutional attack on the firing squad under the establishment clause. In *Engel* parents of school children successfully attacked classroom recitation of a prayer as an unconstitutional establishment of religion. A noted commentator emphasized that the parents neither had to show expenditure of public funds nor coercion of their children to possess standing:

> One finds asserted in *Engel* no requirement that a litigant, if he would invoke judicial power to forbid governmental action, must show that by it he "has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

Sutherland, *Establishment According to* Engel, 76 HARV. L. REV. 25, 26-27 (1962) (footnote omitted). *See also* Anderson v. Salt Lake City Corp., 475 F.2d 29, 31 (10th Cir.), *cert. denied*, 414 U.S. 879 (1973) (standing permitted to raise establishment clause question solely because of plaintiff's "beliefs about religion"; plaintiff not required to show economic injury or religious coercion).

16. *See* H. BEDAU, *supra* note 15, at 121-23.

17. Statistics indicate that 71% of Utah residents are members of the Mormon Church. UTAH FOUNDATION STATISTICAL REPORT 238 (1977).

origins alone may be sufficient grounds for holding legislation unconstitutional under the establishment clause.

The analysis herein will show that the example of the Utah firing squad represents an instance in which establishment clause doctrine and policy justify invalidating legislation simply because of sectarian motivation. This article will demonstrate that the usual misgivings about such invalidation are inapposite in this example. Finally, the analysis will use the firing squad example as the basis for generating several general principles offered as a framework for reviewing legislative motivation in other establishment clause cases.

II. BLOOD ATONEMENT AND THE FIRING SQUAD

The firing squad in Utah raises establishment clause issues because it is tied, historically at least, to the doctrine of "blood atonement"—a teaching of the Mormon Church, emphasized primarily in the nineteenth century, that requires a form of capital punishment which sheds the blood of certain offenders, most notably murderers. Utah is unique both in its distinct Mormon heritage and influence and in its employment of a mode of execution that actually spills the victim's blood.[18] The existence of the firing squad solely in Mormon Utah is no coincidence; rather, it is a consequence of an attempt to effectuate Mormon doctrine through the capital punishment law of the state.

Religious justification for the institution of capital punishment is not unique to the Mormon people;[19] neither is the theological rationale for the death penalty limited to the State of Utah.[20] But while sectarian

18. Utah is the only state to employ the firing squad—a sure means of shedding blood. All other states that permit capital punishment utilize either hanging, the electric chair, the gas chamber, or lethal injection—none of which necessarily results in spilling the blood of the offender. *See* OKLA. STAT. ANN. tit. 22, § 1014 (West Supp. 1978); TEX. CRIM. PRO. CODE ANN. tit. 43, § 43.14 (Vernon 1977); W. BOWERS, EXECUTIONS IN AMERICA 9-12 (1974); Gardner, *Executions and Indignities—An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment*, 39 OHIO ST. L.J. 96, 119-29 (1978).

19. *See generally* Ingram, *The Keystone of Our Penal System*, in ESSAYS ON THE DEATH PENALTY 55 (1963); Taylor, *Capital Punishment—Right and Necessary*, in ESSAYS ON THE DEATH PENALTY 45 (1963); Taylor, *The Death Penalty*, in ESSAYS ON THE DEATH PENALTY 21 (1963).

Religious appeals also are often invoked to support the abolition of capital punishment. *See generally* Carpenter, *The Christian Context*, in THE HANGING QUESTION 29 (1969); Livingston, *The Crime of Employing the Punishment of Death*, in VOICES AGAINST DEATH 15 (1976); Rush, *Abolish the Absurd and Unchristian Practice*, in VOICES AGAINST DEATH 1 (1976); Spear, *Thou Shalt Not Kill*, in VOICES AGAINST DEATH 78 (1976).

20. "About 55% of American and Canadian subjects who approve of capital punishment would approve of it even if it had no greater deterrent effect than imprisonment. Most of these

defenses of capital punishment may be commonplace, Mormonism is unique in its historical emphasis on the necessity of observing particular methods of execution to conform to divine will. Because of this concern for the form of implementing the death penalty, as well as the profound influence of Mormonism in Utah, the impact of religion on capital punishment law in that state is much more vivid than it is elsewhere,[21] where appeals to a variety of secular reasons for the death penalty often conceal religious justifications and obstruct recognition of the full extent of the sanction's religious undergirding. One may more readily identify ecclesiastical impact on capital punishment in Utah, however, because of the distinctly sectarian origins of the firing squad.

This section will trace the doctrine of blood atonement in Mormon theology and assess the role of the doctrine in shaping Utah's capital punishment law. The concept of blood atonement in Mormom theology is essentially a nineteenth-century phenomenon that the Mormons very recently officially disavowed.

A. *The Blood Atonement Doctrine*

Mormon doctrine teaches that Christ's atonement unconditionally saves the entire human family from physical death—the separation of the body and spirit that results from Adam's transgression.[22] Christ's atonement also provides salvation from spiritual death—the alienation

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subjects indicated as the justification for capital punishment the idea of 'just deserts' and Biblical ideas of retribution." Kohlberg & Elfenbein, *The Development of Moral Judgments Concerning Capital Punishment*, 45 AM. J. ORTHOPSY. 614, 616 (1975).

21. The population of Utah historically has been monolithic. The Mormons settled in the Valley of the Great Salt Lake after being driven from their prior settlements. The Great Basin offered the opportunity for development of the Mormon lifestyle in an environment free from persecution.

> There are three major contributory factors to the emergence of a monolithic culture in Utah. One was the similarity of backgrounds, both cultural and racial, among the early settlers. The second was the isolation of the community, which would tend to foster the development of a unique set of social mores. The third was the strong bond of commonality of religion held by the immigrants. The religious Weltanschauung of the L.D.S. Church is such that to the present day there is great cohesiveness among its members. . . . The Mormon culture is unique within the annals of history because of its size, the length of its existence as a viable culture, and the cohesiveness existing among the people.
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> For these reasons the practice of execution in Utah must be assumed to be atypical of other areas in this country.

J. WALTERS, A STUDY OF EXECUTIONS IN UTAH 2 (1973).

22. *See* L. RICHARDS, A MARVELOUS WORK AND A WONDER 262-81 (1958); J. TALMAGE, THE ARTICLES OF FAITH 75-89 (12th ed. 1924).

from God that occurs because of one's actual sins—on the condition that the individual repent of his/her sins and obey God's commandments.[23] The doctrine of blood atonement posits that some sins, primarily murder, are so heinous that the atoning sacrifice of Christ is unavailing as an expiation of the sin of the offender.[24] Although the gravity of their sin apparently makes it impossible for these offenders to overcome completely "spiritual death" and be "exalted" in the Celestial Kingdom,[25] an offender can achieve a degree of forgiveness if he/she personally "atones" for the sin by sacrificing his/her life in a manner that literally sheds the person's blood.[26] The doctrine requires the spilling of blood because it views blood as possessing symbolic religious significance; hence, Christ shed his blood as a vicarious means of redemption for the vast majority of mankind.[27] But for those who commit certain grievous sins, the doctrine requires individual atonement.[28]

It is not entirely clear under what circumstances and for which sins blood atonement would avail the offender. Some sins, particularly

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23. *See* L. RICHARDS, *supra* note 22; J. TALMAGE, *supra* note 22. For treatment of these general principles of salvation in the context of blood atonement, see C. PENROSE, BLOOD ATONEMENT 5-11 (1916).

24. C. PENROSE, *supra* note 23, at 21. Penrose's sermon on blood atonement, delivered in 1884, is the most systematic development of the blood atonement doctrine by any Mormon leader. For this reason, discussions of the theory of blood atonement often refer to Penrose.

25. *Id.* at 19-21. Mormon theology divides heaven into three kingdoms or degrees of glory, the highest of which is the "Celestial" Kingdom. *See* DOCTRINE & COVENANTS § 76:70-81.

26. It is essential that the blood actually be shed to conform to the doctrine of blood atonement. "The man who commits murder, who imbrues his hands in the blood of innocence, cannot receive eternal life, because he cannot get forgiveness of that sin. What can he do? The only way to atone is to shed his blood. Hanging is not the proper method." C. PENROSE, *supra* note 23, at 21. The doctrine requires the spilling of blood because blood is perceived to possess special symbolic religious significance.

> Atonement [through Jesus Christ] could not have been made without the shedding of blood. The 22nd verse of the 9th chapter of the epistle to the Hebrews says: "And almost all things are by the law purged with blood; and without shedding of blood is no remission." There is no remission of sins without the shedding of blood . . . . Instead of the blood of the individuals being shed the blood of Christ was shed for them, and it stands in the place of their blood. What is the reason of that? Why, we are told in the book of Leviticus, the 17th chapter and 11th verse: "For the life of the flesh is in the blood; and I have given it to you upon the alter to make an atonement for your souls; for it is the blood that maketh an atonement for the soul." . . . [I]f Christ's blood had not been shed, each individual would have had to have his blood shed, according to Bible doctrine.

Id. at 11-12.

27. *Id.*

28. *Id.* at 21-23.

murder committed by baptized Mormons who have been "specially enlightened" by the power of the Holy Spirit, apparently can never be forgiven even if the offender willingly atones for the offense with his/her own blood.[29] For these offenders, however repentent, there seems to be no hope of overcoming spiritual death. Thus, God forever banishes those offenders from his presence.[30] Apparently, there are few possible candidates for this class of "specially enlightened" murderers.[31] The vast majority of murderers, therefore, would be capable of a modicum of salvation from their sins if they shed their own blood in atonement.[32] It is not clear whether atonement is conditioned on any particular state of mind of the offender, although willingness to make restitution through sacrificing one's life appears to be an important, if not a necessary, factor in achieving forgiveness.[33]

Apart from murder, Mormon leaders also taught that sexual misconduct by Church members in certain circumstances, as well as the violation of certain sacred covenants, would be dealt with through blood atonement if people lived the complete law of blood atonement.[34] These opinions concerning blood atonement for sins other than murder did not express a doctrine viable in secular society, but rather, discussed a theoretical doctrine that operated anciently when no separation of church and state existed or that would apply in the future when a ruling theocracy had the power to take life.[35] Mormons have, how-

29. *Id.* at 21-22.

30. *Id.*

31. Apparently, there is hope for some forgiveness for every sin except heinous sins committed by especially responsible people who are without hope for salvation because they sinned in spite of special light they had received. *Id.* at 23. Penrose wrote: "The greater a man's light is, the greater his sin." *Id.*

Penrose describes the case in *I Corinthians* of a man who came into the Church, received the Holy Ghost, "rejoiced in the truth," and then committed a "gross transgression," apparently incest with his mother. Penrose suggests that this man might benefit from having his blood shed to atone as much as possible for his sin. *Id.* at 19-20. Elsewhere, Joseph Smith intimated that even the Prophet David was not sufficiently "enlightened" so as to be precluded a modicum of salvation from his heinous sins. 6 HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 253 (1950).

32. *Id.*

33. The discussions of blood atonement often speak of the redemptive value of "giving" one's life for his crimes, thus implying a willingness on the part of the offender to submit to capital punishment. *See* C. PENROSE, *supra* note 23, at 20. Whether "atonement" occurs if life is simply "taken" against the offender's will is not clear.

34. *See* Grant, *Rebuking Iniquity*, in 4 JOURNAL OF DISCOURSES 49, 49-51 (1857); Kimball, *Sanctification*, in 7 JOURNAL OF DISCOURSES 16, 20 (1860).

35. Despite extreme statements by some leaders, the Mormon Church never authorized an

ever, recognized the possibility of effectuating blood atonement for murder in modern secular society[36] not as an ecclesiastical function,[37] but rather as a possible consequence of secular capital punishment law.

Genesis 9:6 provided the primary scriptural support for the doctrine of blood atonement, at least for the sin of murder: "Whoso sheddeth man's blood, by man shall his blood be shed."[38] This verse coupled with I *John* 3:15 ("No murderer hath eternal life abiding in him"), *Hebrews* 9:22 ("And almost all things are by the law purged with blood; and without shedding of blood is no remission"), and *Leviticus* 17:11 ("For the life of the flesh is in the blood: and I have given it to you upon the altar to make an atonement for your souls: for it is the blood that maketh an atonement for the soul") laid the foundation upon which Mormon leaders developed their doctrine.[39]

The first seeds of blood atonement teaching apparently sprouted in Mormon thought before the Saints settled in Utah. In 1843 Joseph Smith, the founder and first prophet of Mormonism, argued:

> In debate, George A. Smith said imprisonment was better than hanging.
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> I replied, I was opposed to hanging, even if a man kills another, I will shoot him, or cut off his head, spill his blood on the ground, and let the smoke thereof ascend up to God; and if ever I have the privilege of making a law on that subject, I will have it so.[40]

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ecclesiastical practice of blood atonement. Larsen, *The Mormon Reformation*, 26 UTAH HIST. Q. 45, 62 (1958) ("the church did not officially condone taking life other than through legal process" and "responsibility for any . . . blood shedding must rest upon fanatical individuals"). President Brigham Young made it clear that the teaching referred to the distant past and the millennial future. President Young's remarks about blood atonement for adultery make clear that he did not claim present Church authority to execute adulterors.

> The time has been in Israel under the law of God, the celestial law, . . . that if a man was found guilty of adultery, he must have his blood shed, and that is near at hand. But now I say, . . . that if this people will sin no more, but faithfully live their religion, their sins will be forgiven them without taking life.

Young, *To Know God is Eternal Life—God the Father of our Spirits and Bodies—Things Created Spiritually First—Atonement By the Shedding of Blood*, in 4 JOURNAL OF DISCOURSES 215, 219 (1857). *See also* DOCTRINE & COVENANTS § 134:10 (official doctrine precludes ecclesiastical authority to take life).

36. *See* notes 52, 87-105 *infra* and accompanying text.

37. *See* DOCTRINE & COVENANTS §§ 42:79, 134:10. *See also* B. ROBERTS, 4 A COMPREHENSIVE HISTORY OF THE CHURCH 136-37 (1957) (denials by the Mormon Church of any extra-legal blood atonement).

38. *See* C. PENROSE, *supra* note 23, at 21.

39. *Id.* at 11-12, 21.

40. J. SMITH, 5 HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 296 (1949).

On another occasion Smith stated: "[H]anging is the popular method of execution among the Gentiles in all countries professing Christianity, instead of blood for blood according to the law of heaven."[41]

Although the Mormons taught, or at least suggested, the doctrine prior to coming to Utah, Smith's successor, Brigham Young, fully developed blood atonement theory. In one of his sermons Young stated:

> There are sins that men commit for which they cannot receive forgiveness in this world, or in that which is to come, and if they had their eyes open to see their true condition, they would be perfectly willing to have their blood spilled upon the ground, that the smoke thereof might ascend to heaven as an offering for their sins; and the smoking incense would atone for their sins, whereas, if such were not the case, they would stick to them and remain upon them in the spirit world.
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> I know when you hear my brethren telling about cutting people off from the earth, that you consider it is strong doctrine, but it is to save them, not to destroy them.
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> . . . And furthermore, I know that there are transgressors, who, if they knew themselves, and the only condition upon which they can obtain forgiveness, would beg of their brethren to shed their blood, that the smoke thereof might ascend to God as an offering to appease the wrath that is kindled against them, and that the law might have its course. I will say further, I have had men come to me and offer their lives to atone for their sins.
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> It is true that the blood of the Son of God was shed for sins through the fall and those committed by men, yet men can commit sins which it can never remit . . . . There are sins that can be atoned for . . . [only] by the blood of the man.[42]

Other Mormon leaders in early Utah, including Jedidiah M. Grant and Heber C. Kimball, both counselors in the First Presidency of the Church, also taught the doctrine of blood atonement.[43] Significantly,

41. J. SMITH, 1 HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 435 (1951).

42. Young, *The People of God Disciplined by Trials—Atonement by the Shedding of Blood etc.*, in 4 JOURNAL OF DISCOURSES 51, 53-54 (1856).

43. Grant argued:

> But if the Government of God on earth, and Eternal Priesthood, with the sanction of High Heaven, in the midst of all his people, has passed sentence on certain sins when they appear in a person, has [sic] not the people of God a right to carry out that part of his law as well as any other portion of it? It is their right to baptize a sinner to save him, and it is also their right to kill a sinner to save him, when he commits those crimes that can only be atoned for by shedding his blood. If the Lord God forgives sins by baptism, and . . . certain sins cannot be atoned for . . . but by the shedding of the blood of the

Young, Grant, and Kimball all played major roles in implementing the first capital punishment law in Utah.[44]

Although the most fervent sermons on blood atonement occurred during the "reformation" movement in the 1850's, a period of intense Mormon revivalism bordering on fanaticism,[45] nineteenth-century Church leaders also defended the doctrine, even after the excessive rhetoric of the "reformation" had subsided. In 1884 George Q. Cannon, in responding to anti-Mormon critics, proclaimed: "[W]e do not believe in hanging. We think that if a man sheds blood, his blood should be shed by execution . . . . [But it] is a process of law [not a Church function] and has no reference to any Church ordinance."[46] In 1889 the First Presidency and Council of Twelve Apostles issued an official proclamation to answer claims that the Mormon Church had itself practiced blood atonement extralegally: "[W]e regard the killing of a human being, except in conformity with the civil law, as a capital crime, which should be punished by shedding the blood of the criminal after a public trial before a legally constituted court of the land."[47]

Unlike their nineteenth-century counterparts, modern Mormon lead-

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sinner, query, whether the people of God be overreaching the mark, if they should execute the law. . . . We would not kill a man, of course, unless we killed him to save him.

