The Politics of Virtue: Animals, Theology, and Abortion

Elizabeth Henry Schlegel
University at Buffalo School of Law

Alan Freeman
University at Buffalo School of Law

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ARTICLE

THE POLITICS OF VIRTUE: ANIMALS, THEOLOGY AND ABORTION

Elizabeth Mensch*
Alan Freeman**

** Professor of Law, SUNY at Buffalo School of Law; A.B., 1964, Brown; L.L.B., 1967, New York University.

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It is easy to understand why protest becomes a distinctive moral feature of the modern age and why indignation is a predominant modern emotion.

Protest is that negative phenomenon which characteristically occurs as a reaction to the alleged invasion of someone’s rights in the name of someone else’s utility. The self-assertive shrillness of protest arises because the facts of incommensurability ensure that protestors can never win an argument; the indignant self-righteousness of protest arises because the facts of incommensurability ensure equally that the protestors can never lose an argument either. Hence the utterance of protest is characteristically addressed to those who already share the protestors’ premises. The effects of incommensurability ensure that protestors rarely have anyone else to talk to but themselves. This is not to say that protest cannot be effective; it is to say that it cannot be rationally effective and that its dominant modes of expression give evidence of a certain perhaps unconscious awareness of this.

Alasdair MacIntyre

INTRODUCTION

If protest, so aptly described by MacIntyre, has become the characteristic form of moral discourse in our culture, abortion is its paradigmatic subject. As we began to write this article, a new Supreme Court Justice was about to be reviewed by the Senate; media coverage suggested that the abortion issue was the only one that counted in assessing the fitness of the nominee. One is tempted to blame the media for fanning hysteria, yet it is all too

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1 A. MacIntyre, After Virtue: A Study in Moral Theory 71 (1984) [hereinafter A. MacIntyre, After Virtue].

2 See, e.g., Gorey, Supreme Confidence, TIME, Sept. 24, 1990, at 46. “[T]he bachelor from Weare, N.H., keenly senses that he has been chosen by Bush and history to cast perhaps the deciding vote on whether to overturn Roe v. Wade, the landmark 1973 decision that made abortion legal in all states.” Id. See also Cohn, The “Soon-to-Be” Supreme, NEWSWEEK, Sept. 24, 1990, at 27. “To the frustration of committee liberals and women’s-rights activists, Souter unflappably insisted on his prerogative to avoid the all-important question of abortion.” Id.
apparent that a Supreme Court decision, *Roe v. Wade,*\(^3\) has become an ideological commodity invested with awesome powers and significance, to be defended at all costs by one side and annihilated, also at all costs, by the other.

The rhetoric is appropriately extreme. Those who are "pro-life," who may number as many as half the population, regard the other half as actual or potential murderers; those who are "pro-choice," who may also number as many as half the population, regard the other half as violating the fundamental human rights of women.\(^4\) For sociologists Peter and Brigitte Berger, "the abortion issue reveals a highly significant rupture in the moral fabric of contemporary Western societies."\(^5\) Lacking any moral consensus, one finds a "moral pluralism"\(^6\) that is mutually and contemptuously intolerant.

One is drawn to recall slavery and prohibition as the historical analogues to this controversy. In the absence of any common moral ground for debate, the usual American move is to invoke the coercive force of the law. As the Bergers observe:

> [T]his moral difference touches directly on an important area of actual conduct in social life, therefore demands legal regulation, and therefore makes it very difficult for people amicably to "agree to disagree."

\(^3\) 410 U.S. 113 (1973); see also Doe v. Bolton, 410 U.S. 179 (1973) (*Roe's* companion case).

