ACTIVISM
AND THE RULE OF LAW

Achieving Balance in Washington to Support Democracy

by Patrick J. Preston

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IN media images of the 1999 World Trade Organization (WTO) demonstrations in Seattle, helmeted police officers in black body armor and baton-wielding National Guard troops were pitted against peaceful environmental protesters, sign-carrying union members and labor activists, and a small number of anarchistic vandals. WTO delegates shuffled hurriedly between their hotels and meetings at the Washington State Convention Center within the 25-block "limited curfew" downtown area — the city's no-protest zone. The images also captured law enforcement pepper-spraying and arresting hundreds of citizens, many of whom later received settlements for civil rights claims.[1]

The tumultuous "Battle in Seattle" illustrates the complex relationship between activism and the rule of law. Activism seeks to drive legal and political change by relying on activists' rights of free speech, assembly, and association. When the law provides a public forum for activism — streets for marches, public squares for gatherings and speakers — it fosters the exchange of ideas necessary for democracy. But the law may also suppress activist speech based on security concerns, ideology, impacts on private interests, and the raw might of those in power. Following vigorous activism, courts have recognized fundamental civil liberties on constitutional grounds; yet dissenters, including the late U.S. Supreme Court Justice Antonin Scalia, have argued that a constitution is meant to "impede" change, not facilitate it.

For activists, each era, decade, or election cycle may legitimize or delegitimize their actions. Their legitimacy depends on the activist's message, means, and ends weighed against societal views on issues such as economic prosperity, nationalistic fears, and peace or war. The tyranny of the majority may bury the activist's message with the passage of time. Or that message may manifest in a successful judgment in the courts, an activist elevated to public office, or the will of the electorate resulting in an initiative that becomes law.

Washington has a long history of activists facing off with the rule of law. The free speech protections conferred by our state constitution are broader than the First Amendment. But the exercise of such rights may become theoretical when criminal statutes are strictly enforced and restrictions are threatened against the populace by governmental action.

The following Washingtonians' perspectives show the relationship between activism and the rule of law through the eyes of a top federal prosecutor, a religious protester convicted for an act of civil disobedience, and the executive of a large nonprofit organization. Although disagreements with the particular message of an activist or governmental actor are inevitable at times, these stories ultimately illustrate important societal checks and balances at work.

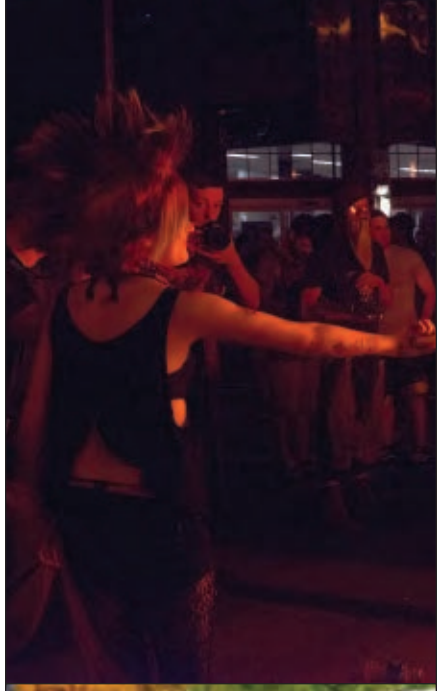
PROTECTED SYMBOLIC SPEECH

1989 was the "year that changed the world" according to *Time* magazine.[2] The year saw the massacre of student protesters in Tiananmen Square, the fall of the Berlin Wall marking the end of the Cold War, Poland's first free election in 40 years, and the death of Iran's theocratic leader, Ayatollah Khomeini.

While these monumental geopolitical events took place abroad, a small American flag burning demonstration in Seattle may have gone unnoticed in 1989. But a new federal law criminalizing flag desecration had potential national significance when it became the focal point of protesters.

On June 21, 1989, the U.S. Supreme Court held in *Texas v. Johnson* that state criminal prohibitions against desecration of the American flag violated First Amendment free speech, including the symbolic act of flag burning.[3] In his dissent, Justice John Paul Stevens cited the "soldiers who scaled the bluff at Omaha Beach" to support his nationalistic view that the flag was "worthy of protection from unnecessary desecration."[4] As an alternative to a constitutional amendment proposed by Republicans, the Democrat-controlled Congress passed the bipartisan Flag Protection Act, signed by President George H.W. Bush to criminalize desecration of the American flag as a federal offense.[5] The law would take effect at midnight on October 28, 1989.