Deseret News, Jul. 27, 1854, at 2, col. 1. For Kimball's views on blood atonement, see Kimball, *Limits of Forbearance—Apostates—Economy—Giving Endowments*, in 4 JOURNAL OF DISCOURSES 374, 375 (1857); Kimball, *Sanctification*, in 7 JOURNAL OF DISCOURSES 16 (1860).

44. *See* notes 95-98 *infra* and accompanying text.

45. This period [1854-55] saw a marked religious reaction, inspired by the leadership of the church, against a certain laxness that the experiences of the previous decade had introduced into Mormon behavior. Some Saints were lured by gold to California, there were quarrels about property, some had been ignoring the Sabbath, stealing was not unknown, and . . . "sex sins" had become common, or at least temptation had become continuous in the circumstances of unsettlement and mobility. The result was the "Mormon Reformation" preached by Jedediah M. Grant, Brigham Young, and others. Mormon missionaries went to every settlement and questioned each person individually about his sins, ranging from murder, treachery, adultery, failure to pay tithes . . . and even personal cleanliness. It was a kind of Mormon revivalism and was accompanied by inner anxiety and high emotion. . . .

The result and in part the aim of the movement were to increase group loyalty as well as religious enthusiasm . . . . Brigham Young preached the doctrine of "blood atonement" . . . .

. . . Blood atonement certainly enkindled . . . [a violent] sort of spirit, and, although it seems that it was rarely practiced, the atmosphere was one of inordinate group loyalty to the point of fanaticism. Obedience to authority became a most important mark of religious fervor.

T. O'DEA, THE MORMONS 100-01 (1957). *See generally* Larson, *The Mormon Reformation*, 26 UTAH HIST. Q. 45 (1958).

46. *Quoted in* J. WALTERS, A STUDY OF EXECUTIONS IN UTAH 14 (1973).

47. B. ROBERTS, 4 A COMPREHENSIVE HISTORY OF THE CHURCH 136 (1957). Again in 1891,

ers rarely discussed blood atonement, perhaps because of growing disenchantment with the doctrine. Several twentieth-century discussions of Mormon doctrine by Church authorities, however, suggested that blood atonement has retained some modern vitality as a teaching of the Church.[48] Moreover, despite considerable criticism of blood atone-

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Wilford Woodruff, President of the Mormon Church, stated in answer to "scurrilous charges" against the Mormons:

> It is a fundamental doctrine of our creed that a murderer cannot be forgiven; that he "hath not eternal life abiding in him"; that *if a member of our Church, having received the light of the Holy Spirit, commits this capital crime, he will not receive forgiveness in this world nor in the world to come.*
>
> . . . It is part of our faith that *the only atonement a murdered [sic] can make for his 'sin unto death' is the shedding of his own blood* [through capital punishment as practiced by the State and *not* the Church], according to the fiat of the Almighty after the flood: "Whoso sheddeth man's blood by man shall his blood be shed." But *the law must be executed by the lawfully appointed officer. This is "blood atonement" so much perverted by maligners of our faith.* We believe also in the atonement wrought by the shedding of Christ's blood on Calvary; that it is efficacious for all the race of Adam for the sin committed by Adam, and for the individual sins of all who believe, repent, are baptized by one having authority, and who receive the Holy Ghost by the laying on of authorized hands. *Capital crime* committed by such *an enlightened person* cannot be condoned by the Redeemer's blood. For him there is "no more sacrifice for sin"; his life is forfeit, and he can only pay the penalty. *There is no other blood atonement taught, practiced or made part of the creed of the Latter-day Saints.*

Letter from Wilford Woodruff to the editor of the *Illustrated American* (January 9, 1891), *cited in* Letter from Bruce R. McConkie to Thomas B. McAffee (Oct. 18, 1978) (McConkie letter on file at the University of Nebraska College of Law) [hereinafter cited as McConkie Letter].

48. Brigham H. Roberts, a general authority and official Church Historian, in discussing the "divine instructions to the Church," represents the status of blood atonement as follows:

> But if, as seems to be the case . . . there are certain limitations to vicarious atonement, even to the vicarious atonement of the Christ, then these ancient laws proclaiming that the life of the flesh is in the blood, and that "the blood maketh an atonement for the soul," make plain what is needful for the salvation of the soul where one's sins place him beyond the reach of vicarious means of salvation—then it is the shedding of the sinners [*sic*] own blood that must be referred to.

B. ROBERTS, *supra* note 47, at 128-29. Likewise, Joseph Fielding Smith, a Mormon Apostle, stated that Utah capital punishment law grants

> unto the condemned murderer the privilege of choosing for himself whether he die by hanging or whether he be shot, and thus have his blood shed in harmony with the law of God; and thus atone, so far as it is in his power to atone, for the death of his victim.

J. SMITH, 1 DOCTRINES OF SALVATION 136 (1954). More recently, Bruce R. McConkie, a present Mormon Apostle, stated:

> But under certain circumstances there are some serious sins for which the cleansing of Christ does not operate, and the law of God is that men must then have their own blood shed to atone for their sins. Murder, for instance, is one of these sins; hence we find the Lord commanding capital punishment.

B. MCCONKIE, MORMON DOCTRINE 92 (2d ed. 1966). Significantly, in an earlier discussion of blood atonement, McConkie had stated, "As a mode of capital punishment, hanging or execution on a gallows does not comply with the law of blood atonement, for the blood is not shed." *Id.* at 314 (1st ed. 1958). The deletion of the reference to hanging in McConkie's later work indicates that he had modified his view of the theological significance of blood-spilling modes of execution.

ment from non-Mormons,[49] the Church, apart from disclaimers of extralegal practice of the doctrine, never specifically disavowed until very recently the notion that blood atonement could be effectuated through the firing squad.

However uncertain the modern status of blood atonement might have been, it became clear in October 1978 that the Mormon Church has officially rejected the doctrine as a present teaching of the Church. The Church now views the shedding of the blood of sinners to remit sin as a doctrine that is inapplicable in contexts in which a separation of church and state exists.[50] While the Mormon Church continues to defend the institution of capital punishment itself, the *mode* of execution is now theologically irrelevant. Official Church doctrine no longer attaches any religious significance to the firing squad.[51]

But, as suggested above, a very different conception of bloodspilling modes of capital punishment historically prevailed in Utah. The concept of blood atonement occupied an important place in nineteenth-century Mormon thought, and as an outward act of religious significance, one should not attempt to understand it merely in abstract doctrinal terms.[52] That early Mormons did not view blood atonement as a

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See McConkie Letter, *supra* note 47. An allusion to blood atonement is contained in a 1972 editorial in the Church Section of the Mormon Newspaper, the Deseret News, which reads:

> Biblical principles are sound, and are as applicable today as they were in ancient times. One of those principles as taught in scripture was capital punishment.
>
> As far back as the days of Noah the Almighty gave this law: "Whoso sheddeth man's blood, by man shall his blood be shed . . . .
>
> . . . .
>
> Have the opponents of capital punishment ever thought of it in its eternal sense? Is this one way by which sinful man may atone, at least in part, in the eyes of God, for his serious offenses?

Deseret News, Feb. 26, 1972 (Church Section), at 16, col. 1. Although these few references to blood atonement suggest that the doctrine possessed some modern vitality, other major twentieth-century treatments of Mormon doctrine by Church authorities fail to discuss blood atonement. *See, e.g.,* J. TALMAGE, *supra* note 22, which contains lengthy discussion of the Mormon plan of salvation without ever mentioning blood atonement. Perhaps significantly, the present Mormon prophet, Spencer W. Kimball, also fails to mention blood atonement as theologically relevant to murderers. S. KIMBALL, THE MIRACLE OF FORGIVENESS 127-32 (1969).

49. *See, e.g.,* the sources cited in B. ROBERTS, *supra* note 47, at 126 n.30.

50. *See* McConkie Letter, *supra* note 47.

51. *Id.*

52. Blood atonement seemed to assume a quasi-sacramental status so far as the crime of murder was concerned, Cannon, *see* text accompanying note 46 *supra*, to the contrary notwithstanding. Although most Mormon ordinances required Priesthood authority to make them efficacious, the State's executions of murderers were apparently seen as religiously significant exercises, which perhaps bestowed spiritual blessings upon the offender. *See* notes 87-105 *infra* and accompanying text; C. PENROSE, *supra* note 23, at 23 (capital punishment by the *State* should not be

purely hypothetical principle becomes clear upon examination of the relationship between that doctrine and Utah capital punishment law.

B. *Capital Punishment Legislation in Utah*

In July 1847 the first company of Mormon pioneers arrived and began to settle the geographical area embraced within the boundaries of the State of Utah.[53] At that time the area belonged to Mexico; Mexico ceded it to the United States in February 1848 by the Treaty of Guadalupe Hidalgo.[54]

Apart from a few trappers and Indians, the Saints found a wilderness devoid of people, civilization, or law.[55] A theocracy governed the first two-and-a-half years of Mormon settlement in the Great Basin and the Saints made no attempt to establish a secular government.[56]

The first effort towards secular government occurred in 1849 when the Council of Fifty, the secret governing body of the "political Kingdom of God,"[57] drafted a plan for territorial government.[58] The Council of Fifty, although theoretically a political body distinct from the

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abolished because it allows the shedding of blood as atonement for sin according to God's law). Blood atonement through state execution thus took on the character of a religious ordinance.

53. *See* J. ALLEN & G. LEONARD, THE STORY OF THE LATTER-DAY SAINTS 245-47 (1976) [hereinafter cited as STORY OF L.D.S.]; Creer, *The Evolution of Government in Early Utah*, 26 UTAH HIST. Q. 23 (1958).

54. Thomas & Jensen, *A Study of the Indeterminate Sentence & Parole in Utah*, 21 BULL. U. UTAH 1, 57 (1931).

55. Skidmore, *Penology in Early Utah*, 2 UTAH HUMANITIES REV. 145, 145 (1948).

56. STORY OF L.D.S., *supra* note 53, at 252; Creer, *supra* note 53, at 27. For a good discussion of government in early Utah, see Morgan, *The State Deseret*, 8 UTAH HIST. Q. 65 (1940).

57. The Mormon concept of millenialism implied that manmade governments would ultimately fail and the just rule of Christ would replace them. Daniel's vision of a kingdom rolling forth to fill the earth was interpreted to mean that a political kingdom was to be established prior to the millennium. As early as 1842 those closest to Joseph Smith anticipated the establishment of a political entity outside the regular organization of the Church, although dominated by priesthood leaders. The governing body of the kingdom was the Council of Fifty. This body was to establish a righteous government that would protect the rights of all and prepare the world politically for the second coming of the Savior and his millennial reign. STORY OF L.D.S., *supra* note 53, at 186-87; *see generally* Clark, *The Kingdom of God, the Council of Fifty and the State of Deseret*, 26 UTAH HIST. Q. 131 (1958). The Council of Fifty was organized in 1844 in Nauvoo, Illinois, in 1844 and was a secret body of leading Mormon officials. The body followed the Saints to Utah and remained a vital force in shaping Utah politics until the 1890's. Hansen, *Political Kingdom as a Source of Conflict*, in MORMONISM AND AMERICAN CULTURE 112, 115-26 (1972). The Council of Fifty was considered the "legislature of the Kingdom of God." Melville, *Theory and Practice of Church and State During the Brigham Young Era*, 3 B.Y.U. STUD. NO. 1 33, 33 (1960).

58. STORY OF L.D.S., *supra* note 53, at 253. *See also* K. HANSEN, QUEST FOR EMPIRE 126-27 (1967).

Mormon Church,[59] was composed of and controlled by the Mormon hierarchy and was thus virtually indistinguishable from the Church itself.[60] While waiting for federal approval of its petition for territorial status, the Council of Fifty established the provisional State of Deseret,[61] apparently to begin realization of the ideals of the political Kingdom of God.[62] Although the Constitution of the State of Deseret paid lip service to the principle of popular sovereignty,[63] the Council of Fifty handpicked the first "state" legislature.[64] Members of the Council filled all of the executive and judicial branches of the new government,[65] and the Council elected Brigham Young governor.[66] "Church and state were clearly welded together."[67]

The General Assembly of the State of Deseret, controlled by members of the Council of Fifty,[68] adopted a criminal code in 1851 that

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59. "[I]n theory, the political kingdom of God was to be a pluralistic society that granted wide latitude to the individual differences of its prospective members. Such a latitude was only possible if the kingdom and the church were separate organizations." K. HANSEN, *supra* note 58, at 37.

60. "For the most part [the Church and the political kingdom] were separate in theory only. Ultimately, no distinction could be drawn between the two. The priesthood that controlled the church also controlled the state." *Id.* at 36. "The basic authority for the Kingdom of God lay in the authority of the priesthood of the president of the Mormon Church, but the directional control was vested in . . . the Council of Fifty." Clark, *supra* note 57, at 134.

61. STORY OF L.D.S., *supra* note 53, at 253. The Council of Fifty worked out the basic ideas for the government of the State of Deseret before the Saints migrated to Utah. "The State of Deseret was the planned result of the doctrine of the political Kingdom of God." Clark, *supra* note 57, at 133.

62. K. HANSEN, *supra* note 58, at 127.

63. Section two of the "Declaration of Rights" of the Deseret Constitution provided:

> All political power is inherent in the people; and all free Governments are founded in their authority, and instituted for their benefit; Therefore, they have an inalienable and indefeazible [*sic*] right to institute Government; and to alter, reform, and totally change the same, when their safety, happiness, and the public good shall require it.

Quoted in K. HANSEN, *supra* note 58, at 129. "But this passage was hardly intended to encourage the principle of popular democracy, for, according to the political theory of the Kingdom of God, sovereignty rested not with the people but in the hands of God." *Id.*

64. *Id.* at 130.

> In territorial Utah the Council of Fifty . . . was the policy-making body of the Kingdom of God. It was the body from which policies for the civil government of men on the earth were to emanate. It was the policy-making body; the legislature of the State of Deseret was the legislative agency required to put these policies into law. . . .

Clark, *supra* note 57, at 141.

65. K. HANSEN, *supra* note 58, at 129-31; STORY OF L.D.S., *supra* note 53, at 253.

66. *See* K. HANSEN, *supra* note 58, at 126-30.

67. STORY OF L.D.S., *supra* note 53, at 253.

68. K. HANSEN, *supra* note 58, at 131.

imposed capital punishment for the crime of murder.[69] The code prescribed the mode of execution: "Be it further ordained, that when any person shall be found guilty of murder, under any of the preceding sections of this ordinance, and sented [*sic*] to die, he, she or they shall suffer death by being shot, hung or beheaded."[70] Apparently, the court determined the precise mode of execution.[71]

The provisions of the Deseret Assembly hardly took force before the United States granted Utah territorial status. In 1852 the territorial legislature enacted a more extensive criminal code, which adopted all the laws of the provisional State of Deseret, including the capital punishment measures,[72] but also provided that the offender could choose the mode of execution.[73] First-degree murderers could " 'suffer death by being shot, hung, or beheaded, as the court may direct,' or as the convicted person may choose."[74] As it had done with the Deseret Assembly, the Council of Fifty again orchestrated the election of the territorial legislature, and members of the Council held at least twenty of the thirty-nine seats.[75]

The 1852 law governed capital punishment in the Territory of Utah until 1876 when the legislature adopted a more complete criminal code.[76] The 1876 statute inadvertently repealed the section on modes of execution without providing a new section, but the Utah courts continued to impose capital punishment by firing squad.[77]

In 1888 the legislature removed beheading as a method of state ex-

69. Section 1 of the Criminal Laws of the State of Deseret provided: "[I]f any person shall, with premeditated intent, unlawfully kill a human being, in this State, they shall be deemed guilty of murder, and on conviction of the same, before a court having jurisdiction thereof, shall suffer death." LAWS & ORDINANCES OF THE STATE OF DESERET § 1 (Jan. 16, 1851).

70. *Id.* § 10.

71. "[T]he culprit shall suffer death, as the court may have directed." *Id.* § 11.

72. STORY OF L.D.S., *supra* note 53, at 258; Skidmore, *supra* note 55, at 161.

73. Skidmore, *supra* note 55, at 162.

74. Wilkerson v. Utah, 99 U.S. 130, 132 (1878) (quoting 1852 Utah Laws).

75. The Council of Fifty . . . organized the territorial government of Utah . . . .
. . . [The Council] controlled key legislative committees.
. . . .
Since church members followed the advice of the hierarchy in matters both spiritual and temporal, the Council never had any difficulty in assuring election of its candidates. Nominations were made by leading church authorities; absence of the secret ballot also assured that only the most recalcitrant would dare oppose the official state.
K. HANSEN, *supra* note 58, at 136-37.

76. *See* Thomas & Jensen, *supra* note 54, at 58.

77. *See* Wilkerson v. Utah, 99 U.S. 130 (1878).

ecutions, but retained shooting and hanging.[78] The present statute, virtually identical to the 1888 measure, provides:

> The punishment of death must be inflicted by hanging the defendant by the neck until he is dead, or by shooting him, at his election. If the defendant neglects or refuses to make election, the court at the time of making the sentence must declare the mode and enter the same as a part of its judgment.[79]

Whether by exercise of the defendant's option or by judicial imposition, shooting has been by far the predominant mode of execution in Utah.[80]

In short, present capital punishment law in Utah was shaped during the territorial period. During this time the Mormon Church exerted tremendous influence on Utah politics. Leading Saints made up the territorial legislature,[81] and the Council of Fifty was highly influential in directing governmental affairs.[82] Utah's territorial period also was a time of stormy relations between the Saints and their Gentile (non-Mormon) neighbors.[83] Although a variety of factors contributed to the strife,[84] the heavy Mormon involvement in Utah politics was the exas-

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78. 2 COMP. L. UTAH § 5131 (1888) provides:

> The punishment of death must be inflicted by hanging the defendant by the neck until he is dead, or by being shot, at his election. If the defendant neglects or refuses to make the election, the court, at the time of rendering the sentence, must declare the mode and enter the same as a part of its judgment.