\(^4\) A review of opinion poll data, with due respect for its fallibility, leaves one with the impression that some 20-25% of the American public believe that abortion should be illegal in all or nearly all circumstances, some 20-25% believe that it should be legal in all circumstances and the rest will vary, depending on the form of the question, the timing of the abortion (first trimester versus later trimesters) or the reason for the abortion (rape or physical danger to the mother versus family size or simply inconvenience). See, e.g., C. Condit, *Decoding Abortion Rhetoric: Communicating Social Change* 147-51, 167-68, 170 (1989); Callahan, *The Abortion Debate: Is Progress Possible?*, in *Abortion: Understanding Differences* 309, 313 (S. Callahan & D. Callahan eds. 1984) [hereinafter *Abortion: Understanding Differences*]; Segers, *Abortion and the Culture: Toward a Feminist Perspective*, in *Abortion: Understanding Differences*, *supra*, at 229, 232-34. See generally Lamanna, *Social Science and Ethical Issues: The Policy Implications of Poll Data on Abortion*, in *Abortion: Understanding Differences*, *supra*, at 1-23.


\(^6\) Id.
It is only logical, then, that each side seeks the coercive support of state power—the "pro-choice" side no less than the "pro-life" side. The law . . . may continue to uphold abortion against those who consider it murder, deepening their alienation from the society; or the law may reverse itself and proscribe abortion once again, thereby creating a new explosion of "crime" for which the prohibition era provides a good preview. A sociologist must believe that "victory" would be Pyrrhic in either case.7

That the abortion issue has become intractable, as observed by the Bergers, is not to say that it must be so or that it has always been so. Some seem to have an investment in proclaiming and perpetuating its intractability, as does Laurence Tribe in his recent book,8 in order to advance his implicit agenda in favor of the pro-

7 Id. at 75-77.
8 L. Tribe, Abortion: The Clash of Absolutes (1990). From an advocacy perspective, the strategy of Tribe's book is to keep the two sides as far apart as possible, especially emphasizing the pro-life position as necessarily incapable of compromise, so as to leave the reader who is unwilling to criminalize all or nearly all abortions with no choice but to reaffirm Roe v. Wade.

For a similar reaction to Tribe's book, see Recent Publications, 25 Harv. C.R.-C.L. L. Rev. 625, 625-29 (1990). For instance, the author notes that "[while] [Tribe] critiques both the pro-life and pro-choice positions, the bulk of his criticisms are reserved for the pro-life proponents. Thus, Tribe's desire for compromise is somewhat thwarted by his apparent intent to fuel pro-choice advocates with criticism of the pro-life position." Id. at 626.

Tribe's repeated rejection of potential areas of compromise is troubling in view of what he proclaims is the purpose of the book. As a result, the book may demonstrate the very intractability of the positions on abortion which Tribe seeks to mediate. Thus, Tribe fails to deliver fully on his promise to set the stage for compromise.

Id. at 629.

For a particularly glaring example, consider Tribe's assertion that "[b]y the late 1960s as many as 1,200,000 women were undergoing illegal abortions each year: more than one criminal abortion a minute." L. Tribe, supra, at 41. Tribe cited J. Mohr, Abortion in America: The Origins and Evolution of National Policy 254 (1978), where this sentence appears: "By the late 1960's estimates of the number of illegal abortions performed in the United States each year ranged from 200,000 to 1,200,000." Id. (On the difficulties implicit in making such calculations, see C. Condit, supra note 4, at 37 n.4).

While Tribe's "as many as" is not technically inaccurate, from the perspective of our own legal training and experience, we think the difference between Mohr's very qualified statement and Condit's careful evaluation, on the one hand, and Tribe's coverage of the same issue, on the other, is the difference between a scholarly agenda and an advocacy agenda.
choice status quo exemplified by Roe v. Wade. In contrast, others claim that Roe v. Wade is itself a compromise between the extremes, or that despite rhetorical excess, practical compromise is already existent and widespread, belying the bleakness of the debate. We find ourselves unpersuaded by either the “intractabil-

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9 Tribe takes this position. L. Tribe, supra note 8, at 78-79. See, e.g., Olsen, Comment: Unraveling Compromise, 103 Harv. L. Rev. 105 (1989), characterizing Roe as a “political, legal, and social compromise.” Id. at 107. Thus, Roe v. Wade was a compromise. The case legalized most abortions but it did not grant the plaintiffs everything they wanted . . . .