Mike McKay, U.S. Attorney for the Western District of Washington, had been in office only three months when the Flag Protection Act took effect. Protests were staged across the country. At 12:01 a.m., McKay sat in a parked car with federal agents watching a rowdy demonstration outside a small brick post office in Seattle's Capitol Hill neighborhood. News reports described the crowd as including members of Vietnam Veterans Against the War and "skinhead youths."[6] Chants of "burn, baby, burn" alternated with the singing of the national anthem. One thousand paper flags were distributed to protesters, "who threw them into two fires burning in baking pans."[7] McKay recalls that some protesters burned other American flags they had brought to the demonstration.



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As McKay and the agents watched, a small group climbed onto the post office roof. Whether by mistake or not, the post office's American flag had been left up that night. The group "lowered the flag from its 20-foot pole" before one protester doused the flag with a flammable substance, "ignited it and raised the burning emblem up the pole."[8] A television news crew filmed the event, and the footage was later obtained by federal investigators.

McKay and top assistant U.S. attorneys from his office, including Criminal Division Chief David E. Wilson, subsequently reviewed the investigation reports for potential charges. Before approving the two misdemeanors filed against four protesters who took part in burning the post office's flag, McKay reached a consensus with the assistant prosecutors that the new law probably would be held unconstitutional under *Texas v. Johnson* and the First Amendment. "We took the First Amendment considerations very seriously," recalls McKay.

Although it is a federal prosecutor's duty to enforce federal laws despite anticipated courtroom challenges, McKay was also guided by a fundamental principle of prosecutorial discretion: "It's not what you can charge, but what you should charge." Thus, many other protesters who violated the new law by burning American flags they brought to

the demonstration never faced charges. For strategic reasons, the flag desecration count filed against the four co-defendants was accompanied by a general misdemeanor count of destruction of government property. And after another demonstration involved the burning of protesters' flags at the University of Washington, no federal charges were brought under the new law.

When McKay reflects on his approval of the flag desecration charge in *U.S. v. Haggerty,*[9] he adds that the decision of his office was compelled by processes involving two of the three branches of government to enact the new law. In his view, it was not the role of the U.S. Attorney's Office to undermine such a duly enacted law. He directed, however, that his trial prosecutors Robert G. Chadwell and Mark N. Bartlett make "a good record for appeal."

The third branch of federal government then had its say. The U.S. District Court for the Western District of Washington dismissed the flag desecration count on First Amendment grounds, and a unique provision of the new law triggered direct review by the U.S. Supreme Court. On the day of the District Court's dismissal, McKay was in Washington, D.C., and he made an appointment to visit U.S. Solicitor General Kenneth W. Starr regarding the anticipated appeal.

McKay recalls Starr welcoming him into his office where their discussion turned to McKay's assessment that his team had worked to make "a tough case for the government as easy as possible to argue" before the U.S. Supreme Court. Starr invited a young Deputy Solicitor General named John G. Roberts to join them. While Roberts, who would later become Chief Justice of the U.S. Supreme Court, quietly took notes for the briefing he would draft, Starr remained bullish on the government's prospects of prevailing over the First Amendment challenge.

When the Seattle case reached the U.S. Supreme Court, it was paired with *U.S. v. Eichman,* a companion flag-burning case from Washington D.C. McKay sat in the audience with Chadwell. During oral argument, Starr's reliance on the "content neutral" nature of the flag desecration law was met with skepticism by several justices, including initial interruptions by Justice Scalia, who asked,"General Starr, I don't understand this line of argument. Is . . . it that you're saying that somehow the expression 'I hate the United States' is entitled to less constitutional protection . . . ?"[10]

Civil rights lawyer William M. Kunstler argued on behalf of the protesters that the law effectively was a content-based statute. He noted the diverse viewpoints behind the symbolic flag burnings: "One didn't like the treatment of Mexican-Americans. One didn't like the treatment of women. One didn't like the United States military involvement abroad. There were many."[11]