79. UTAH CODE ANN. § 77-36-16 (1953).

80. Records indicate that only six offenders have been legally hanged in Utah, but thirty-eight have been shot. There are no recorded beheadings. J. WALTERS, *supra* note 46, at 73..

81. "Members of the legislature were usually Church leaders, elected by the people of the various counties. In some ways they viewed their political responsibilities as an extension of their church activity, for they were all engaged in building a political community conducive to the success of the Kingdom." STORY OF L.D.S., *supra* note 53, at 262. *See generally* Melville, *supra* note 57, at 46-53.

82. An examination of Utah territorial legislatures from 1851 to 1896 reveals that not until the 1880's, when the influx of Gentiles into the territory in large numbers began to crack Mormon political hegemony, did the Council of Fifty lose its political influence. Throughout this period it controlled key legislative committees.

K. HANSEN, *supra* note 58, at 137. "Utah began as a territory with a government which was run largely as a church operating through an informal but partially invisible Council of Fifty." Lamar, *Statehood for Utah: A Different Path*, in MORMONISM AND AMERICAN CULTURE 127 (1972). "The Mormons . . . simply elaborated their ecclesiastical machinery into a government." *Id.* at 129.

83. *See* L. ARRINGTON, GREAT BASIN KINGDOM 291-322 (1958); K. HANSEN, *supra* note 58, at 147-79; T. O'DEA, *supra* note 45, at 104-11.

84. *See* STORY OF L.D.S., *supra* note 53, at 343; L. ARRINGTON, *supra* note 83, at 291-322 (economic tensions between Mormons and Gentiles); R. BURTON, THE CITY OF THE SAINTS 476-93 (1963) (Mormon practice of polygamy as source of Mormon-Gentile strife).

cerbating, if not the sole, reason for the early Mormon-Gentile conflict.[85] To a lesser extent, religious tension remains a part of present Utah society because of the perception that the Mormon Church has remained unduly involved in state and local politics.[86]

1. *Historical Purpose of Firing Squad Provision*

Virtually nothing exists in the way of official legislative discussion of the firing squad provision in Utah apart from the language of the law itself; thus, an assessment of the purpose of the law and the motivation of the legislators who enacted it must be drawn from circumstantial evidence. The use of circumstantial evidence to assess legislative motivation, however, is not necessarily a wild exercise in speculation. Discerning motivation by drawing inferences from legislative conduct, in the context of antecedent and concurrent events and situations, is often reasonably sound and is neither unknown to the law[87] nor fraught with special metaphysical difficulty.[88] An inquiry into the motivation of the lawmakers who first introduced the firing squad into Utah law suggests that their purposes were significantly religious.

The Deseret Assembly, and later the territorial legislature, became the first American lawmakers to adopt beheading and the firing squad

85. *See* K. HANSEN, *supra* note 58, at 147-79; T. O'DEA, *supra* note 45, at 104-11, 172; B. ROBERTS, 5 A COMPREHENSIVE HISTORY 372-81 (1957).

86. It is no secret that the Mormon Church wields tremendous political power in Utah. One Utah writer has pointed out that although "[c]hurch leaders claim that they purposely exert wide influence only on 'moral' issues . . . [t]heir definition of moral . . . has been broad enough to include [such things as] the Equal Rights Amendment . . . ." Jarvik, *Probing the Power Structure*, 5 UTAH HOLIDAY 4, 6 (May 24, 1976). The Church's opposition to the ERA ratification fight has been a special source of tension between Mormons and non-Mormons in Utah. ERA supporters, primarily non-Mormons, accused the Church of sending its members to the Utah Womens conference with instructions to vote against ratification and to use mob tactics. *See* Salt Lake Tribune, June 29, 1972. However, conflicts are not limited to the ERA controversy. Other observers have noted tensions along religious lines because of Mormon influence in the Utah schools, in dating relationships, in racial relations, and in local government. *See generally* Swenson, *Mormons and Gentiles*, 6 UTAH HOLIDAY 6 (Nov. 8, 1976); *see also* STORY OF L.D.S., *supra* note 53, at 618-22; T. O'DEA, *supra* note 45, at 172.

87. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 107-09 (1968). Circumstantial evidence is utilized in a variety of legal contexts to discern state of mind. In the criminal law, for example, criminal intent is often found by drawing inferences from circumstantial evidence backward to the state of mind of the actor. A. BICKEL, *supra* note 6, at 214.

88. Inquiries into legislative motivation need not involve mysterious searches for the "sole," or "real," or even the "dominant" motive of the legislature. It is often fairly easy to determine that illicit motivation played a "material role" in the legislative process however prevalent the existence of legitimate motivation may also be. *See* Brest, *supra* note 1, at 119-24.

as modes of execution. Except for a few aberrations during colonial times, no American jurisdiction used beheading[89] and Britain had effectively ceased its use more than one hundred years before the Mormons adopted it in 1851.[90] While shooting was an acceptable mode for military executions,[91] hanging was the exclusive means of state executions in other jurisdictions at the time the firing squad was introduced into Utah law.[92] In light of the fusion of church and state in Utah, the most plausible explanation for the emergence of these methods in Utah is that they were intended to implement the late Prophet Joseph Smith's desire to make beheading and shooting the law in order to "spill the blood of the murderer on the ground" so that "smoke thereof might ascend up to God."[93] Brigham Young and the other Mormon leaders in early Utah revered Joseph Smith. It is only natural that when they took to the task of enacting capital punishment law, the views of Joseph on the subject would heavily influence their thinking.[94]

Regardless of whether Joseph Smith's opinion on the religious ad-

89. *See* N. TEETERS, HANG BY THE NECK 95, 461 (1972); Bedau, *General Introduction*, in CAPITAL PUNISHMENT 21 (1972).

90. The last British execution by decapitation was in 1747. G. SCOTT, THE HISTORY OF CAPITAL PUNISHMENT 179 (1950). Beheading was utilized on the European continent in the 1800's, J. LAURENCE, A HISTORY OF CAPITAL PUNISHMENT 35-38 (1922), but there is little reason to believe its use in Europe had anything to do with the Mormons employment of beheading in early Utah.

91. *See* Wilkerson v. Utah, 99 U.S. 130, 133-35 (1878).

92. *See* N. TEETERS, *supra* note 89, at 461; Bedau, *supra* note 89, at 21. The State of Nevada is the only other state ever to have utilized the firing squad, but its employment of shooting arose after Utah had adopted the method and lasted only briefly. *See* W. BOWERS, EXECUTIONS IN AMERICA 9 (1974).

93. *See* notes 40-41 *supra* and accompanying text. The conclusion that Joseph Smith's religious views on bloodspilling modes of execution directly led to Utah's capital punishment law is further justified because George A. Smith, the person with whom Joseph Smith was debating when Joseph expressed his views on the virtues of beheading and shooting, *see* text accompanying note 40 *supra*, was the author of the first criminal code in Utah. Morgan, *The State of Deseret*, 8 UTAH HIST. Q. 67, 108 (1940). Perhaps the debate with Joseph convinced George A. Smith of the religious virtues of beheading and shooting as execution modes and thus explains why those modes appeared in early Utah law.

94. Brigham Young and Heber C. Kimball stood staunchly by Joseph Smith even when other Saints became disenchanted and called Smith a "fallen prophet." J.F. SMITH, ESSENTIALS IN CHURCH HISTORY 198-99 (5th ed. 1935). Brigham Young once declared: "I honor and revere the name of Joseph Smith. I delight to hear it; I love it. I love his doctrine." H. ANDRUS, JOSEPH SMITH: THE MAN AND THE SEER 43 (1960). Brigham Young's dying words reportedly were, "Joseph, Joseph, Joseph!" *Id.* Mormon scripture reads: "Joseph Smith, the Prophet and Seer of the Lord, has done more, save Jesus only, for the salvation of men in this world, than any other man that ever lived in it." DOCTRINE AND COVENANTS § 135:3. The memory of Joseph Smith is

vantages of bloodspilling modes of capital punishment directly shaped Utah law, it is clear that the opinions of other prominent churchmen on blood atonement did. Three of the most vigorous defenders of blood atonement in early Utah, Brigham Young, Jedediah M. Grant, and Heber C. Kimball,[95] directly participated in the 1851 Deseret Assembly that introduced beheading and the firing squad into Utah law. Young approved the measure in his capacity as Governor of Deseret, and Grant and Kimball were speakers of the Deseret house and senate, respectively.[96] Furthermore, the three were members of the Council of Fifty.[97] Minutes of secret meetings of the Council now available indicate that the Council discussed the doctrine of blood atonement prior to the adoption of the 1851 capital punishment law.[98] Given the political influence of the Council and its sympathy for blood atonement, it is difficult to perceive the sudden and novel emergence of beheading and the firing squad in the positive law of Utah as anything but a religious phenomenon.

That the law included hanging as a mode of capital punishment and permitted the offender to choose the method of execution in no way diminishes the strength of the conclusion that the Assembly implemented beheading and the firing squad to allow for the performance of the blood atonement rite. The Mormons viewed hanging as a secular method of imposing capital punishment, available to those who did not choose to "atone" for their sins.[99] The notion of individual freedom was fundamental both to Mormon theology[100] and to the Council of

perpetuated by a sizable body of Mormon hymns, poetry, and literature. *See* STORY OF L.D.S., *supra* note 53, at 198.

95. *See* notes 42-43 *supra* and accompanying text.

96. LAWS & ORDINANCES OF THE STATE OF DESERET § 31.

97. K. HANSEN, *supra* note 58, at 225.

98. For example, on March 3, 1849, the Council discussed the cases of Ira West and Thomas Byres, who had committed crimes serious enough to arouse Brigham Young to say: "I want their cursed heads to be cut off that they may atone for their sins, that mercy may have her claims upon them in the day of redemption." On the following day the Council agreed that Ira West had "forfeited his Head." *Id.* at 70.

99. Joseph Smith stated that he opposed hanging. *See* notes 40, 41 *supra*. Later Mormon spokesmen expressed similar opinions: "[W]e do not believe in hanging. We think that if a man sheds blood, his blood should be shed by execution." George Q. Cannon, *quoted in* J. WALTERS, A STUDY OF EXECUTIONS IN UTAH 14 (1973); "The man who commits murder . . . cannot receive eternal life . . . . The only way to atone is to shed his blood. Hanging is not the proper method." C. PENROSE, *supra* note 23, at 21.

100. Nothing in the Mormon conception of man is more in evidence or relates more importantly to the total theological structure than the affirmation of the freedom of the will. Nothing is permitted to compromise that freedom as the essential meaning of personal-

Fifty's political theory.[101] Forcing blood atonement upon the offender thus would have been inconsistent with basic Mormon belief. Hanging represented a secular alternative for offenders who, in the exercise of their free agency, chose to reject a possible way to salvation from sin. Beheading and the firing squad provided religious alternatives,[102] affording the murderer the opportunity to pay for his offenses.

Numerous commentators agree with the thesis that the firing squad exists in Utah law, at least historically, to effectuate blood atonement. One Mormon historian in a discussion of blood atonement stated:

> ity, whether human or divine, and at every turn of Mormon theological discussion the fact of moral freedom and its implied moral responsibility must be met and accounted for. . . . It is especially this commitment to the freedom of the will that conditions Mormon theology against the concepts of human depravity, salvation by grace only, divine election, the perserverance of the saints, and every form of predestinationism and stands squarely against acceptance of the large measure of absolutism characteristic of Christian theology.

S. MCMURRIN, THE THEOLOGICAL FOUNDATIONS OF THE MORMON RELIGION 77-78 (1965).

101. "[I]n theory, the political kingdom of God was to be a pluralistic society that granted wide latitude to the individual differences of its prospective members." K. HANSEN, *supra* note 58, at 37. "[The Mormons] substituted for [majority rule] a doctrine of individual rights that was also ultimately grounded in natural law, but with the important qualifications that under its provisions the individual did not have to bow to the will of the majority." *Id.* "The Kingdom of God was to protect all peoples in their civil and religious rights, including the right to differ." Clark, *supra* note 57, at 134.

102. Not all early Mormons thought of beheading and shooting in purely sectarian terms. Some evidence of deterrence theory occasionally crept into discussions of capital punishment by those methods.

> [T]he best way to sanctify ourselves, and please God our Heavenly Father in these days is to rid ourselves of every thief, and sanctify the people from every vile character. I believe it is right; it is the law of our neighboring state to put the same thing in execution upon men who violate the law, and trample upon the sacred rights of others. It would have a tendency to place a terror on those who leave these parts, that may prove their salvation when they see the heads of thieves taken off, or shot down before the public.

Hyde, *Sanctification—Economy—Apostates—The Wolves and the Sheep*, in 1 JOURNAL OF DISCOURSES 71, 73 (1854). It does seem, however, that the early Mormons primarily viewed capital punishment in retributive terms as a means of expiating sin through shedding blood; hence, beheading and shooting were religiously significant, but hanging was not. Retributive elements are also evident in the Mormon conception of legal punishment in general:

> We believe that the commission of crime *should be punished according to the criminality of the offense*; that murder, treason, robbery, theft, and the breach of the general peace, in all respects, *should be punished according to their criminality* and their tendency to evil among men, by the laws of that government in which the offense is committed; and for the public peace and tranquility all men should step forward and use their ability in bringing offenders against good laws to punishment. [Emphasis added].

DOCTRINE & COVENANTS § 134:8. "The Mormons were firm believers in the Hebrew concept that crimes were sins against God: the social attitude toward the criminal offender was that 'he should willingly confess his crime and willingly expiate his wrong and then go forth with a repentant heart.'" Skidmore, *Penology in Early Utah*, 2 UTAH HUMANITIES REV. 145, 146 (1948).

> Latter-day Saints believe that where secular government prescribes capital punishment it is better that such form of execution be adopted as will shed the blood of the criminal; hence in Utah, when the Latter-day Saints, in their capacity as citizens of the state have made the laws, condemned criminals, subject to capital punishment, are permitted to choose their mode of execution either by being hung or shot, the latter mode, of course, resulting in the shedding of their blood, thus meeting the requirement of the law of God as well as the law of the state.[103]

Another Mormon historian and doctrinal authority concludes that Mormon legislators incorporated capital punishment provisions into the laws of Utah to allow the offender to "have his blood shed in harmony with the law of God; and thus atone so far as it is in his power, for the death of his victim."[104] Others agree that Utah's use of the firing squad is rooted in the beliefs of early legislators in the doctrine of blood atonement.[105]

Whatever secular justifications might underpin the institution of capital punishment itself, religion provides a significant historical reason and justification for the firing squad as a mode of execution. The hanging provision in Utah law may well be a secular legislative response, but the provision for the firing squad seems heavily motivated by sectarian concerns.

2. *Blood Atonement as a Contemporary Defense for Capital Punishment*

Even though modern Mormon leaders did not enthusiastically embrace the blood atonement doctrine and the recent Church statement specifically rejects it, some Mormon citizens[106] and government offi-

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103. B. ROBERTS, *supra* note 47, at 129 n.41.

104. J. F. SMITH, *supra* note 48, at 136-37.

105. H. ANDRUS, JOSEPH SMITH AND WORLD GOVERNMENT 106-07 n.50 (1963). It would appear that Bruce R. McConkie also believed that the firing squad was religiously significant in Utah law. *See* B. MCCONKIE, *supra* note 48, at 93. McConkie has apparently reconsidered these views, however. *See* McConkie Letter, *supra* note 47.

106. The following shows that blood atonement is still a part of the conciousness of some modern Mormons who favor capital punishment:

> Then blood atonement came up [in a discussion in a Mormon priesthood meeting]. It frequently did in those years [1960's] when I discussed capital punishment with fellow Mormons. Historians apologize for the doctrine. Few people claim to fully understand it, but among Mormons I knew it was frequently used as a final argument in favor of the death penalty.
>
> One of the elders stated that certain sins, such as murder, could only be atoned for if the offender voluntarily requested that his blood be shed. They correctly pointed out that Utah is the only state in the union which gives a condemned man a choice as to

cials[107] used the doctrine up to the time of the rejection as a justification for capital punishment. Utah is still the only state to employ a form of capital punishment that assures the shedding of the offender's blood. Hanging, electrocution, lethal gas, or lethal injection—the modes utilized in every other jurisdiction that imposes the death penalty—do not entail bloodshed. As a consequence, blood atonement can be practiced only in Utah before the firing squad. One author has speculated that the present Mormon-dominated Utah legislature would be reluctant to adopt more humane methods of execution because offenders would be induced to choose those new methods in lieu of the firing squad and its potential for atonement.[108] While it is impossible to determine the accuracy of that speculation, the Utah legislature recently rejected a bill that would have provided death by "medical anesthesia" as a third alternative to shooting and hanging for Utah capital offenders.[109] Shortly after the Utah legislature expressed its continued preference for shooting and hanging, the legislature of the adjacent State of Idaho adopted lethal injection as its sole means of execution.[110] Legislative concern in Utah for retaining a capital punishment scheme that encourages blood atonement provides a plausible explanation for the

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method of his execution. The firing squad spills blood. The other choice, hanging, does not spill blood. They indicated that some of the more humane methods adopted by the other states such as electrocution and gas do not shed blood, but since they would likely be chosen over the bloodspilling firing squad, Utah has not adopted them. . . . There has been only one hanging in Utah's recent history. It is a horrible way to die and is rarely selected by those on death row. The condemned man was a Mormon. I have been told by inmates and officers who knew him that his behavior often appeared to be an active attempt to blacken his family name and shame his parents. He chose hanging as a final defiant gesture, fully aware that he was not choosing the alternative that might atone for his crime.