Id.

For a characterization of Roe, from the pro-life side, as something other than compromise, see J. Noonan, A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES 10-12 (1979) [hereinafter J. Noonan, A PRIVATE CHOICE]. As Noonan sums it up, Vis-a-vis the childbearing woman who wanted an abortion, the unborn child was valued by The Abortion Cases [Roe v. Wade and Doe v. Bolton] at zero before viability and as less than a whole human being after viability. Id. at 119. This is not to affirm Noonan’s characterization, but merely to suggest that the assertion of Roe v. Wade as “compromise” is substantially belied by both the substantive positions of its critics and the politics which followed the decision. For more on Noonan, who is a significant figure in the history we seek to relate, see infra text accompanying notes 294-327.

10 With respect to the issue of “compromise,” even Condit, in her otherwise excellent study, leaves her readers perplexed. Condit’s book is a sophisticated, and studiously unbiased historical account of abortion as situated in public discourse from 1960 to 1985. Her careful and critical depiction of the rhetorical moves utilized by both sides (described as the “heritage tale” of the illegal abortion for pro-choice, C. Condit, supra note 4, at 22-42, or the “Pro-Life Human History,” id. at 43-58) makes the book a rarity in an area usually characterized by the production of polemical excess, not by reflection upon its content. Yet Condit seems determined from the outset to have her story end with “legal and cultural consensus.” Id. at xii.

In her strongest statement on the issue, at the end of a chapter reviewing prime-time television coverage of abortion in the early 1980s, Condit announces that the “general acceptance of a compromise position on the abortion issue” serves to refute the “social pessimists,” like Alasdair MacIntyre, who see such issues as instances of moral “incommensurability.” Id. at 141. For a discussion of Alasdair MacIntyre, see supra note 1; infra text accompanying notes 189 & 770-71. Conceding that “rationally generated” compromise was not possible, Condit nevertheless claims that the ambivalence revealed in scenes such as a long dialogue between Cagney and Lacey reveals the existence of “pragmatic resolution” or “working compromise.” C. Condit, supra note 4, at 142, 126-33.

The assertion of compromise depends upon a number of problematic items of evidence: that, basically, Roe v. Wade was itself a compromise; that, even if not a compromise, it somehow authoritatively settled the abortion issue; and that the “public” in some sense agreed to live with it and settled down to proceed from there. Thus, Condit says that in Roe the Court “constructed a compromise,” id. at 112, yet on the same page she recognizes that the compromise was rooted in an “individualism” that “exacts a clear price” and that the rhetoric of “choice” itself leads to no-choice in the form of being held “economically responsible for all such choices.” Id.
Most people who write about this subject do so to serve and shore up agendas that are strongly pro-choice or strongly pro-life. That agenda is not always disclosed, especially by editors of

More significantly, she does not consider how Roe might be considered not a compromise at all, but a pro-choice victory. For one thing, her study discounts the importance of religion in this debate. She recognizes that "religion has been the underlying motivation and world view of most pro-Life activists," see id. at 215-16 n.1, but she cannot bring herself to take theological issues seriously as such. Her very statement of the "compromise" achieved by the 1980s belies its credibility or stability: "The compromise negotiated about abortion framed it as a woman's choice but also as an undesirable moral act. Abortion was to be legally permitted but not publicly financed. It was to be undertaken primarily in the first term of pregnancy." Id. at 199. [But see Roe??] Against that background, it should have been no surprise, as Condit points out, that activists on both sides became increasingly militant, self-righteous and unwilling to enter into dialogue with the other side, preferring the purity of their own posturing. Id. at 159-60, 164-66.

Ultimately, the compromise Condit insists upon depends on the precedential immortality of Roe. Although Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989), was decided after her book had gone to press, Condit does agree that Webster "substantially alters the consensus and conditions that obtained during the period examined by this book." C. Condit, supra note 4, at 198. Our own view is that neither consensus nor compromise was possible after Roe.