In a 5-4 decision handed down less than a month later, Scalia was in the majority when the Supreme Court invalidated the federal flag desecration statute on First Amendment grounds. The *Eichman* majority held that while "desecration of the flag is deeply offensive to many," the law's criminalization of such a symbolic act "dilutes the very freedom that makes this emblem so revered, and worth revering."[12] For the Seattle defendants, *Eichman* was only a partial victory, albeit an important vindication of their rights. Their choice to burn the post office's flag — instead of their own flags — became the basis for their guilty pleas to misdemeanor government property destruction on remand.

A lifelong Washingtonian and Republican, McKay today feels privileged to have served the government's role in response to the flag-burning events that led to the Supreme Court's ultimate determination of First Amendment protections. He also believes the Department of Justice may have an uphill battle attempting to defend many of the current administration's unilateral actions and executive orders — especially if President Trump seeks to codify his view that: "Nobody should be allowed to burn the American flag — if they do,

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there must be consequences — perhaps loss of citizenship or year in jail!"[13]

ACTIVISM AS INDICTED CIVIL DISOBEDIENCE

> "An individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for the law."
>
> Martin Luther King, Jr., "Letter From a Birmingham Jail" (April 16, 1963)

Sister Maureen Newman chuckles when she recalls the "Irish guilt" her mother used to discourage her from participating in civil disobedience in her early years as an activist for social justice. Sister Maureen's mother told her that her first responsibility was to the elementary school children she taught, and cautioned her not to jeopardize her duties as an educator.

Sister Maureen was a different kind of '60s radical from the hippies of her generation. She entered the Sisters of Providence in 1964, embracing the social, philosophical, and political movements of the civil rights era. She pledged solidarity with the poor through her religious mission to perform compassionate works and provide education to those most in need.

After graduating from Seattle University in 1972, she taught elementary school for the next three decades. Over the years, her activist works included providing summer daycare for the children of migrant workers, tutoring Hmong immigrants, and attending peaceful demonstrations against construction of the U.S. Navy's Trident submarine base and military installations on farms surrounding Bangor on the Kitsap Peninsula. She found inspiration in the religious activism of Seattle Archbishop Raymond G. Hunthausen, who challenged the U.S. government over nuclear arms and challenged the Catholic orthodoxy on the role of women in church leadership and the rights of gays and lesbians. The assassination of human rights proponent Archbishop Oscar Romero during mass in El Salvador shaped her evolving views on the need for social justice. She and fellow sisters formed the Seattle chapter of Witness for Peace, a grassroots organization committed to nonviolent support of human rights and peace in Latin American countries. She led a Witness for Peace delegation to Nicaragua during the war there and later participated in a relief operation to provide food and supplies to the poor and war refugees from El Salvador.

While working in Central America, Sister Maureen heard firsthand accounts from women survivors of brutal acts of political repression by the government and military. She joined a growing chorus of activists protesting the School of the Americas (SOA) located at the U.S. Army's Ft. Benning near Columbus, GA. Officially, the SOA trained pro-democracy government personnel from allied countries in Latin America to thwart communist insurgencies. The military school had existed since the beginning of the Cold War. But following the lead of activists, the media and certain congressional leaders accused the SOA of training Latin American soldiers and police who became "notorious torturers, mass murderers, dictators and state terrorists."[14] They cited SOA graduates who included Panamanian dictator Manuel Noriega and Augusto Pinochet of Chile.

For three years, Sister Maureen traveled to Ft. Benning to participate in annual SOA protests. The protests included a remembrance of the 1989 massacre of six Jesuit priests, along with their housekeeper, and her daughter, in El Salvador by Salvadoran military members whose counterinsurgency unit reportedly had been created at the SOA. The growing scrutiny of

the SOA included a close congressional vote that nearly closed the military training facility.