Wilcock, *Utah's Peculiar Death Penalty*, 7 DIALOGUE 28, 32, 34 (1972).

[W]ithin the context of the present national debate, many members of the [Mormon] Church seem to remain surprisingly aloof. Rather than personally confront the numerous moral and social dilemmas inextricably bound up in the question of capital punishment, they prefer to rely on the so-called doctrine of blood atonement as the basis of their position.

Hatch, *Capital Punishment and Blood Atonement*, 2 SUNSTONE 90 (1977).

107. For an indication that blood atonement was a factor in the minds of those prosecuting Gary Gilmore, see the interview with Deputy Attorney General Michael Deamer (on file at the Utah Historical Society), at 48-51.

108. Under this theory, relatively more humane but bloodless methods such as the gas chamber and lethal injection would be unappealing to Mormon legislators. *See* Wilcock, *supra* note 108, at 32.

109. *See* S. 333, 1977 Gen. Sess., Utah State Legislature, 31 UTAH SENATE J. 33 (Feb. 9, 1977).

110. Previously, hanging had been the mode of execution in Idaho. Salt Lake Tribune, Mar. 15, 1978, at 48, col. 1.

radically different approaches of the neighboring Utah and Idaho legislatures with respect to the death penalty, especially because the Utah rejection of medical anesthesia occurred prior to the official Mormon rejection of blood atonement.

The legislative history of the statute defining the modes of execution in Utah reveals no statement of secular purposes sought to be achieved through either the firing squad or the option granted offenders of death by hanging or firing squad. Neither do there appear to be any court cases or statements of legislators, other governmental officials, or legal commentators that explore the secular virtues of the Utah law. In the absence of any secular purpose yet articulated to explain the unique presence in Utah law of the option to choose a bloodspilling mode of execution, religious factors best explain Utah's novel approach in effectuating capital punishment.

If this analysis is correct, the firing squad retains present religious significance to the extent that its current existence in Utah law is a consequence of a historical legislative process, motivated significantly, it appears, by sectarian concerns. But the present religious *effects* of the firing squad are largely symbolic because of the recent Mormon disclaimer of blood atonement. Although for a time it appeared that Utah law directly aided religion by providing a vehicle for the effectuation of the blood atonement rite, that direct religious effect is lacking today. Because the media has not widely publicized the Church statement disavowing the doctrine, however, some people probably still perceive the firing squad as a means of effectuating blood atonement. If so, religious considerations, albeit ones based on Church doctrine now officially disavowed, may still be operating as a justification for the firing squad.

Given this doctrinal and historical background, the first amendment issue posed by present Utah law may be stated: Is the provision for shooting capital offenders, which had an initial legislative purpose of providing a vehicle for effectuation of a consensual religious practice, unconstitutional under the establishment clause even though the measure does not currently promote religious practice or directly aid religion?

III. THE ESTABLISHMENT CLAUSE: VALUES, DOCTRINE AND CASES

The first amendment's religion provision, applicable to the states through the fourteenth amendment,[111] provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[112] Despite criticism from some commentators,[113] courts have developed separate strands of doctrinal theory under the establishment and free exercise clauses.[114] The Supreme Court has generally analyzed the distinction between the two clauses in terms of whether the governmental action that touches on religion results in direct or only indirect coercion upon individuals.

> The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion.[115]

Because there appears to be governmental support behind a particular religious belief in the case of the firing squad, establishment clause problems exist.[116] Although free exercise infringements generally occur when a person or group suffers a meaningful violation of religious

111. Everson v. Board of Educ., 330 U.S. 1 (1947) (establishment clause applied to the states); Cantwell v. Connecticut, 310 U.S. 296 (1940) (free exercise clause applied to the states).

112. U.S. CONST. amend. I.

113. *See, e.g.*, Kurland, *The School Prayer Cases*, in THE WALL BETWEEN CHURCH AND STATE 142, 160-61, 178-79 (D. Oaks ed. 1963); Note, *Toward a Uniform Valuation of the Religion Guarantees*, 80 YALE L.J. 77 (1970).

114. *See* Moore, *The Supreme Court and the Relationship Between the 'Establishment' and 'Free Exercise' Clauses*, 42 TEX. L. REV. 142, 146-47 (1963); Note, *supra* note 113.

115. Engel v. Vitale, 370 U.S. 421, 430-31 (1962). *See also* McGowan v. Maryland, 366 U.S. 420 (1961), in which the Court describes a broader purpose for the establishment clause than merely to insure protection of free exercise rights. "[T]he establishment of a religion was equally feared [at the time of adopting the first amendment] because of its tendencies to political tyranny and subversion of civil authority." *Id.* at 430 (footnote omitted).

116. R. MORGAN, THE SUPREME COURT AND RELIGION 76 (1972). "[T]he primary element in the usual establishment case is that of favoring religion." Moore, *supra* note 114, at 150.

liberty,[117] violations of the establishment clause require no showing of actual harm because they threaten to upset the institutional balance of religion and state.[118]

A. *Establishment Clause Values*

Appeals to the history of the first amendment for guidance in implementing the establishment clause are usually not helpful. Even though the framers of the amendment could not have had today's problems in mind when they drafted the religion clauses,[119] it appears that they greatly differed among themselves over the meaning of the clauses. Commentators have noted at least three distinct schools of thought that influenced the drafters of the Bill of Rights. First, a pro-religious movement, associated primarily with Roger Williams, saw separation of church and state as a means of protecting organized religion from the state.[120] Government should foster a climate conducive to all religions.[121] Thomas Jefferson and other Enlightenment thinkers of a decidedly anticlerical bent held a different view, which advocated separation to protect the state from religion.[122] Only the complete separation of religion from politics would eliminate the influence of religious institutions on political institutions and provide for a free choice among political views.[123] Third, James Madison saw separation of church and state as a means to protect churches and government from

117. E. SMITH, RELIGIOUS LIBERTY IN THE UNITED STATES 332 (1972).

118. "Establishment . . . appeared as an erosion of principle, a wrong without injury, or an infraction technical and abstract in character." Note, *supra* note 113, at 82-83.

119. *See* Abington School Dist. v. Schempp, 374 U.S. 203, 237-38 (1963) (Brennan, J., concurring). *See also* Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II, The Nonestablishment Principle*, 81 HARV. L. REV. 513, 516-26 (1968).

120. M. HOWE, THE GARDEN AND THE WILDERNESS 6 (1965).

121. L. TRIBE, *supra* note 4, at 817.

122. The Jeffersonian strand of first amendment history reflects the anticlerical bias of eighteenth-century rationalism, which was a significant factor in generating the establishment clause. *See* Gorman, *Problems of Church and State in the United States: A Catholic View*, in THE WALL BETWEEN CHURCH AND STATE 41, 42-43 (D. Oakes ed. 1963). Jefferson's theory of strict separation of church and state is evidenced by his opposition to forced contributions to religion. "That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." *Quoted in* C. ANTIEAU, A. DOWNEY & E. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT 33 (1964). The Jeffersonian tradition represents a distrust of organized religion and a desire to keep the church from misusing the state as its instrument. Kirby, Everson *to* Meek *and* Roemer: *From Separation to Detente in Church-State Relations*, 55 N.C.L. REV. 563, 566 (1977).

123. L. TRIBE, *supra* note 4, at 817.

each other.[124] Madison believed that both religion and government could best achieve their high purposes if each remained free of the other within its respective sphere.[125]

Although appeals to these somewhat conflicting historical views, all of which were influential in precipitating the religion clauses, may not be particularly fruitful in supplying answers to modern church-state problems, it is possible to abstract from the traditions of Williams, Jefferson, and Madison some broad principles that demonstrate the values underlying the religion clauses. These values, in turn, facilitate analysis of establishment clause problems.

The history of the religion clauses shows that religion has always occupied an important place in American life. Religious liberty is still a highly prized commodity. The protection of religious liberty, embodied specifically in the free exercise clause, recognizes the value of allocating religious choices to the realm of individual conscience, unfettered by governmental coercion.[126] The free exercise clause is thus a mandate of religious voluntarism.[127] If religious freedom is to be meaningfully effectuated, it is necessary to prevent not only governmental antagonism of religious belief, but also governmental preference for it. The ideal of free competition of religious sects among themselves and with irreligious elements is disrupted when government provides either religious or irreligious promotion.[128] The realization of religious autonomy requires substantial insulation of government from religion. Thus, the value of religious voluntarism leads to a principle of separation of church and state that precludes governmental involvement in religious affairs. The principle of separatism not only promotes the value of religious voluntarism, but also prevents religio-politico dissension, the historic evil that the establishment clause was meant to remedy, which often arises when religion and politics become associated.[129] Hence, the establishment clause is meant to complement the free exercise clause in achieving the value of voluntarism through the separation of church and state and in avoiding religio-politico strife.

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124. *Id.*
125. *Id.*
126. *Id.* at 818; Gianella, *supra* note 119, at 517.
127. L. TRIBE, *supra* note 4, at 818.
128. *Id.*
129. Gianella, *supra* note 119, at 517.

B. *Establishment Clause Doctrine—The Three-Prong Test*

In an attempt to facilitate analysis of establishment problems, the Supreme Court has developed a three-step standard, which is referred to here as the "three-prong test." The test evolved from a series of cases that concerned church-state problems in education; specifically, cases of governmental financial aid to parochial schools[130] and cases of religious exercises in public schools.[131] This section will not attempt to trace the development of the three-prong test. Others have undertaken that analysis[132] and the education cases are not particularly useful in resolving the establishment issue posed by the firing squad. The Court undoubtedly has been especially sensitive to the problems of supporting sectarian schools with public monies[133] and protecting impressionable school children from the evils of religious establishment.[134] Moreover, most of the education cases—indeed, most establishment cases in general—focus primarily on legislative effect rather than on motivation and thus are of limited value for purposes of this article. It is clear, however, that the three-prong test, the first prong of which focuses on legislative motivation, is the basic framework for analyzing establishment clause cases in all factual areas.[135] Thus, the test is relevant for analysis of the problem at hand.

1. *The Secular-Purpose Prong*

To withstand establishment clause attack, legislation that touches on

130. *See* Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Tilton v. Richardson, 403 U.S. 672 (1971); Lemon v. Kurtzman, 403 U.S. 602 (1971); Board of Educ. v. Allen, 392 U.S. 236 (1968); Everson v. Board of Educ., 330 U.S. 1 (1947).

131. Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962); Zorach v. Clauson, 343 U.S. 306 (1952); McCollum v. Board of Educ., 333 U.S. 203 (1948).

132. *See, e.g.*, J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 850-61, 863-68 (1978); Nowak, *The Supreme Court, The Religion Clauses and the Nationalization of Education*, 70 NW. U.L. REV. 883 (1976).

133. *See* Louisell, *Does the Constitution Require a Purely Secular Society?*, 26 CATH. U.L. REV. 20, 25 (1976); Nowak, *supra* note 132, at 889-91; Zoetewey, *Excessive Entanglement: Development of a Guideline for Assessing Acceptable Church-State Relationships*, 3 PEPPERDINE L. REV. 279, 311 (1976).

134. Education touches on a most sensitive area of church-state relations. "The judicial position taken with respect to religious practices in public schools cannot be viewed in isolation from policy considerations rooted in an understanding of the functions and values served by the public school in a pluralistic society." P. KAUPER, RELIGION AND THE CONSTITUTION 90 (1964).

135. *See* Jones v. Butz, 374 F. Supp. 1284 (S.D.N.Y.), *aff'd without opinion*, 419 U.S. 806 (1974).

religion must possess a legitimate secular purpose.[136] The function of the secular-purpose prong is to ascertain governmental purpose when it is not clearly enunciated or to judge the credibility of purported purposes.[137] Legislation enacted solely to promote religion is unconstitutional.[138] Overtly religious legislation, however, is extremely rare. Establishment clause analysis of legislative purpose usually arises in statutory contexts that include both secular and religious aims. Apart from occasional statements that merely "coincidental" advancements of religion through secular legislation are not unconstitutional establishments of religion under the secular-purpose test,[139] the cases offer no guidance in determining the constitutionality of legislation that possesses both secular and religious aims.

One commentator has offered some suggestions to assist with secular-purpose analysis, advocating a liberal construction of secular purpose.

> [T]he definition of "secular" here must be a generous one: if a purpose were to be classified as nonsecular simply because it coincided with the beliefs of one religion or took its origin from another, virtually nothing that government does would be acceptable; laws against murder, for example, would be forbidden because they overlapped the fifth commandment of the Mosaic Decalogue. It is clear, then, that the definition of religion that must be employed in finding a violation of the secular purpose requirement should be: if something is "arguably nonreligious" it is sufficiently secular.[140]

For these reasons, "the Court will usually find in the statutory language or elsewhere a secular purpose for a challenged law, and will then move on to consideration of the remaining [two prongs of the three-prong test]."[141] Moreover, judicial reluctance to strike down legislation under the secular-purpose prong evidences the traditional objections to inquiry into legislative motivation. Courts are hesitant "to challenge another branch's judgment or good faith and engage in the difficult process of unearthing hidden motives [if] that branch has formulated a

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136. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 132, at 851.

137. Note, *Establishment Clause Analysis of Legislative and Administrative Aid to Religion*, 74 COLUM. L. REV. 1175, 1178-79 (1974).

138. Epperson v. Arkansas, 393 U.S. 97 (1968).

139. *See* McGowan v. Maryland, 366 U.S. 420, 442 (1961).

140. L. TRIBE, *supra* note 4, at 835 (footnotes omitted). *See also* Sumpter v. State, 261 Ind. 471, 477-78, 306 N.E.2d 95, 101 (1974), *cert. denied*, 425 U.S. 952 (1976).

141. L. TRIBE, *supra* note 4, at 836.

secular purpose."[142] Further, to invalidate laws simply because of religious motivation is futile and counterproductive if the effects of the legislation are legitimately secular.

When a religiously motivated statute also has religious effects, it is probably best, for the reasons above, to avoid strict scrutiny of motivation and focus constitutional attention on the effects of the measure. But there will be instances—the Utah firing squad, for example—when religiously motivated statutes will lack significant religious effect at the time its constitutionality is questioned. In these cases, strict scrutiny of motivation is appropriate. If so, the secular-purpose test requires significantly more content than it presently enjoys to be an adequate analytic service.

2. *The Primary-Effect Prong*

The general inclination to focus on legislative effect rather than on motivation is illustrated by the judicial tendency to admit secular purpose but to scrutinize legislation closely under the primary-effect test.[143] Under this test legislation that touches on religion must have a primarily secular effect to withstand establishment clause challenge.[144] If a law has the essential effect of promoting the pursuit of a religious tradition or the expression of a religious belief, it violates the establishment clause.[145]

As with secular purpose, the judiciary has done little to clarify primary effect. The aid-to-education cases suggest that even if a measure has the effect of promoting secular purposes, it is nevertheless unconstitutional if it has the "direct and immediate" effect of advancing religion.[146] Although the "direct" and "immediate" criteria are themselves vague, legislation apparently fails the primary-effect test if it directly and immediately aids religion, regardless of whether the aid is a principal or even a substantial effect of the statute.[147] Likewise, there appears to be no requirement that the religious effect outweigh the secular effect

142. Note, *supra* note 137, at 1179.

143. *Id.* at 1179-82.

144. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 132, at 851.

145. L. TRIBE, *supra* note 4, at 839.

146. *See* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783 n.39 (1973).

147. Kauper, *The Supreme Court and the Establishment Clause: Back to* Everson?, 25 CASE W. RES. L. REV. 107, 120-21 (1974).

if the religious aid is "direct."[148] Under this formulation, aid to religion is unconstitutional unless it is "indirect or incidental."[149]

3. *The Excessive-Entanglement Prong*

The final prong, often characterized as a variation of the other two prongs and not itself a separate standard,[150] provides that government must not be "excessively entangled" with religion.[151] Avoiding excessive governmental entanglement promotes the Madisonian concern for minimizing contact between the spheres of church and state lest both government and religion be corrupted.[152] Although Madison voiced concern over two separate kinds of "entanglement"—political and administrative[153]—for present purposes we need focus only on political entanglement. Excessive entanglement of political forces with those of religion threatens to engender political strife along religious lines. Political involvement with a single religious group, particularly with a majority religion, is especially likely to result in ill-feeling among those not of the majority sect. Thus, aid to a majority religion is especially suspect under the excessive-entanglement prong,[154] for "the very symbolism of conspicuous governmental aid to identifiably religious enterprise is regarded as an independent evil."[155]

The excessive-entanglement prong, like the secular-purpose and primary-effect prongs, is a nebulous standard. The prohibition against excessive political entanglement with religion does embody a funda-

148. *Id.*

149. *Id.*

150. *See* L. TRIBE, *supra* note 4, at 865.

151. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 132, at 851.