E.g., L. Tribe, supra note 8; see also R. Petchesy, ABORTION AND WOMEN'S CHOICE: THE STATE, SEXUALITY, AND REPRODUCTIVE FREEDOM (1984). According to Condit, "Petchesky appears to believe that any moral decision is merely an inappropriate ploy by men to control women." C. Condit, supra note 4, at 16 n.7.

E.g., J. Noonan, A PRIVATE choice, supra note 9. In his introduction, Noonan appeals to readers who are confused and concerned about this issue by promising to address those who, given the cultural reality of the United States at this time, "hold that abortion, like war, is a social necessity." Id. at 4. The remainder of the book, while containing some fair criticism, especially with respect to the jurisprudence of Roe v. Wade, is basically a relentless pro-life tract, often propagandistic in argument, which never addresses the particular concerns of those who are troubled about abortion yet regard it as a necessity in at least some cases. Compare these thoughts with those of James Gustafson, who may have been the source of the war analogy: "As the morally conscientious soldier fighting in a particular war is convinced that life can and ought to be taken 'justly,' but also 'mournfully,' so the moralist can be convinced that the life of the defenseless fetus can be taken, less justly, but more mournfully." Gustafson, A Protestant Ethical Approach, in THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES 122 (1970). Gustafson's treatment of abortion is contextual and particular, rather than abstract and categorical, with due respect for the life and death character of the issue. See infra text accompanying notes 603-14.

More difficult to situate is M.A. Glendon, ABORTION AND DIvORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES (1987) [hereinafter M.A. Glendon, ABORTION AND DIvORCE IN WESTERN LAW]. We disagree strongly with the hostile denunciation Glendon received in Cohen, Review Essay, Comparison-Shopping in the Marketplace of Rights, 93 YALE L.J. 1235 (1989) (reviewing M.A. Glendon, ABORTION AND DIvORCE IN WESTERN LAW, supra) which displays an unabashed hostility toward the pro-life position. Glendon does call for legislative compromise on the abortion issue, using the various European approaches to illustrate the possibility of compromise, and she correctly points out that the "rights" ap-
anthologies, many of which have an implicit tilt.\textsuperscript{13} We therefore feel obliged to disclose our own somewhat odd agenda and its relationship to this article. We undertook this project because, as Part I will discuss, we were struck by a set of unusual correspondences

\textsuperscript{13} E.g., \textit{The Ethics of Abortion} (R. Baird & S. Rosenbaum eds. 1989) (pro-choice tilt); \textit{Abortion: Moral and Legal Perspectives} (J. Garfield & P. Hennessey eds. 1984) (pro-choice tilt). Some are not at all subtle in their position. \textit{Compare Abortion and the Constitution: Reversing Roe v. Wade Through the Courts} (D. Horan, E. Grant & P. Cunningham eds. 1987) [hereinafter \textit{Abortion and the Constitution}] (explicitly pro-life) \textit{with The Problem of Abortion} (J. Feinberg 2d ed. 1973) (a balanced anthology, most of which was written before the decision in \textit{Roe v. Wade}).


Strikingly unique for this field is \textit{Abortion: Understanding Differences}, supra note 4, which offers a rare instance of actual dialogue between proponents of the two sides. All but one of the 12 contributors are women (the exception being Daniel Callahan), who not only present their views in essays but also, with few exceptions, comment directly on the views of other contributors. The overall result is a rich and thought-provoking dialogue, perhaps facilitated by the fact that the Callahans themselves, who are spouses, are on opposite sides of this issue (she is pro-life; he is pro-choice).
between the issue of animal rights and the issue of abortion. That connection became clear to us as we were teaching a course in environmental ethics, a course which inevitably raises questions central to the abortion debate—whether it is possible in our culture to deal publicly with hard moral issues, whether there is any available discourse for doing so.  