In 2002, Sister Maureen attended a Seattle University forum sponsored by Catholic Relief Services where she heard Colombian speakers describe human rights violations supported by U.S. government funds in their country. "The same human rights violations in Nicaragua and El Salvador," she learned, were escalating in Colombia.[15] She heard reports of rapes, kidnappings, and executions of Colombians — including the slayings of Archbishop Isaias Duarte Cancino, several priests, and other religious workers. She later recalled that as she listened to the presentation, "the memory of the women of Nicaragua and El Salvador haunted me. Their eyes are always with me, as I remember how they spoke of being raped, their children kidnapped, and their husbands disappeared."[16]

Although fellow activists had been arrested for many of the causes she supported, including at certain Bangor nuclear protests, she had followed her mother's advice to refrain from civil disobedience and eventually became vice principal of St. Therese School in Seattle's Madrona neighborhood.[17] But she returned to Ft. Benning on an annual sabbatical, where she protested with a heightened awareness of human rights issues in Latin America. She considered participating in group civil disobedience by entering the military base without permission to send a greater message. It was a decision that weighed heavily on her conscience, but one that would not impact St. Therese students as in prior years. After making sure the protest would be non-violent, she and some 90 other protesters stepped through a hole in the fence and onto the base.[18] Because of the recent Sept. 11 terrorist attacks, she had a pretty good idea that the protesters would be arrested.

Young soldiers took the non-violent protesters into custody, binding their hands with plastic ties, before processing them and leading them to the county jail in leg chains. Sister Maureen spent two nights in a cold holding tank before her arraignment. In *U.S. v. Newman*, the government charged her with the petty offense of entering a military installation for any purpose prohibited by law in violation of 18 U.S.C. 1382. After rejecting personal recognizance release typically granted to SOA protesters in the past, the judge set a $5,000 bond as "necessary in these times" — a reference Sister Maureen believed to be related to a post-Sept. 11th mindset. Her defense team was led by New Orleans public interest lawyer and Loyola Law professor William P. Quigley. The judge denied subsequent motions by the defense team for a jury trial and a defense based on international law.

IN HER ACTIVISM FOR THE WOMEN, AND MEN, AND YOUTH SERVED BY PLANNED PARENTHOOD, CHARBONNEAU IS WELL AWARE OF THE CONCEPT OF THE RULE OF LAW AS BOTH A SWORD AND A SHIELD.

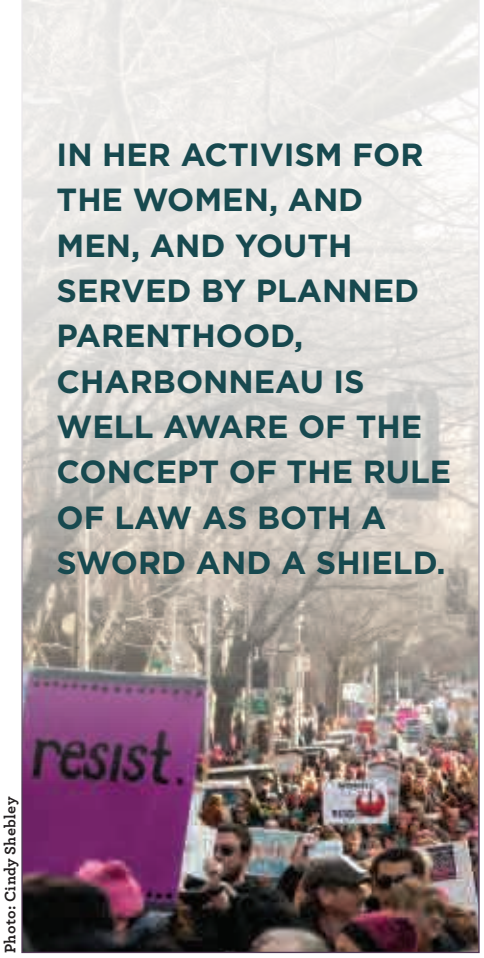

Photo: Cindy Shebley

To protest her arrest, Sister Maureen released a statement reminiscent of Martin Luther King's words regarding arrest for an act of conscience:

> "If you want to say that I did break a law, I would not take breaking a law lightly. If a bad law such as segregation oppresses or endangers or limits the right to livelihood of a large group of people, one may be called to do more than just picket or write letters to Congress. In the time of segregation, letters and legal picketing did not change the laws of segregation. Actions of civil disobedience did change these oppressive laws."[19]