152. Use of the excessive-entanglement criteria to avoid political-religious strife may be traced to James Madison, who was especially concerned that the first amendment prevent political divisiveness among religious groups. *See* Kirby, *supra* note 122, at 571-73. For further discussion of the "political strife" aspect of the establishment clause, see Fruend, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969); Nowak, *supra* note 132, at 906; Underwood, *Permissible Entanglement Under the Establishment Clause*, 25 EMORY L.J. 17, 29 (1976); Zoetewey, *supra* note 133, at 283. For the view that "strife avoidance" is not a separate constitutional value underlying the establishment clause, see Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692, 711 (1968).

153. L. TRIBE, *supra* note 4, at 866.

154. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. at 794, 797-98. "[G]overnmental preference of a particular religion . . . gives rise to an advantage which is clearly inconsistent with voluntarism and will surely breed political dissension." Gianella, *supra* note 119, at 517. Instances where a particular religion benefits from governmental aid probably occur most often where a majority of voters are members of the benefited religion.

155. L. TRIBE, *supra* note 4, at 868.

mental value that the establishment clause promotes—the avoidance of political strife among religious sects—and to this extent it is analytically relevant. It is perhaps best used, however, not as a basis for invalidating statutes that offend its requirements, but as a basis for justifying strict scrutiny of statutes under either the secular-purpose or primary-effect tests.[156]

C. McGowan, Epperson, *and* West

Although no Supreme Court cases directly speak to the firing squad situation, two Court cases do address, more or less directly, the issue of whether sectarian motivation is a sufficient ground for invalidating legislation under the establishment clause. These cases, as well as a lower court case from Maryland, are relevant in analyzing the establishment clause issue raised by the Utah firing squad law.

In *McGowan v. Maryland*,[157] a 1961 case decided before development of the three-prong test, the United States Supreme Court examined Maryland's Sunday Closing Law under the establishment clause. The statute under consideration in *McGowan* generally proscribed all labor, business, and other commercial activities on Sunday.[158] Seven employees of a discount store, who were convicted for selling several inexpensive items on Sunday in violation of the statute, argued that the purpose of the enforced labor stoppage on Sunday, the Sabbath day for most Christians, was to facilitate and encourage church worship by Christians and to induce non-Christians to join the Christian faith.[159] The employees supported their sectarian purpose arguments by an appeal to the wording of the Maryland statute, earlier versions of the law, and judicial constructions of the measure. They further contended that even if secular purposes also existed for the statute, those purposes could be achieved in religiously neutral ways;[160] thus the statute violated the establishment clause.

The Court, in an opinion by Chief Justice Warren, sustained the statute through reasoning that clearly anticipated the three-prong analysis. The Court focused primarily on the problem of sectarian motivation in holding that although the legislation under consideration was religious

156. *Id.* at 866; Note, *supra* note 137, at 1189.
157. 366 U.S. 420 (1961).
158. *Id.* at 422-25.
159. *Id.* at 431.
160. *See id.* at 449-50.

in origin and had the present effect of benefiting some religious groups, the current legislative purpose was to achieve the secular objective of providing a common day of rest and recreation.[161] Although the original versions of the statute were religious on their face,[162] and early judicial opinions read them as religiously motivated,[163] a series of amendments clearly evidenced the emergence of secular purposes for the Sunday Closing Law. The amendments omitted much of the explicitly religious language,[164] and introduced for entertainment and recreation businesses exemptions that were inconsistent with a thoroughly religious reading of the statute. Later judicial interpretations recognized the secular evolution of the statutes from original protections of Sunday worship to present embodiments of legislative concern for protecting the health and welfare of employees through provision of a day of rest and relaxation.[165] The *McGowan* Court found that the provisions permitting various sports and entertainments on Sunday clearly manifested a legislative purpose of "providing a Sunday atmosphere of recreation, cheerfulness, repose and enjoyment."[166] Coupled with the general proscription against other types of work, the statutory "air of the day is one of relaxation rather than one of religion."[167] Moreover, a variety of nonreligious groups, including organized labor and trade associations, supported similar statutes in other jurisdictions, thus indicating the secular nature of modern Sunday Closing Laws.[168]

The *McGowan* Court did not clearly define when statutes that possess both secular and religious purposes become essentially secular; it

161. Although the Court in *McGowan* spoke of the relevance of the religious effects of the Maryland statute, *id*, at 442, 445, 449, 453, its analysis was primarily directed toward legislative motivation rather than effect.

> [I]n [*McGowan*] the Court introduced the idea . . . that whether a law constitutes an establishment of religion or a denial of religious freedom is largely a function of whether the legislature intended to aid or hinder religion. After an exhaustive search, the Court found no illicit motivation to have underlain any of the Sunday laws before it, but warned that if it ever did, its vengence would be swift.

Ely, *supra* note 1, at 1209.

162. The predecessor of the Maryland statute was entitled "An Act Concerning Religion," which prohibited profaning "the Sabbath or Lord's day." Another ancestor of the Maryland statute was entitled "An Act for the Service of Almighty God and the Establishment of the Protestant Religion within this Province." 366 U.S. at 446.

163. *Id.* at 446-47.

164. *Id.* at 448.

165. *Id.* at 449.

166. *Id.* at 448.

167. *Id.*

168. *Id.* at 435.

made no attempt to provide a judicial test for determining when these statutes will withstand establishment clause attack. Although the Court implied that these laws may sometimes be unconstitutional,[169] the only guidance it offered for determining future cases was the statement that statutes whose secular purpose "merely happens to coincide or harmonize with the tenets of some or all religions" are not unconstitutional.[170]

The Court easily found that the state had a legitimate interest in mandating a day of rest and even in mandating the same day for all so that "members of the family and community have the opportunity to spend and enjoy together, a day on which there exists relative quiet and disassociation from the everyday intensity of commercial activities, a day on which people may visit friends and relatives who are not available during working days."[171] But the question remained whether the state was justified in choosing Sunday for the common day of rest if religiously neutral days could achieve the secular purposes of the statute as effectively as Sunday. The Court answered this question by finding that the state could not have chosen other means to achieve its secular purposes that would have avoided support of religion. Most of society considers Sunday a day of rest regardless of religion.[172] Sunday, therefore, is the most logical legislative choice for a common day of rest.[173] The Court concluded that "[t]o say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State."[174] The Court, therefore, felt that invalidation of the statute would promote no purpose underlying the establishment clause and actually would be offensive to the public welfare.

The Court left open, however, the possibility that Sunday Closing

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169. *See* note 175 *infra* and accompanying text.

170. 366 U.S. at 442.

171. *Id.* at 450.

172. *Id.* at 451-52.

173. The Court permitted the government to select Sunday as the common day of rest precisely because it is the common Sabbath of the majority. The Court allowed this selection, not in order to advance the observance of the Sabbath, but in order to choose the day most suitable for secular purposes of rest and recreation in the eyes of the majority.

Gianella, *supra* note 119, at 532.

174. 366 U.S. at 445.

Laws in other contexts may be unconstitutional under the establishment clause.

> [W]e should make clear that this case deals only with the constitutionality of . . . the Maryland statute before us. We do not hold that Sunday legislation may not be a violation of the 'Establishment' Clause if it can be demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion.[175]

In a 1968 case, *Epperson v. Arkansas*,[176] the Supreme Court again focused on the problem of sectarian motivation when it considered the constitutionality of an obscure and largely dormant Arkansas law that prohibited the teaching in public schools of the theory that man evolved from other species of life.[177] This time the Court invalidated the measure, explicitly resting its holding upon the conclusion that the law had been passed with the intent to promote fundamentalist Christianity.[178] While the statute did not promote religion on its face, the Court relied on a variety of circumstantial evidence to find sectarian motivation. Newspaper advertisements published during the time the legislature debated the bill explicitly urged believers in the Bible to support the measure as a vote against "atheistic evolution."[179] Letters to the editors of newspapers expressed fear that teaching evolution would "subvert Christianity."[180] Moreover, the legislature passed the statute immediately after the famous Scopes trial had tested Tennessee's law that made it unlawful "to teach any theory that denies the story of the Divine Creation of man as taught in the Bible, and to teach

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175. *Id.* at 453.

176. 393 U.S. 97 (1968).

177. At the time *Epperson* reached the Supreme Court, the state had not attempted to enforce the anti-evolution statute. *Id.* at 109 (Black, J., concurring). Moreover, there seemed little likelihood that the *Epperson* plaintiffs would suffer harm through application of the statute. One plaintiff, Susan Epperson, was a teacher in the Arkansas system when she brought the action against the statute. When the case reached the Supreme Court, however, she was rumored to have left her teaching job and moved, perhaps out of the State of Arkansas entirely. *Id.* at 110 (Black, J., concurring). The other plaintiff was a parent who wanted his children to be taught evolutionary theory. Justice Black speculated that the children had probably been so taught and that in any event they had likely finished high school by the time *Epperson* reached the Court, rendering moot any claim they may have had. *Id.*

178. *Id.* at 103. Commentators view *Epperson* as an establishment clause case in which the Supreme Court invalidated legislation solely because of illicit motivation, as opposed to effect. *See* Ely, *supra* note 1, at 1318.

179. 393 U.S. at 107-08.

180. *Id.*

instead that man has descended from a lower order of animals."[181] The *Epperson* Court easily found that the Arkansas law was motivated for the same reasons as the explicitly religious Tennessee law.[182] Unlike the statute in *McGowan*, the legislature had never amended the Arkansas statute since its initial passage in 1928.

The Court found in the record no "suggestion . . . [that] the Arkansas law [could] be justified by considerations of state policy other than [a desire to support] the religious views of some of its citizens,"[183] and thus held the statute invalid. Mr. Justice Black, who concurred on other grounds, argued that the majority had chosen to see a nonsecular purpose when it could have easily read the statute as an attempt by the state "to withdraw from its curriculum any subject deemed too emotional and controversial for the public schools."[184] Furthermore, Justice Black saw possible free exercise problems if the state was precluded from eliminating what many viewed as an anti-religious doctrine from the schools. "If the theory [of evolution] is considered anti-religious, as the Court indicates, how can the State be bound by the Federal Constitution to permit its teachers to advocate such an 'anti-religious' doctrine to school children?"[185]

The Court intimated that the effects of the Arkansas statute favored religious interests.[186] Clearly, however, the Court based its opinion on religious motivation, not effect.[187] It relied on the principle of separatism as the establishment value threatened by the Arkansas law. "Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion . . . and it may not aid, foster, or promote one religion . . . against another or even against the militant opposite."[188] The Court concluded that the first amendment "mandates governmental neutrality between religion and religion, and between religion and nonreligion."[189]

In reaching its decision, the Court did not cite *McGowan*. Instead, it

181. *Id.* at 108-09.
182. *Id.*
183. *Id.* at 107.
184. *Id.* at 113.
185. *Id.*
186. *See id.* at 104, 106.
187. *See* Ely, *supra* note 1, at 1318.
188. 393 U.S. at 103-04.
189. *Id.* at 104.

relied entirely on cases in the area of education, some of which did not consider establishment issues.[190] The Court intimated that the *Epperson* holding might be limited to the educational context. In quoting previous cases, the Court noted that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools . . . . [The first amendment] does not tolerate laws that cast a pall of orthodoxy over the classroom."[191] Because the Court held the statute unconstitutional solely as a result of its sectarian motivation, it did not discuss how or even whether the failure to teach evolutionary theory had the consequence of "casting a pall of orthodoxy over the classroom." Furthermore, because the parties bringing the action sought to have the statute declared unconstitutional for reasons essentially educational and not religious in nature, *Epperson* may be of limited precedential value in noneducational contexts. Susan Epperson, an Arkansas teacher, attacked the statute because her school required that she use a book with a chapter on evolutionary theory, which she feared might trigger personal liability under the statute. A parent, whose reason for attacking the statute stemmed from his desire that his children be informed of all scientific theories, joined her in the action.[192] Hence, while *Epperson* clearly relied on establishment clause analysis, it is not clear from the opinion whether the Court envisioned the primary evil of the Arkansas statute in terms of its religious intrusion into government or its inhibition of academic freedom.

One should note a final case before turning to a legal analysis of the firing squad. While lacking the Supreme Court authority of *McGowan* and *Epperson*, the opinion of the Court of Special Appeals of Maryland in *State v. West*[193] is useful. In *West*, decided in 1970, the court struck down the religiously motivated Maryland blasphemy statute because it lacked secular purpose in violation of the establishment clause. The statute was religious on its face, prohibiting blasphemy against "God," "Jesus Christ," or the "Trinity."[194] Appeals to the historical origins of the statute convinced the court that the purpose of the measure was to

190. The Court cited due process cases dealing with restrictions on academic freedom. *Id.* at 105 (citing Meyer v. Nebraska, 262 U.S. 390 (1923) and Bartels v. Iowa, 262 U.S. 404 (1923)).

191. 393 U.S. at 104-05. The Court also stated that "[t]here is . . . no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma." *Id.* at 106.

192. *Id.* at 110; *see* note 177 *supra*.

193. 9 Md. App. 270, 263 A.2d 602 (Ct. Spec. App. 1970).

194. The statute provided *inter alia*: "If any person, by writing or speaking, shall blaspheme or

"preserve the sanctity of the Christian religion."[195] Apart from some minor amendments that altered only the penalty for blasphemy, the statute had remained in essentially the same form from its inception to the present.[196]

The parties conceded the religious origins of the statute, but the State urged that the statute had assumed "a secular aura and may be sustained as an effort by the State to enable 'those citizens who desire to worship to carry on unmolested' and, additionally, as an effort to avoid the endangerment of public peace by persons who are incensed or outraged by the blasphemous utterances proscribed by the statute."[197] The court responded:

> It is apparent . . . from a literal reading of the statute and when considered in its historical setting, that there has not been and could not be, *short of legislative action*, any infusion of a secular purpose into the statute in its present form. The statute does not purport to relate the blasphemous utterances therein proscribed to the prevention or breaches of the public peace or to enabling persons of the Christian or other faiths to worship unmolested, or to preserve the orderliness of our society. It plainly and unequivocally makes it a crime for any person to blaspheme or curse God . . . . The setting or circumstances in which the . . . [blasphemy] occurs is unrestricted. [The statute] simply and categorically proscribes such utterances under any and all circumstances.[198]

Thus, the court apparently recognized that secular purposes may indeed be infused to save a statute from establishment attack, but until the legislature specifies these purposes in the text of the law itself, the statute cannot stand.

The *West* court referred to *McGowan* and *Epperson* only obliquely,[199] but did utilize the secular-purpose prong as a basis for its decision.[200] The court cited the principle of separatism as the establishment value offended in *West*. "When the power, prestige, and support of government is placed behind a particular religious belief, there inevitably occurs a breach of the 'wall of separation' which, according to Thomas Jefferson, the framers of the First Amendment intended to

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curse God, or shall write or utter any profane words of and concerning our Saviour Jesus Christ, or of and concerning the Trinity . . . he shall on conviction be fined." *Id.* at 272, 263 A.2d at 603.

195. *Id.*

196. *Id.*

197. *Id.* at 275, 263 A.2d at 604.

198. *Id.* at 275-76, 263 A.2d at 604-05 (emphasis added).

199. *Id.*

200. *Id.* at 274, 263 A.2d at 604.

erect and forever maintain between Church and State."[201]

IV. SECTARIAN MOTIVATION AS A BASIS FOR RENDERING THE FIRING SQUAD UNCONSTITUTIONAL

Epperson and *West* sustain the claim that sectarian motivation may be a sufficient condition for invalidating legislation under the establishment clause. The cases do not, however, explicitly define the conditions under which invalidation should occur. Clearly, a doctrine that mandates invalidation whenever sectarian motivation can be documented is too broad. That view would hold any law overlapping the Mosaic Decalogue unconstitutional. In addition, invalidation because of religious motivation per se would seem to deny religious groups the opportunity to voice their opinions on important social issues.[202] Moreover, if the religious beliefs of lobbyists and the intensity of their activity were the sole determinants of constitutionality, "there would be a serious danger of manipulative efforts, with various religious groups feeling impelled or enticed by the test either to conceal or to feign interest in an area of legislative activity or inaction."[203]

This part of the article develops a framework for determining when

201. *Id.* For a discussion of blasphemy laws in a variety of legal contexts, see Note, *Blasphemy*, 70 COLUM. L. REV. 694 (1970). *See also* 41 A.L.R.3d 519 (1972). The legal significance of the *West* case is uncertain. Some courts have cited it approvingly. *See, e.g.*, Webb v. Lake Mills Community School Dist., 344 F. Supp. 791, 802 (N.D. Iowa 1972) (court suggests in dicta that state regulation of "profanity" may run afoul of the establishment clause under *West*). There are, however, decisions that may call *West* into question. Courts have rejected establishment clause challenges to various other criminal statutes that defined offenses originally religious in nature. In State v. Saunders, 130 N.J. Super. 234, 326 A.2d 84 (1974), *rev'd on other grounds*, 75 N.J. 200, 381 A.2d 333 (1977), the court upheld the New Jersey fornication statute under establishment clause attack. The court conceded the religious origins of the statute, but found that its present purposes were to promote the "compelling" secular purposes of preventing illegitimate births, and the spread of venereal disease. *Id.* at 244, 326 A.2d at 89. The *Saunders* court cited neither *West*, *McGowan*, nor *Epperson*. Likewise, the court in Stewart v. United States, 364 A.2d 1205 (D.C. 1976), upheld the D.C. sodomy statute, finding that although religious forces motivated original sodomy laws, these laws presently reflect the legitimate secular purpose of promoting public decency. *Id.* at 1208-09. The attackers appealed to *McGowan* for support. *See also* Conner v. State, 253 Ark. 854, 490 S.W.2d 114 (1973) (sodomy statutes upheld under establishment clause attack); People v. Baldwin, 37 Cal. App. 3d 385, 112 Cal. Rptr. 290 (1974); Sumpter v. State, 261 Ind. 471, 306 N.E.2d 95 (1974), *cert. denied*, 425 U.S. 952 (1976) (prostitution statute upheld against establishment clause challenge because virtually all criminal laws are the progeny of Judaeo-Christian ethics).