Our goal in this Article is not to advance one side or the other in the abortion debate, but rather to explore whether we are necessarily stuck with the grim and destructive fact of moral incommensurability. To do that we move back in time, to the period before

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14 In this regard, the role of explicitly theological or religious discourse in public debate becomes important. This Article may be regarded as a part of the larger ongoing discussion of that issue. For discussions advocating a place for religion in public political discourse, see K. GREENAWALT, RELIGIOUS CONVictions AND POLITICAL CHoICE (1988); M. PERRY, LOVE AND POWER (book forthcoming); M. PERRY, MORALITy, POLITICS & LAW 180-84 (1988); Gaffney, Politics Without Brackets on Religious Convictions: Michael Perry and Bruce Ackerman on Neutrality, 64 Tul. L. Rev. 1143 (1989); Perry, Comment on The Limits of Rationality and the Place of Religious Conviction: Protecting Animals and the Environment, 27 WM. & MARY L. Rev. 1067 (1986). For an excellent example of such discourse, see M. BALL, LYING DOWN TOGETHER: LAW, METAPHOR AND THEOLOGY (1985).


15 For a philosophical and historical reevaluation of what purports to be moral discourse in our culture, concluding with the reality of incommensurability, see A. MACINTYRE, supra note 1. For his specific application of the problem to abortion, see id. at 6-7. Our use of MacIntyre for our introductory quotation underscores our indebtedness to him. See supra text accompanying note 1.

Appreciating his critical insights, however, does not compel us to embrace either his solution, Aristotelianism, or his more recent work. We are thus content to follow him through the first eight chapters of After Virtue, without necessarily agreeing that the question he poses at the beginning of chapter 9, “Nietzsche or Aristotle?,” is the correct question at all. A. MACINTYRE, supra note 1, at 109. Our position may be similar to MacIntyre’s with respect to Nietzsche and Sartre, that they were “at their philosophically most powerful and cogent in the negative part of their critiques.” Id. at 22. On his more recent work, see Nussbaum, Recoiling from Reason, N.Y. Rev. Books, Dec. 7, 1989, at 36 (reviewing A. MACINTYRE, Whose Justice? Which Rationality? (1989)).

For an approach that parallels that of MacIntyre, see L. WEINREB, NATURAL LAW AND JUSTICE (1987). For Weinreb’s position on MacIntyre, see id. at 251-59. For some insightful
Roe, in an effort to recapture the context within which the moral/theological debate about abortion was unfolding. That examination leaves us with the conviction that it might have been otherwise—although we hasten to emphasize the "might." Despite a period of considerable confusion in American churches, especially including confusion about the role of women, serious theologians were, on ethical grounds, moving toward a position of some compromise on the sanctity of fetal life question. The effect of Roe's "rights" formulation of the issue was to render that process of moral dialogue abruptly irrelevant for law-making purposes. Whatever the advantages of Roe, chiefly in removing a divisive moral problem deeply affecting women's lives from the state (male-dominated) legislative process, there were also costs. People troubled by the moral/religious implications of abortion as an absolute right even throughout the second trimester (which at the time was not viewed as moral compromise) became hardened absolutists in their opposition to all abortion—compromise became more, not less, unthinkable. Moreover, so long as Roe seemed securely in place, that absolutism too easily took on the character of moral "high-ground," at no political cost. Undeniably, that phenomenon helped mobilize religious support for Reagan and the "new right" generally.