A one-day bench trial took place three months later. Sister Maureen's impression was that the judge "rubberstamped the government's case" before rendering a guilty verdict and sentencing her to 90 days of confinement. At the Federal Correctional Institution in Dublin, CA, Sister Maureen was housed with women convicted of embezzlement and drug offenses. She taught reading skills to her fellow inmates and suffered through the indignities of work on the bathroom detail, pat-downs, and hearing insults by the guards.[20]

After her release, she returned to her activism against the SOA, which had changed its name after purportedly closing. As reported by the activist organization, SOA Watch, she traveled to Chile with an international delegation and presented Freedom of Information Act records to a human rights commission to show that the Chilean government was continuing to utilize SOA-based military training.[21] Her delegation's work reportedly drew the attention of investigative journalists there.

Despite her arrest and prosecution, Sister Maureen today does not feel the law has chilled her lifelong social justice activism. As noted by SOA Watch, her arrest and conviction were "self-directed." Instead, she contrasts her relative expressive freedoms in the United States with her view of the corruption of the law in Central and South America and atrocities suffered by the poor and disenfranchised there.

Resolute as ever today, she speaks plainly about the value of political speech."Right now our country needs activism as much as possible. I think people realize that's what we have to do — with immigrants, the refugee ban, not supporting women." As Sister Maureen

helps train newcomers to the Sisters of Providence, she remains optimistic that they will carry their mission forward on behalf of the poor.

Nonprofit Activism From the Middle

At a rally before the Womxn's March on Seattle the day after the 2017 presidential inauguration, Christine Charbonneau waited anxiously to speak to the burgeoning crowd at Judkins Park. The affable and normally gregarious CEO of Planned Parenthood of the Great Northwest and the Hawaiian Islands (PPGNHI) held written talking points prepared with the help of an assistant. Given the magnitude of the Womxn's March to the mission of her organization, Charbonneau sought to deliver a clear message to supporters.

She spoke about the new administration's threat to many women's health services offered by PPGNHI: "They intend to not worry a lot about the lack of pap smears, the affordable contraceptive care, cancer screenings, birth control, sexually transmitted diseases... and they must be stopped."[22]

The media noted later that Charbonneau "drew the biggest roar from the crowd at the pre-march rally Saturday just by saying where she worked."[23] Her rousing but hopeful speech on a platform in the park shared by prominent women leaders warned sympathetic listeners that a Republican-controlled Congress and the new administration could defund the vital services provided by Planned Parenthood. Bedecked in a pink Planned Parenthood scarf and hat, she and fellow marchers, including U.S. Senator Maria Cantwell, later walked Seattle's streets behind a banner promoting an action network to fight back against attacks on reproductive health and rights. In Charbonneau's view, the millions of participants in women's marches across the country sent a loud and clear message to the President and Congress.

In her activism for the women, men, and youth served by Planned Parenthood, Charbonneau is well aware of the concept of the rule of law as both a sword and a shield. After more than 80 years of care and activism as cited in a 2016 press release, PPGNHI currently offers programs including reproductive health services, sexual education for men and women, and providing information on sexual orientation and gender. To advance and maintain legal protections for these programs, Charbonneau believes it is critical to interact with all three branches of government.

After the 2016 elections, Charbonneau anticipates a need to lobby Congress against new bills threatening to eliminate Planned Parenthood's Medicaid reimbursements for the poor, which could deprive millions of patients of their health care choices and clinics in underserved rural and suburban areas. "It's incredibly important for women across the country to say that is unacceptable," Charbonneau told *The Seattle Times*.[24]

Yet at times, the law has been at cross-purposes with Charbonneau's activism. For example, PPGNHI supported Washington's promulgation of rules in 2007 to require pharmacists to deliver all prescribed medications, including the Plan B emergency contraceptive, to patients without discrimination based on any pharmacist's religious beliefs. After an Olympia pharmacy obtained a preliminary injunction against enforcement of the rules in a federal lawsuit based on a First Amendment religious challenge, the Ninth Circuit Court of Appeals reversed the injunction as overbroad, holding the rules were neutral and generally applicable.[25] Based on development of the factual record on remand, however, the District Court for the Western District of Washington, applying a constitutional strict scrutiny standard, found the rules violated the Free Exercise Clause.[26] In a final twist, however, a further Ninth Circuit appeal

saw the pharmacy rules again upheld as constitutional and the U.S. Supreme Court denied review.[27]