202. *See* Choper, *supra* note 14, at 273.

203. Tribe, *supra* note 4, at 24.

sectarian motivation should be a sufficient condition for invalidating legislation under the establishment clause. The test is generated through the process of assessing the constitutionality of the Utah firing squad. This discussion demonstrates that although the existence of the firing squad in Utah law produces little present religious effect and may well be supported by legitimate secular purposes, good reasons nevertheless exist for invalidating the firing squad simply because of its religious origins. Thus, if the Utah firing squad is indeed unconstitutional, it represents a purer example of invalid sectarian motivation than do *Epperson* and *West* in which the religiously motivated legislation also had the effect of promoting present religious interests. The firing squad law thus may be a paradigmatic instance of religiously motivated legislation that is unconstitutional simply because of its sectarian origins. If so, analysis of this paradigm should provide guidance in constructing a general theory of sectarian motivation as sufficient justification for legislative invalidation under the establishment clause.

A. *The Firing Squad and the Three-Prong Test*

As mentioned earlier, analysis of any establishment problem should begin, although seldom will it end, with a consideration of the three-prong test. For present purposes, this essentially entails an analysis under the secular-purpose prong. Before discussing whether the firing squad has sufficient secular purpose, however, some attention must be paid to the primary-effect and excessive-entanglement prongs as they relate to the Utah law.

The firing squad probably would be constitutional under the primary-effect test. Because the Mormon Church has now disavowed blood atonement, the firing squad has decreased in religious import. Thus, it is difficult to argue that Utah's continued use of that mode of execution "directly and immediately" advances religion under the primary-effect rubric. The cases that have invalidated legislation under this rubric involved statutes that advanced *present* religious interests, doctrines, or practices.[204] Although the Utah firing squad may be religiously significant as a symbol of past promotions of religion by the State, its present religious effect probably is not sufficient to constitute a "direct and immediate" advancement of religion.

204. *See, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

Although the firing squad probably would survive constitutional scrutiny under the primary-effect test, its potential to engender political strife along religious lines might raise constitutional questions under the excessive-entanglement prong. The issue of capital punishment itself is an extremely controversial matter about which members on both sides of the controversy have strong feelings. Widespread knowledge that Utah's capital punishment law was originally justified by the religious beliefs of Mormon legislators[205] would almost certainly antagonize non-Mormons who favor the abolition of capital punishment. If historical religious involvement in secular law poses the potential of exacerbating present tensions over the issue of capital punishment by creating animosity between Mormons and Gentile abolitionists, then the firing squad would be highly suspect under the excessive-entanglement prong. This is especially true in light of the past history of Mormon-Gentile strife and the great potential for religio-politico conflict in a context such as Utah where a majority religion has become involved in politics. Although the firing squad may constitute "excessive entanglement" of religion in government, however, it does not follow that the firing squad is necessarily unconstitutional. The potential for religio-politico conflict provides a basis for justifying strict scrutiny under the secular-purpose test,[206] but this potential is not a necessary condition for strict scrutiny because independent reasons exist for use of this standard whenever clear and convincing evidence of significant sectarian motivation is shown.[207]

Analysis under the secular-purpose test requires courts to ascertain governmental purposes where, as in the case of the Utah firing squad, no secular purposes have been articulated by the legislature.[208] Two formulations of secular-purpose issues arise with respect to the Utah statute. One issue focuses on the constitutionality of the firing squad as the religious component of a law that also embodies a secular component and allows the offender to choose between the two. On this view of the problem, the establishment clause issue depends on the secular purpose of the *option* to choose between religiously significant and re-

205. This historical information is not widely known; this article is one of the only attempts thus far to document and trace the religious underpinnings of the firing squad. *See also* J. WATTERS, *supra* note 21.

206. *See* L. TRIBE, *supra* note 4, at 866-68.

207. *See* notes 229-33, 246-47 *infra* and accompanying text.

208. *See* Note, *supra* note 137, at 1178-79.

ligiously neutral execution modes, not on the secular justification of the religiously significant mode itself. If the option, given its religious connotation, lacks secular justification, it follows from *Epperson* that the option violates the establishment clause; the state could only use the religiously neutral mode of execution, hanging. But the firing squad problem also raises an issue that focuses on the secular justifications for the firing squad apart from its place as a religious component in a model that permits choice between religious and secular modes. Practically speaking, the firing squad has become the sole mode of execution in Utah because it is the overwhelming choice of offenders and the mode judicially imposed when offenders fail to exercise their option.[209] Thus, if the firing squad is, in effect, the sole execution mode in Utah, can secular purposes justify that mode, apart from its role as an element in the option apparatus?

Because the state has not articulated secular purposes for either the firing squad-hanging option or the use of the firing squad itself, secular-purpose analysis of these issues requires speculation about any such purposes to justify the law.

Only one justification appears plausible for providing capital offenders the choice of execution mode: the option affords a modicum of dignity to offenders by respecting their choices on the method of death. The 1888 enactment, which deleted beheading, a particularly gross form of execution, from the available choices, lends credence to the claim that the option provision reflects humanitarian concern for the offender, although the legislative history provides no evidence of this rationale.

Although this justification is plausible,[210] especially in the 1850's before the states developed more humane modes of execution, the religious theory probably accounts more adequately for the origins of the option. Moreover, attempts to support the present option as a concession to human dignity are unconvincing. Hanging and shooting are the two most barbarous modes of execution employed in any American jurisdiction.[211] To provide a choice between even the most humane modes of death is no doubt a small concession to human dignity, but an option between only the most primitive modes at best places the of-

209. *See* note 80 *supra*.

210. *See* Gardner, *supra* note 18, at 110-18.

211. *Id.* at 118-29. *See also* J. KERVOKIAN, MEDICAL RESEARCH AND THE DEATH PENALTY 15-16 (1960).

fender between a rock and a hard place, and at least insults rather than respects the humanity of the offender. Moreover, the Utah legislature's recent rejection of medical anesthesia as a third option,[212] arguably a more humane mode of execution than either hanging or shooting,[213] is inconsistent with the view that the present hanging-firing squad option serves for humanitarian purposes.

If one cannot explain the option as an attempt to inject humanitarian concerns into the execution process, it seems that no secular purpose presently supports the option. Given the religious significance of the option, its existence in Utah law is best understood as a remnant of past attempts to promote religious doctrine through secular law. Lacking in secular purpose, the firing squad-hanging option, like the anti-evolution statute in *Epperson* and the blasphemy statute in *West*, seems unconstitutional. Thus, the courts should invalidate the religious component of the option—the firing squad. There is a caveat, however; because the principle of voluntarism is the most fundamental establishment value, one should not make a decision of unconstitutionality under the establishment clause without considering the possible effects of that decision on religious freedom. Any establishment clause decision that is detrimental to the free exercise of religion is suspect. This article will later consider in detail the free exercise ramifications of invalidating the firing squad under the establishment clause.[214]

From the above discussion, one can extract a general principle that is applicable to other cases: Clear and convincing evidence[215] of significant sectarian legislative motivation[216] is a sufficient condition for invalidating legislation if no secular legislative purpose exists, or if purported secular purposes merely attempt to rationalize illicit motivation, provided that no significant violations of religious liberty result from the invalidation.

This analysis of the execution option and its facile conclusion of the

212. *See* text accompanying note 109 *supra*.

213. *See* Gardner, note 18 *supra*, at 128-29.

214. *See* notes 258-78 *infra* and accompanying text.

215. The standard of "clear and convincing" evidence, although somewhat arbitrary, seems proper to accommodate the competing interests involved in analyzing sectarian motivation under the establishment clause. *See* Brest, *supra* note 1, at 130 n.171.

216. Evidence of only "insignificant" secular purpose should not be a sufficient basis for invalidating legislation under the establishment clause. Evidence is "significant" if it demonstrates that secular purpose played a nontrivial part in the legislative decisionmaking process and might have affected the outcome. *Id.* at 119.

unconstitutionality of the firing squad, however, may fail to address the real issue. It is perhaps misguided to focus on the firing squad in its relationship to hanging when the first amendment issue arises initially because of the presence of the firing squad, not the firing squad-hanging option, in Utah law. Thus, one may view the firing squad itself as the proper subject of constitutional attention. If the firing squad is to fall, perhaps it should be because *it*, and not the option, is without sufficient secular underpinning. One may frame the issue, then, under the secular-purpose test in terms of whether adequate secular purpose supports the firing squad itself.

This latter formulation of the issue raises interesting and difficult establishment problems. The issue is difficult because one may posit a variety of legitimate secular purposes to support the firing squad as a mode of execution. It is arguably a penologically effective, efficient, economical, and relatively dignified method of satisfying the legitimate state interests that capital punishment is thought to promote. Because the firing squad seems to possess both historical religious purposes and present secular purposes, it thus raises an establishment clause issue that courts and commentators have not extensively explored.

B. *The Firing Squad and the Establishment Case Law*

McGowan is clearly the most helpful case for examining problems of legislation motivated by both secular and religious aims. It thus will be extensively compared with the case at hand. Before looking at *McGowan*, however, *Epperson* and *West* must be related to the firing squad problem.

Epperson is of minimal value in assessing the constitutionality of the firing squad because the Court found no evidence of secular purpose to support the Arkansas statute. *Epperson* is important, however, in establishing the propriety of appeals to circumstantial evidence to derive sectarian motivation for a statute religiously neutral on its face. Hence, the process of discerning sectarian motivation used in this article seems justified in light of *Epperson*, assuming, of course, that *Epperson* can be extended to noneducational contexts. The Court did not specify the quantum of evidence necessary to establish sectarian motivation in any context, but presumably it might be lower in a case like *Epperson* in which secular purpose is lacking than it would be in the case of the firing squad in which secular purposes arguably exist. The *Epperson* Court, however, felt that scrutiny of legislative motivation was neces-

sary to maintain the principle of separatism. That the Court considered such scrutiny necessary in the case of an obscure and largely dormant Arkansas law shows that establishment challenges often represent matters of lofty principle that are more symbolic than real in their effects.[217] Thus, it is not unreasonable to suppose that the issue of the Utah firing squad also represents an important matter of principle worthy of judicial attention.

The *West* case appears more useful in analyzing the firing squad. The facts of *West* parallel the Utah situation quite closely. Both cases concern religiously motivated statutes that arguably have lost much of their historical sectarian flavor and have come to embody legitimate secular purposes. Neither legislature amended its statute to any significant extent from the time of its original adoption. Both cases concern statutes void of explicit statements of secular purpose either on the face of the statute or through legislative history. Both cases concern statutes that promote particular religious interests. The blasphemy statute in *West* imposed secular punishment for a sin against the Christian religion; the Utah firing squad statute imposes a form of ecclesiastical punishment through the secular law of the state. But a key difference between the two cases precludes *West's* applicability to the problem at hand. It is possible to imagine secular purposes to uphold the firing squad statute because the Utah law is religiously neutral on its face. The *West* blasphemy statute on its face, in contrast, blatantly supported a religious view and prohibited blasphemy in all contexts, not just those where the blasphemous utterances threatened secular interests of public peace and quiet religious worship. The *West* court found it impossible to conclude that secular purposes justified the law in its present form. Thus, the statute in *West* resembles the statute in *Epperson*—a solely religious measure with no possible secular justification.

Unlike *Epperson* and *West, McGowan* deals with a statute that possesses both religious and secular purposes. *McGowan* thus provides insights into when such statutes may withstand constitutional scrutiny under the establishment clause. It is clear from *McGowan* that some statutes enacted initially to promote religious interests may become sufficiently secular to withstand establishment attack. When evidence of secular purpose, inconsistent with original religious purposes, emerges through legislative amendment and judicial interpretation, the secular

217. *See also* Engel v. Vitale, 370 U.S. 421 (1962).

purpose becomes predominate over the original religious purpose.[218] The *McGowan* Court determined that the statutory amendments showed a clear legislative intent to secularize the statute. In addition, the secularization was inconsistent with the original religious intent. The amendments, which exempted entertainment and recreation businesses from the Sunday Closing Law, encouraged people to spend "the Sabbath" at the beach or at the ballpark, rather than at church. The "air of the day" had become one of relaxation rather than religious piety.[219] Thus, the clear evidence of a secularization process, coupled with the emergence of secular purposes inconsistent with earlier religious purposes, protected the statute from establishment attack. That the secular purposes could not be achieved in religiously neutral ways only fortified this conclusion.

None of this reasoning is applicable to the Utah situation. Unlike the statute in *McGowan*, the Utah statute has remained virtually unchanged from its inception. There is no evidence of the kind of secularization process that occurred with the Maryland Sunday Closing Law. Moreover, unlike the situation in *McGowan*, the secular purposes that one may posit for the Utah measure are not inconsistent with the historical religious purposes of the statute. It is perfectly possible to rationalize the firing squad as an efficient, economical, and humane way of executing capital offenders, as well as a means of effectuating the blood atonement rite. It is not as possible to justify the Maryland statute as a measure intended to get people into church by making beaches available to them. There is thus no reason, using the *McGowan* rationale, to conclude that the secular purposes of the firing squad, whatever they may be, have come to predominate over the original religious purposes. Furthermore, *McGowan's* reasoning, which argues that laws possessing both religious and secular purposes should be upheld from establishment attack if the secular purpose cannot reasonably be achieved in a religiously neutral way, does not require a finding that the firing squad is constitutional. Religiously neutral alternatives *are* available to achieve the secular purposes that the firing squad promotes.

There are several objectives that guide the manner in which capital punishment should be administered: general deterrence, retribution,

218. *See* Ely, *supra* note 1, at 1325.
219. *Id.* at n.374.

and concerns for humane, efficient, and economical modes of execution.[220] There is no reason to suppose that the firing squad is a more effective deterrent than any other method of capital punishment. The Utah capital offenders' overwhelming choice of the firing squad over hanging[221] indicates that death by shooting generates no special fear that might make the firing squad a more effective deterrent than death by other execution modes.[222] Even if the firing squad were a particularly dreadful way to die, the Utah scheme permits the offender to choose the gallows. Furthermore, because Utah's use of the firing squad may actually encourage certain offenders to commit capital offenses in that state, the firing squad may be a less effective deterrent than other modes of capital punishment. Some individuals commit capital offenses in hopes of being executed.[223] Because the thrill and notoriety surrounding a violent mode of execution appeals to these offenders,[224] death in a blaze of rifle fire may be particularly attractive.[225]

Likewise, there is no reason to favor the firing squad over other modes of execution to serve secular retribution policies. Considera-

220. A variety of considerations underly the imposition of the criminal sanction. The theoretical bases of punishment are generally thought to be incapacitation of dangerous offenders, rehabilitation, special deterrence, general deterrence, and retribution. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW 21-25 (1972). The concern over incapacitating dangerous criminals is alleviated no matter what method of execution the state employs. The goals of rehabilitation and special deterrence, important in understanding punishment in other contexts, are irrelevant in assessing the value of various ways to execute offenders.

The firing squad does not seem to represent a more efficient or humane mode of execution than those methods used in other jurisdictions. In fact, it may be less efficient. Even the Royal Commission on Capital Punishment did not consider the firing squad as a serious alternative to hanging: "The firing squad is open to obvious objections as a standard method of civil execution: it needs a multiplicity of executioners and does not possess even the first requisite of an efficient method, the certainty of causing immediate death." ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1949-53 REPORT CMD. NO. 8932, at 249 (1949-1953). There are reported instances of Utah firing squad marksmen missing their target or only wounding the offender who painfully awaited death as the marksman reloaded for a second execution try. Gardner, *supra* note 18, at 124.

221. *See* note 80 *supra.*

222. To the extent that capital punishment deters, it is probably a product of the fear of death itself and not of the method used to accomplish it. The fear of death is universal, whether caused by disease, the firing squad, or the gas chamber. *See* E. KUBLER-ROSS, ON DEATH AND DYING 5 (1969).

223. Incitement of capital crimes by the existence of capital punishment is referred to as the "suicide-murder syndrome." Bedau, *The Case Against the Death Penalty*, in VOICES AGAINST DEATH 301, 304 (P. Mackey ed. 1976). *See also* J. KERVOKIAN, *supra* note 211, at 44.

224. *See* J. KERVOKIAN, *supra* note 211, at 44.

225. Some have speculated that Gary Gilmore committed his crimes in Utah so that he might die in a "blaze of rifle fire" that would transform him into a kind of hero. *See* H. BEDAU, *supra* note 15, at 121.

tions of justice set rough boundaries of proportionality between offense and punishment, but do virtually nothing to establish the form that the punishment should take.[226] Even defenders of the *lex talionis* variety of retribution seem unconcerned about whether one method of executing an individual murderer or class of murderers is more just than another.[227]

Finally,the offenders' option to choose between hanging or the firing squad refutes arguments that the firing squad is necessary because it is more humane, more efficient, or less costly than other methods. If the firing squad did possess these virtues, certainly the Utah legislature would have made it the state's sole execution mode.

All in all, religiously neutral alternatives such as hanging or the gas chamber achieve the secular goals of capital punishment at least as effectively as shooting. Utah thus does not need to use the firing squad to effectuate a secular capital punishment policy. Although *McGowan* is not authority for the conclusion that the firing squad is unconstitutional because religiously neutral alternatives could achieve the secular goals of capital punishment at least as effectively as shooting, it does leave open the possibility that a statute will be found unconstitutional if its "purpose—evidenced . . . in conjunction with its legislative history . . . is to use the State's coercive power to aid religion."[228] Thus, *McGowan* and the firing squad situation are distinguishable, and the Utah law is not necessarily constitutional under that case. *McGowan*, unfortunately, does not provide a standard with which to measure the sufficiency of secular purpose in a case like the firing squad, and none of the case law appears to be of great use. Appeals to policy considerations, therefore, must be the primary basis for constitutional assessment of the firing squad.

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226. For a discussion of forms "retributive" arguments, see Gardner, *supra* note 18, at 115-18.

227. For example, Immanuel Kant defended the principle that "the undeserved evil which any one commits on another, is to be regarded as perpetuated on himself," Kant, *Justice and Punishment*, in PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 103, 104 (G. Ezorsky ed. 1972), but he did not seem to believe that the actual form the murderer utilized in committing his offense should be used in executing the murderer. Rather, retributive justice to Kant demanded that the murderer be executed in a manner "entirely free of any maltreatment that would make an abomination of the humanity residing in the person suffering it." Kant, *The Right to Punish*, in PUNISHMENT AND REHABILITATION 35, 37 (J. Murphy ed. 1973). Retributive arguments supporting particular forms of execution for their peculiar power to expiate are not secular arguments and have no useful place in a theory of punishment because they express no more than unverifiable dogma. *See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 38-39 (1968).

228. *See* text accompanying note 175 *supra*.

C. *Policy Considerations—The Argument for Invalidating the Firing Squad*

1. *General Policy Considerations*

Strong policy reasons justify invalidation of the firing squad statute. The establishment clause prohibits the government from promoting religious interests unless the promotion is necessary to insure the free exercise of religious belief.[229] To a significant extent at least, Utah initially adopted the firing squad, and perhaps even capital punishment itself, to promote religious belief. The weight given by the early Utah legislators to an illicit objective thus determined the selection of their form of capital punishment law. To the extent that they were religiously motivated, the legislators treated as desirable a consequence to which a lawfully motivated legislator would be indifferent or would view as undesirable.[230]

All citizens, Mormons and Gentiles alike, are entitled to a full and proper assessment of the secular merits of decisions made by their legislative representatives.[231] If clear and convincing evidence exists to establish that governmental measures were significantly influenced by sectarian concerns, citizens have a legitimate complaint not only because of the impropriety of constitutionally illicit motivation itself, but also because of the possible failure to attend adequately to the secular merits of the decision.[232]

The history of the firing squad indicates that the legislature may never have carefully considered the secular desirability of the hanging-shooting option or of the firing squad itself. Religiously motivated legislators initially passed the Utah law and recent legislators have done little more than rubber-stamp subsequent revisions. Given this history, a law that was improperly adopted exists on the books of Utah. But because the law may in fact be useful and secularly advantageous, it should not be invalidated solely on the basis of its origins. Rather, it should be strictly scrutinized and upheld if the state can show that the law promotes legitimate governmental interests that cannot be achieved through reasonably available alternatives that do not entail the promotion of sectarian concerns. If religiously neutral alternative means do

229. *See* notes 255-57 *infra* and accompanying text.
230. *See* Brest, *supra* note 1, at 116.
231. *See id.* at 116-17.
232. *See id.* at 116-34.

exist, the law should be invalidated, given its suspicious pedigree, provided that invalidation does not result in infringements of religious liberty. Because alternatives do exist to achieve the secular values promoted by shooting capital offenders,[233] it follows that the firing squad is unconstitutional.

This "alternative means" analysis of the problem of sectarian motivation is not unique to this article. The negative implication of *McGowan's* reasoning suggests this analysis: if a religiously motivated law is necessary to achieve the secular goals promoted by that law, it is constitutional (the *McGowan* Sunday Closing Law); if a religiously motivated law is not necessary to achieve the secular goals promoted by that law, it is likely unconstitutional (the negative implication of *McGowan*).[234] Although a majority of the Court has never specifically adopted this approach,[235] individual Justices have espoused it,[236] including Justice Frankfurter in his concurrence in *McGowan*,[237] as well as a variety of commentators[238] and several lower courts.[239]

If the courts adopted the alternative means approach, religious groups would not be foreclosed from lobbying for legitimately secular legislation. If the secular interests could be achieved only through the means advocated by the lobbying religious groups, the legislation would not be unconstitutional; if the secular purposes could be achieved through religiously neutral means, those means could be adopted. In either case the lobbying religious group would obtain leg-

233. *See* notes 219-26 *supra* and accompanying text.

234. *See also* Moore, *The Supreme Court and the Relationship Between the 'Establishment' and 'Free Exercise' Clauses*, 42 TEX. L. REV. 142, 173 (1963). For a view that *McGowan* actually rejected the mode of analysis suggested in the text, see Note, *Toward a Uniform Valuation of the Religious Guarantees*, 80 YALE L.J. 77, 79 (1970).

235. *See* Choper, *supra* note 205, at 309.

236. Prior to *Walz*, Justices Frankfurter and Brennan had both employed an "alternative means" rationale in establishment clause cases. Mr. Justice Frankfurter suggested that "[i]f a statute furthers both secular and religious ends by means unnecessary to the effectuation of the secular ends alone . . . the statute cannot stand." McGowan v. Maryland, 366 U.S. 420, 466-67 (1961) (Frankfurter, J., concurring). Similarly, Mr. Justice Brennan stated that "[t]he Constitution enjoins those involvements of religions with secular institutions which . . . use essentially religious means to serve governmental ends where secular means would suffice." Abington School Dist. v. Schempp, 374 U.S. 203, 231 (1963) (Brennan, J., concurring). A majority of the Court never specifically embraced the "alternative means" analysis. *See* Choper, *supra* note 205, at 309.

237. *See* Choper, *supra* note 14, at 309.

238. *See, e.g.*, Choper, *supra* note 14, at 309. *See generally* Note, *supra* note 234.

239. *See, e.g.*, Grossberg v. Deusebio, 380 F. Supp. 285, 289 (E.D. Va. 1974); Murray v. Comptroller of Treasury, 241 Md. 383, 398, 216 A.2d 897, 906 (1966).

islation that promotes the secular ends it seeks. Furthermore, the standard objections to scrutiny of illicit motivation do not seem to be fatal to this analysis. As discussed immediately below, this approach to invalidating illicitly motivated legislation is not fraught with special difficulties of ascertaining legislative motivation, nor with objections that invalidation is futile, counterproductive, or improper.

2. *Inapplicability of Standard Objections to Inquiries into Motivation*

The claim that inquiries into legislative motivation should be avoided because of the difficulty of ascertaining motivation is misplaced in establishment cases requiring analysis under the secular-purpose test. As *McGowan, Epperson*, and *West* illustrate, it is permissible, and in some cases necessary, to inquire about legislative motivation. Fairly reliable conclusions of sectarian motivation can be made even if circumstantial evidence is the sole basis for the conclusion.[240] As *Epperson* and the Utah firing squad example illustrate, social and historical contexts may clearly indicate a religiously charged milieu; the legislative products of that milieu may be best understood in religious terms.[241]

Analytical problems in ascertaining legislative motivation do exist, however, because the case law is of so little help in establishing either the quantum of evidence necessary to constitute sectarian motivation or the extent to which sectarian purposes must predominate over secular purposes when both types of purposes exist. This article suggests that "clear and convincing" evidence of sectarian motivation must exist before a statute fails the secular-purposes test.[242] If clear and convincing evidence of sectarian motivation exists but evidence of legitimate secular purpose is also present, the alternative means analysis should be used unless legislative amendments inconsistent with the original religious purposes dictate a finding that secular purposes predominate over prior religious ones.

Use of the alternative means analysis negates the objection that invalidation of laws on the basis of legislative motivation is futile because the legislature could simply reenact the same law for valid reasons. Once a court invalidates a law under the alternative means rationale, the legislature simply cannot reenact that law. Of course, the passage

240. *See* Brest, *supra* note 1, at 120-23.
241. *See* Tribe, *supra* note 4, at 23-24.
242. *See* note 215 *supra*.

of time might justify reenactment of the old law if the present alternatives to it have become less able to promote the underlying secular values than the old, religiously motivated law.

Even if the alternative means analysis does not preclude reenactment of a law invalidated because of sectarian motivation, judicial invalidation is not necessarily futile. "Judicial review of legislative motivation is no more 'futile' merely because re-enactment is possible than appellate review is futile because an appellee may prevail again on remand after a trial court is reversed for giving weight to inadmissible evidence or misapplying the law."[243] Moreover, it does not follow that legislators will repass laws invalidated on the basis of sectarian motivation. For example, invalidation of the firing squad statute may force the Utah legislature to consider fully for the first time the secular merits of the hanging-firing squad option as well as the merits of the firing squad itself. Such "reconsideration," free from sectarian bias, may well result in the adoption of new execution modes if, indeed, the state retains capital punishment at all.[244]

Application of the "alternative means" analysis also meets the objection that it is counterproductive to invalidate laws that may effectuate sound policy simply because these laws were religiously motivated. It clearly would be counterproductive to invalidate the crime of murder because it was originally a religious crime, but the analysis suggested here would not have this effect. Surely, the state could show that there are no reasonably available alternatives, short of punishing murder as a criminal offense, that will achieve the secular interests of crime prevention and fairness to offenders presently sought through murder statutes. Moreover, *McGowan* would preclude invalidating murder under the establishment clause because secular purposes have become predominate during the course of amending murder statutes in a manner inconsistent with the Biblical demand for an-eye-for-an-eye.

Invalidation of the firing squad, however, is a wholly different matter. It is not counterproductive to invalidate improperly enacted laws if the same results can be achieved through laws properly adopted. Rather, invalidation serves as a productive reminder to the legislature that it is expected to act for the secular good of the people. To the

243. Brest, *supra* note 1, at 125.

244. For evidence that those favoring capital punishment for irrational reasons may be converted through rational discourse to the abolitionist point of view, see Sarat & Vidmar, *supra* note 15.

extent that the legislature treats an illicit objective as desirable or as a benefit rather than a cost or a neutral factor, the legislature has not properly evaluated the merit of the legislation enacted.[245] Maintaining governmental integrity is especially important in a context such as the Utah case in which a single religious majority has traditionally influenced the affairs of secular government. In this context, the invalidation of the firing squad, even though enacted long ago, may encourage good government by serving as a reminder to the legislature as well as to Utah citizens that sectarian concerns may not unduly influence public policy.

The final objection to invalidating statutes because of illicit legislative motivation is that invalidation implies disrespect for the integrity of the legislative branch. Whatever the merits of this objection, *Epperson* and *West* illustrate that courts do scrutinize sectarian motivation and invalidate laws that lack proper secular justification. Legislatures sometimes do act improperly. When they act in violation of the establishment clause, the proper institutional balance of church and state is upset. Judicial invalidation of legislation unduly motivated by sectarian concerns is a means of restoring a proper church-state balance.

3. *The Religion Clause Values*

A further justification for invalidation of the firing squad statute is the promotion of establishment clause values. This article already has mentioned the potential for political strife among religious groups as a consequence of introducing religious factors into the already controversial area of capital punishment. Moreover, as long as the firing squad remains the law, the potential also exists for a different kind of religio-politico strife. The firing squad symbolizes the entanglement of religion and government that existed throughout early Utah history. However understandable that entanglement might once have been,[246] it is clearly inappropriate in the modern secular state. The firing squad rep-

245. Brest, *supra* note 1, at 128.

246. When the doctrine of blood atonement first became engrained in Utah law, there was no reason to suppose that the first amendment was relevant to anything but Congressional action. In fact, "[i]t was a common assumption in the first decades of the nineteenth century that state governments may properly become the supporters and the friends of religion." M. HOWE, *supra* note 120, at 28. Few people believed that any provision of the Constitution set limits to the scope of state authority. *Id.* at 88. Even after passage of the fourteenth amendment through which the establishment clause ultimately would be applied to the states, most people thought for decades that the amendment was designed to achieve the single purpose of securing Negro rights. *Id. See*

resents a vivid reminder of the uncomfortable possibility that Utah may not have escaped its sectarian past. While this reminder may be no more than a quaint anachronism to Mormons, Gentiles may perceive its symbolism with bitterness and resentment towards their Mormon neighbors. "Apart from the significance of symbols in establishing precedents for more dangerous incursion, the fact of symbolic governmental identification with a religious activity must be understood to constitute a separate evil in a system that regards matters of religious concern as ultimately delegated to individual and community conscience."[247] Invalidation of the firing squad as a mode of execution, on the other hand, would symbolize both the secularization of Utah society and the ideal that dominant religious groups should not unduly influence political decisions. Thus, invalidation would promote both the values of separatism and avoidance of political strife among religious groups.

Voluntarism, as the fundamental value that the religion clauses seek to promote, also warrants careful consideration. Consideration of this value involves issues of religious freedom, most generally conceptualized under the free exercise clause, as they relate to the problem of the Utah firing squad and to the establishment clause analysis proposed in this article. For purposes of this consideration *Jones v. Butz*[248] will be examined in some depth not only because the case is a useful vehicle for raising the religious freedom values relevant to this inquiry, but also because the case is in some ways similar on its facts to the firing squad problem.

D. Jones v. Butz—*The Firing Squad: Free Exercise Right or Permissible Accommodation?*

1. Jones v. Butz

In *Jones* the Federal District Court for the Southern District of New

also Note, *First Amendment Religion Clause: Historical Metamorphosis*, 61 NW. U.L. REV. 760, 769-70 (1966).

247. L. TRIBE, *supra* note 4, at 868. This commentator continues:

> [T]he religion clauses [embody] a fundamental personal right not to be a part of a community whose official organs endorse religious views that might be fundamentally inimical to one's deepest beliefs . . . . [T]he experience of living in a political community which endorses or affirmatively supports religious positions with which one disagrees may be regarded as a peculiar offense to freedom of conscience.

Id. at 869.

248. 374 F. Supp. 1284 (S.D.N.Y.), *aff'd mem.*, 419 U.S. 806 (1974).

York upheld a federal statute that governed the procurement of meat and meat products for the federal government. The statute defined humane methods of slaughtering livestock and specifically determined that ritual slaughter according to Jewish tradition satisfied the definition.[249] A variety of plaintiffs attacked the statute, alleging among other things that the expenditure of their tax money to procure meat slaughtered according to religious ritual violated the establishment clause.[250] The court acknowledged that plaintiffs had standing as taxpayers to maintain the action,[251] but found that the statute did not violate the establishment clause because, among other things, plaintiffs had failed to show that Congress purposely created a religious preference in finding that ritual slaughter was "humane" under the act.[252] It was merely coincidental that Congress found the Jewish practice to be a humane method of slaughter.[253]

The *Jones* court went further in dicta to suggest that even if the protection of ritual slaughter represented an intentional deference to Jewish religion, the statute would not violate the first amendment, because to hold the law violative of the establishment clause might well deprive orthodox Jews of their rights under the free exercise clause to ritually prepared meat, a commodity basic to their religious practice.[254] The court further suggested that even if access to ritually prepared meat does not constitute a protected right under the free exercise clause, congressional deference to ritual slaughter still would not offend the establishment clause because it probably would constitute a permissible "accommodation" of religious liberty interests that otherwise would be threatened.[255]

This interpretation of establishment doctrine is consistent with the underlying values that the religion clauses promote. Applying the establishment clause in a manner that inhibits legitimate religious practice offends the principle of voluntarism—the fundamental first amendment value. That application of the establishment clause also would be inconsistent with the principle of separatism because govern-

249. *Id.* at 1286.
250. *Id.* at 1291.
251. *Id.* at 1287-89.
252. *Id.* at 1291-92.
253. *Id.* at 1292.
254. *Id.* at 1287, 1292-93.
255. *Id.* at 1292-93.

ment would be assuming a hostile rather than a neutral posture towards religion.

Hence, no analysis of a problem under the establishment clause should be concluded without consideration of the companion free exercise clause.[256] Conclusions of unconstitutionality under the establishment clause are tenuous if the consequences entail infringements of legitimate religious liberty interests protected under the free exercise clause. Thus, circumstances of tension between the establishment and free exercise clauses generally should be resolved in favor of the latter[257] to promote the value of voluntarism.

At the time the Utah legislature adopted the firing squad, the Mormon Church taught the doctrine of blood atonement. Analysis of the current status of the firing squad, however, must consider the possibility that the religious motivation underpinning the Utah law is a legitimate attempt to protect religious liberty. If so, the sectarian motivation is not "illicit" and would not constitute a basis for invalidating the firing squad provision.

2. *The Firing Squad as a Free Exercise Right*

It appears impossible to defend the claim that the practice of blood atonement by means of the firing squad ever constituted a protected right to religious practice under the free exercise clause. Thus, invalidation of the firing squad, even during the period that blood atonement was a teaching of the Mormon Church, could not have resulted in an infringement of constitutionally protected rights because governmental coercion of belief is the essence of free exercise violation. Violations of the free exercise clause usually are triggered by positive governmental action that infringes upon religious interests.[258] It is thus difficult to see how any free exercise claims could arise from governmental *failure* to enact a bloodspilling mode of execution. Elimination of the firing squad would have coerced no one's beliefs, but instead would have restored government to a neutral posture in relation to the Mormon faith,

256. *See* P. KAUPER, *supra* note 134, at 45; Moore, *supra* note 234, at 151.