Similarly, Charbonneau found herself despairing after the U.S. Supreme Court's 2014 decision in *Burwell v. Hobby Lobby Stores*, which held that a for-profit corporation was a "person" entitled to Free Exercise rights violated by a contraceptives mandate of the U.S. Department of Health and Human Services.[28] PPGNHI and other Planned Parenthood affiliates prepared for an onslaught of businesses opting out of employer health insurance coverage for contraceptives. But since *Burwell*, Charbonneau's impression has been that the marketplace is reluctant to broadly assert corporate Free Exercise rights that could negatively impact employee hiring and retention, among other considerations.

By contrast, a Washington law supported by PPGNHI that requires the teaching of "medically accurate" information in sexuality education classes has stood the test of time. Charbonneau credits this legislative change with eliminating fear-based misinformation designed to scare young people into certain choices.

In the recent past, Charbonneau has found the U.S. Department of Justice and courts generally to be staunch defenders of pro-choice rights and the safety of Planned Parenthood clinics. Buffer zones have been enforced around clinics for the protection of patients and staff. Threats and attacks against clinics have been investigated as serious criminal offenses, including the FBI's investigation of a 2015 arson attack on a clinic in Pullman.[29]

But what about the equally vocal opposition to PPGNHI's advocacy of pro-choice rights? "I actually support the right of people who don't agree with me to picket," Charbonneau says. "That part doesn't bother me." She is quick to add, however, that circumstances matter. For example, she recalls a clinic on the second floor of a building above a movie theater where moviegoers, including young children, were subjected to a picketer's graphic anti-abortion images.

After attending West Seattle High School and the University of Washington, Charbonneau began her work at Planned Parenthood with administrative tasks related to cervical cancer screenings. Since her career began in 1982, she has seen PPGNHI grow to serve more than 100,000 clients each year in 28 health care sites across four states, including Washington, Idaho, Alaska, and Hawaii.[30] "Planned Parenthood is undeniably a very activist organization, even if it didn't start out that way," she says. The organization serves an important public health function far beyond providing abortions — which represents only 3% of PPGNHI's services — by offering low income patients cancer screenings, HIV testing, and reproductive health care. Charbonneau's most successful activism along the way has been based on an approach to the rule of law from the middle ground, not the extremes.

For Charbonneau, the Womxn's March provided an incredible public forum to advocate many issues uniquely impacting women. The march gave PPGNHI the opportunity to "broaden how we are approaching these issues" through a message that crossed cultural, economic, and ethnic lines. Regardless of how that approach evolves, Charbonneau intends to continue her activism to further her organization's mission through the rule of law. "I find myself having a hard time believing people in government who purport to protect me from my own decision-making," she says.

CONCLUSION

From the dirty office windows of the fifth floor of the King County Courthouse, I saw a long chain of WTO protesters, hand-in-hand, encircling the nearby King County jail. This was as mesmerizing as it was unsettling to me and my former colleagues in the King County Prosecutor's Office. We had never seen anything like this in Seattle. We did not know what would happen next. The WTO demonstrations had run headlong into the rule of law through police crackdowns, hundreds of arrests, and the possibility of scores of prosecutions in the face of First Amendment challenges. Ultimately, the protesters and their advocates, prosecutors, police leadership, the mayor, City Hall, and the judiciary were among the legion of shareholders who reached resolutions. This brought needed reforms in the ensuing weeks and months after the WTO protests.

Washingtonians have experienced unprecedented post-presidential election activism in 2017. Many, or perhaps most, of us again do not know what will happen next — in our cities, counties, state, and nation. But as the stories of activism above illustrate, a balance may be struck with the rule of law that

respects individual rights, promotes the exchange of ideas necessary for democracy, and provides the framework for a stable social order. **NWL**

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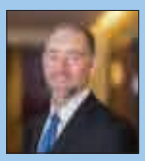

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The opinions expressed are those of the author and do not necessarily reflect the views of the firm, its clients, or the WSBA. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

NOTES

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