257. *See* L. TRIBE, *supra* note 4, at 833.

258 The language of the first amendment is phrased in terms of governmental *action*, not inaction. "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST. amend. I. Governmental actions that accommodate the beliefs of particular religions generally are not justifiable protections of free exercise, but rather are unconstitutional establishments. "[L]aws which protect the *free exercise* of religion should be distinguished from those which merely promote the *exercise* of a particular religion." Moore, *supra* note 234, at 196-97.

neither aiding nor hindering religious belief and practice.[259]

It could be true, of course, that had the firing squad been abandoned during a time when blood atonement was a viable Mormon teaching, the rite could not have been legally practiced in any jurisdiction in the nation.[260] Individual Mormon offenders who desired to atone for their sins by shedding their blood might have regarded this as a serious consequence. However unfortunate this consequence might have been for these persons, religious groups often must abandon religious practices when those practices conflict with legal prohibitions, as the Mormons well know.[261] As fundamentalist Christians might feel expressions of their faith restricted by legal prohibitions against handling poisonous snakes,[262] or Jehovah's Witnesses spirtually offended by compulsory blood transfusions,[263] so might some Mormon capital offenders have felt deprived of salvation if blood atonement were not available.

The tenuousness of the claim that elimination of the firing squad in Utah would violate a constitutionally protected right to practice blood atonement can be further illustrated. If, at a time when blood atonement was a viable doctrine, a Mormon offender had committed murder in State *X* where capital punishment had been abandoned, the murderer would not have possessed a constitutional right to die for that crime,[264] let alone to die in a manner that would effectuate blood atonement. The practice of blood atonement in this jurisdiction,

259. "The command of the establishment clause . . . is a neutral one: Government [should] not take sides either for or against any religious belief." Moore, *supra* note 234, at 198; P. KAUPER, *supra* note 134, at 59.

260. *See* notes 18, 89-92 *supra* and accompanying text.

261. *See* Reynolds v. United States, 98 U.S. 145 (1878).

262. The use of snakes in religious rituals has been prohibited to maintain the public health. *See* Hill v. Alabama, 38 Ala. App. 404, 88 So.2d 880 (1956); Lawson v. Commonwealth, 291 Ky. 437, 164 S.W.2d 972 (1942); State v. Massey, 229 N.C. 734, 51 S.E.2d 179 (1949); Harden v. State, 188 Tenn. 17, 216 S.W.2d 708 (1948).

263. *See* Jehovah's Witnesses v. King County Hosp., 278 F. Supp. 488 (W.D. Wash. 1967) (three-judge court), *aff'd mem.*, 390 U.S. 598 (1968). *See also* L. PFEFFER, GOD, CAESAR, AND THE CONSTITUTION 323-24 (1975).

264. For a philosophical argument that a capital offender does not possess a right to compel the state to execute him even if the state employs capital punishment for his crime, see H. BEDAU, *supra* note 15, at 121-25. "In the absence of controlling constitutional provisions, the manner of execution of death sentences is for legislative enactment," 24B C.J.S. *Criminal Law* § 1975 (1962), religious considerations notwithstanding. "Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?" Reynolds v. United States, 98 U.S. 145, 166 (1878) (dicta). "Can a man excuse his practices [that are contrary to law] because of his religious belief? To permit this would be to make the professed doctrines of religious belief

whether performed by the state or by private individuals, would have constituted unjustifiable homicide.[265] If no constitutional right to practice blood atonement existed in State *X*, it is difficult to see how it possibly could have existed in Utah.[266] Thus, whatever rights Mormons may have had to practice blood atonement in Utah appear to be statutory, not constitutional, in origin.

3. *The Firing Squad as a Permissible Accommodation?*

The court in *Jones* refused to strike down the ritual slaughter provision not only because invalidation of the statute might have constituted an infringement of constitutionally protected rights under the free exercise clause, but also because the protection of ritual slaughter appeared

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superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Id.* at 166-67.

265. "Homicide is the killing of a human being by a human being." R. PERKINS, PERKINS ON CRIMINAL LAW 28 (2d ed. 1969). Unless capital punishment is expressly authorized by the state, execution of criminal offenders constitutes unjustifiable criminal homicide. *See id.* at 33-34. *See also* note 264 *supra*.

266. Claims of a constitutional right to practice blood atonement under the free exercise clause are further suspect when the logic of the blood atonement doctrine is scrutinized. The doctrine may well have been theologically incoherent in light of other Mormon doctrine, and thus would have been difficult to take seriously as a matter of Latter-day Saint faith. The Supreme Court has held that the truth of religious beliefs that motivate conduct violative of public policy cannot be judicially considered, but rigorous questioning of the sincerity of the belief is appropriate. *See* United States v. Ballard, 322 U.S. 78 (1944). *See also* L. PFEFFER, *supra* note 263, at 305-08. Beliefs alleged to be protected under the free exercise clause receive no protection unless seriously held. Mormon doctrine teaches the universal salvation of all mankind through the atonement of Christ and the exercise of diligence in observing God's commandments. *See* notes 22-23 *supra* and accompanying text. The Latter-day Saints' gospel offers hope of salvation to all. But if the only means of salvation for murderers were through blood atonement, all murderers who committed their crimes outside the State of Utah would have been eternally damned. This consequence would have been inconsistent with the fundamentals of the Mormon plan of salvation. Redemption is conditioned on faith and repentence, not on the fortuity that one's sins happened to be committed in a particular geographical location. *See* note 23 *supra* and accompanying text. Blood atonement may have made some theological sense at a time when the Saints were all gathered in a place where the doctrine could be practiced. But given the modern realities of capital punishment law outside Utah, it is doubtful the doctrine could have been reconciled with more fundamental tenets of Mormonism. The constitutional free exercise guarantee also does not protect a doctrine that had no serious following.

> Closely related to the question of sincerity is the element of how central or essential to the religion is the practice affected by the prohibition or requirement. Clearly a conflict which threatens the very survival of the religion or the core values of a faith poses more serious free exercise problems than does a conflict which merely inconveniences the faithful.

L. TRIBE, *supra* note 4, at 862. Thus, it would not appear that abandonment of the firing squad would "threaten the very survival or core values" of Mormonism.

to be a permissible "accommodation" to religious belief. Thus, even if Congress was not *required* to protect ritual slaughter, the *Jones* court concluded that Congress was *permitted* to do so.

The *Jones* court referred to a variety of Supreme Court opinions that held permissible governmental accommodations to religious practices in certain circumstances, although not actually required as a matter of free exercise.[267] For example, the Sunday Closing Laws of some states exempt Sabbatarians from statutory obligations imposed on non-Sabbatarians. While the Supreme Court has held that no free exercise right to this exemption exists,[268] the Court views statutory exemption of Sabbatarians as a permissible accommodation to religious practice.[269] Likewise, the Court has upheld exemptions of conscientious objectors from the draft "because otherwise religious objectors would be forced into conduct that their religions forbid."[270] Similarly, courts view governmental provision of chaplains for soldiers and prisoners who are "cut off by the state from all civilian opportunities for public communion" as a legitimate accommodation to the religious needs of those so cut off.[271] These accommodation cases represent instances in which the proliferation of governmental action in modern times has invaded private life, threatening the enjoyment of what had previously been a privileged area of religious practice.[272] Because of the coercive effect of

267. 374 F. Supp. at 1292.

268. Braunfeld v. Brown, 366 U.S. 599, 608 (1961).

269. *See* Arlan's Dep't Store v. Kentucky, 371 U.S. 218 (1962), which dismissed for want of a substantial federal question an appeal of a Kentucky Court of Appeals case that upheld a Sunday Closing Law that included a blanket exemption for Sabbatarians as a permissible accommodation of religious practice.

270. Welsh v. United States, 398 U.S. 333, 369-70 (1970) (White, J., dissenting). *See also* Selected Draft Law Cases, 245 U.S. 366, 389-90 (1918). The Court has stated in dictum that Congress *need* not grant an exemption for any conscientious objectors. *Compare* Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905), *with* Welsh v. United States, 398 U.S. 333, 359 (1970) (Harlan, J., concurring).

271. Abington School Dist. v. Schempp, 374 U.S. 203, 297-300 (1963) (Brennan, J., concurring); *id.* at 309 (Stewart, J., dissenting).

272. Professor Laurence Tribe describes instances of permissible and required religious classifications by government as follows:

> The . . . use of religion-based classifications to relieve religious persons of both direct and indirect burdens caused by *increased governmental involvement in private life* . . . recognize[s] that government's actions impinge on different persons in dramatically different ways, so that truly even-handed treatment at times compels exempting those whose religious beliefs are exceptionally burdened by a challenged state action. In this *zone of required accomodation*, the theory is that only an illusory and hostile neutrality would be achieved by pursuing a religion-blind constitutional ideal.

L. TRIBE, *supra* note 4, at 821 (first emphasis supplied). Tribe suggests elsewhere that the need for

this increased governmental action on religion,[273] government is said to have assumed a hostile posture that becomes religiously neutral only when special accommodation is made to protect the affected religious interest.[274]

One may argue that although there may never have been a first amendment right to practice blood atonement, the state's acquiescence in the practice through the firing squad, like the state's protection of ritual slaughter in *Jones*, constituted a permissible "accommodation" to religion rather than a violation of the establishment clause. Thus, if this deference to Mormon belief constituted a legitimate accommodation to religious belief, the sectarian motivation would not be unconstitutional. Of course, the line between permissible accommodation and prohibited establishment is often difficult to draw, but the firing squad apparently represents the latter.[275] This seems especially so when one examines the nature of the possible "accommodation." Unlike the accommodation cases discussed, Utah's promotion of religion through its capital punishment law is not a consequence of state attempts to accommodate a religious privilege that prior governmental action had ad-

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government to accommodate religious belief arises because the emergence of an increasingly pervasive "affirmative state" requires positive governmental provision to protect religious pluralism. *Id.* at 834, 851.

273. *Id.*

274. The State must be steadfastly neutral in all matters of faith, and neither favor nor inhibit religion. In my view, government cannot sponsor religious exercises in the public schools without jeopardizing that neutrality. On the other hand, hostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion.

Abington School Dist. v. Schempp, 374 U.S. 203, 299 (1963) (Brennan, J., concurring).

275. Professor Tribe would resolve possible clashes between forbidden establishment and permissible accommodation in favor of the latter if the governmental promotion of religion is "arguably compelled" by the free exercise clause. L. TRIBE, *supra* note 4, at 822. In cases in which the two religion clauses intersect, the free exercise clause carves out of the establishment clause a zone of permissible accommodation. *Id.* at 823. Applying the Tribe test to the firing squad law suggests that the firing squad constitutes a forbidden establishment, not a permissible accommodation, because the firing squad does not seem to be even "arguably compelled" by the free exercise clause. A constitutional right to die by firing squad would entail a free exercise right even in jurisdictions that have abolished capital punishment, but these jurisdictions presumably could show a "compelling state interest" in promoting respect for human life through maintenance of a policy against state executions and thus defeat a claim that the free exercise clause requires state executions as a means of atoning for sin. *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963); notes 264-66 *supra* and accompanying text. While the Supreme Court recently ruled that capital punishment is sometimes *permissible* under the eighth amendment, Gregg v. Georgia, 428 U.S. 153 (1976), it seems unlikely that the Court would rule that it is constitutionally *required* of all states, even of those whose policy is to oppose it, under the free exercise clause.

versely affected. Utah had assumed no hostile stance toward the Mormons that would create a special need for state deference to religious practice.[276] Blood atonement was not a privileged religious exercise *until* the government gave its blessing to the practice.[277] In fact, blood atonement by means of the firing squad, far from being privileged religious practice prior to governmental "accommodation," would have been unjustified homicide if practiced extralegally.[278] Thus, it is difficult to interpret the Utah capital punishment law as a permissible accommodation to otherwise privileged activity. Rather than "accommodating" an old religious privilege, the firing squad provision created a new one. It thus smacks more of "establishment" than "accommodation." If the courts were to invalidate the firing squad law as an unconstitutional establishment, government would not coerce individuals away from legitimate religious practice even if blood atonement were a presently viable doctrine. Because the practice was not privileged but for the governmental action, invalidation of the firing squad would effectively neutralize the state's proreligious posture. Neutralization would promote the value of separatism and would be consistent with the principle of voluntarism because it would not infringe upon legitimate religious interests of either Mormons or non-Mormons. The principle of voluntarism may actually require invalidation of the firing squad law to protect the religious liberty of non-Mormons because minority religious practice is disadvantaged and the ideal of free competition of religious sects, as expressed in the Williams and Madison first amendment traditions, is offended whenever a ma-

276. Of course, one could argue that the homicide laws forbidding extralegal capital punishment curtailed the possibilities for the Mormon Church itself to practice blood atonement, and thus constituted governmental interference with the practice of religion. Notwithstanding that the homicide laws are not the product of the modern "affirmative state," and thus do not represent the kind of governmental action usually found in "accommodation" cases, *see* note 272 *supra*, this argument would be rejected by reference to a variety of cases forbidding religious practices that run afoul of basic secular policy. *See* Reynolds v. United States, 98 U.S. 145 (1878). Forbidding the execution of murderers except through the operation of secular law seems to be as basic a public policy as there is, and one not likely to be deviated from even in the name of religious freedom. *See* L. TRIBE, *supra* note 4, at 850-51; notes 264-65 *supra* and accompanying text.

277. It might be argued that blood atonement could have been privileged during the brief time the Mormons occupied Mexican territory in what is now the State of Utah. Whether Mexican law would have permitted a religious group to practice a form of capital punishment is doubtful, but there is no question that at the time the language of the present law was adopted in the late nineteenth century, blood atonement was not a privileged religious practice.

278. *See* notes 264-65, 276 *supra*.

jority religion uses secular government for its purposes.[279]

No infringements of religious liberty, either of the free exercise "right" variety or of the "privileged" accommodation variety, would arise if the courts held the firing squad law unconstitutional because of the sectarian motivation that contributed to its birth. Invalidation of the firing squad statute would promote the values of separatism and the prevention of religio-politico strife; the value of voluntarism, if not actually promoted, certainly would not be offended. Therefore, the conclusion that the firing squad is unconstitutional under the establishment clause appears sound.

V. General Principles for Reviewing Sectarian Motivation—A Summary

From the foregoing analysis of the Utah firing squad it is possible to abstract a set of general principles for the judicial review of sectarian motivation under the establishment clause. Because these principles undoubtedly require further refinement and raise a variety of problems themselves, they are suggested merely as a rough framework from which to analyze legislation under the secular-purpose test. Although this framework may be rough, it should be useful in furthering analysis that is both consistent with existing case law and relevant policy considerations.

Principle No. 1:

Because of the inherent difficulties of ascertaining religious motivation and the debatable propriety of questioning legislative integrity through inquiry into illicit motivation, courts should use the primary-effect prong of analysis to examine statutes challenged under the establishment clause, except when religiously motivated statutes lack significant religious effect or when no possible secular purposes can be attributed to the statute. When a secular purpose presents the potential for generating religio-politico strife under the excessive-entanglement prong, especially strong reason exists for strict scrutiny under the secular-purpose test or the primary-effect test. Failure to satisfy the excessive-entanglement prong is a sufficient, but not a necessary, condition for strict scrutiny.

279. *See* note 247 *supra* and accompanying text.

Principle No. 2:

In all cases in which clear and convincing evidence of significant sectarian motivation exists, but no secular purposes exist or the purported secular purposes are no more than rationalizations for religious motivation, the religiously motivated statute is unconstitutional unless invalidation of the statute results in significant infringements of religious liberty. If invalidation of the statute would result, or would ever have resulted, in significant violations of free exercise rights, or if the statute constituted a permissible accommodation to religious belief at the time of its enactment, the religious motivation is not "illicit" and the statute should be upheld.

Principle No. 3:

In all cases in which clear and convincing evidence of significant sectarian motivation exists and legitimate secular purposes also exist or could exist, but no significant religious effects exist, the religiously motivated statute is unconstitutional if the secular interests can be equally achieved through reasonably available alternatives that do not entail promotion of sectarian concerns, except when legislative amendments inconsistent with the original religious purposes dictate a finding that secular purposes have come to predominate over the prior religious purposes, or when invalidation of the statute results in significant infringements of religious liberty. If invalidation of the statute would result, or would ever have resulted, in significant violations of free exercise rights, or if the statute constituted a permissible accommodation to religious belief at the time of its enactment, the religious motivation is not "illicit" and the statute should be upheld.

VI. CONCLUSION

This article examined the proposition that sectarian motivation is sometimes a sufficient condition for invalidating legislation under the establishment clause. Through a consideration of a paradigmatic example of religiously motivated legislation (the Utah firing squad), it has shown that illicit motivation is sometimes a legally and philosophically sound basis for invalidating statutes even when the legislation lacks significant religious effect. This consideration of the firing squad case generated analytical principles that offer a useful means for structuring analysis of sectarian motivation under the establishment clause.

Although the problem of illicit motivation in the establishment con-

text has received little attention from courts or commentators, it nevertheless is a matter of genuine importance. To paraphrase the poet whose words began this paper, even though it may not be the greatest constitutional treason for the legislature to do an otherwise permissible deed for the wrong reason, it is sufficient "treason" (in the contexts defined in this paper) to warrant the careful attention of the courts.