The pro-choice side, meanwhile, could too easily employ a close-out "rights" and "choice" rhetoric in an aggressive refusal to engage in moral discourse altogether. When compromise did inevitably come, it was not a compromise hammered out through moral dialogue, but rather a compromise achieved at the expense of the most vulnerable—in the cases upholding legislative denial of public funding.16 Ironically, those cases drew on the rhetoric of "private choice" which undergirds Roe. We suspect, too, that in the absence of moral consensus on the basic "life" issue, the process of


achieving easy political compromise by victimizing the most vulnerable women will continue—as may be the case with parental consent requirements.\footnote{17 See Halpern, The Fight Over Teen-Age Abortion, N.Y. REV. BOOKS, March 29, 1990, at 30.}

At this point, we digress, as has been customary among some people writing about this issue,\footnote{18 See also Colker, An Equal Protection Analysis of United States Family Planning Policy: Gender, Race, Age, and Class (1990) (unpublished manuscript on file with author).} to offer an account of our own experiential relationship to the abortion issue, supplying some perhaps relevant autobiographical data in the process. The history is one of almost perfect irresponsibility, of the kind that absolutely precludes self-righteousness.

One of us (Betty) has had three abortions: one illegal, as a scared teenager; a second when she was the single parent of two small children; and a third, after we were married to each other, out of (probably exaggerated) fear of abnormality due to a prescription drug taken before the pregnancy was suspected.

The same one of us has four children (outrageous, from an environmental perspective) aged twenty-one, twenty, eight and five. For the last two an amniocentesis was performed, and the results indicated no problem; we have never had to consider a late

\footnote{These laws do not propose to outlaw abortion (and so lack the moral authority of those that do). Instead they propose to throw a few obstacles in the path of those who are already limping along—the girls who cannot talk to their parents, the girls without the money to travel to states without restrictions, the girls from broken homes.\footnote{Id. at 31. See also Colker, An Equal Protection Analysis of United States Family Planning Policy: Gender, Race, Age, and Class (1990) (unpublished manuscript on file with author).}}
abortion.

The other of us (Alan) has borne witness to three abortions with respect to which he was the responsible other in the pregnancy: one was illegal, and both mother and father were teenagers; a second, which he reluctantly served as bystander to, probably contributed to the breakup of his first marriage; and the third, described above.

We have both been identified with the left/liberal side of law and politics, a setting in which unquestioning adherence to the pro-choice position has seemed obligatory; for that reason we have gone out of our way to understand and relate the pro-life side of this debate. We are, perhaps, in some as yet undefined sense, gropingly religious people, but we are neither Catholic nor fundamentalist, nor do we believe that any single religious creed offers a categorical “answer” to the abortion dilemma.

Since we are investigating the possibility of genuine public moral debate on this issue, we refuse to regard either the pro-choice or pro-life position as categorically correct. With respect to the former, we do not accept that the only correct “feminist” position is unwavering support for Roe v. Wade. For one thing, there are many women, some of whom see themselves as feminists, who are nevertheless on the pro-life side. Moreover, in saying that there is a debatable moral issue with respect to abortion, we are acknowledging that there is an issue about fetal life that cannot be dis-

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19 See, e.g., Cahill, Abortion, Autonomy, and Community, in Abortion: Understanding Differences, supra note 4, at 261-276; S. Callahan, Value Choices in Abortion, in id. at 285-301; Elshtain, Reflections on Abortion, Values, and the Family, in id. at 47-72; Mehan, More Trouble Than They're Worth?: Children and Abortion, in id. at 145-70. See generally Abortion and the Law: Perspectives on a Painful Dilemma, Sojourners, Nov. 1989, at 14-22.

For recognition that one might in good faith as a feminist support a pro-life position, see K. McDonnell, Not An Easy Choice: A Feminist Re-Examines Abortion (1984); Colker, Feminist Litigation: An Oxymoron? A Study of the Briefs Filed in William L. Webster v. Reproductive Health Services, 13 Harv. Women's L.J. 137, 161-164 (1990); Putnam, Being Ambivalent About Abortion, Tikkun, Sept./Oct. 1989, at 81-82. Thus, we cannot accept the charge that “pro-life feminism, as currently formulated, is a contradiction in terms,” as expressed by Kathy Pollitt in her hostile review of F. Ginsburg, Contested Lives, supra note 13. See Pollitt, Everything’s Up to Date in North Dakota, Tikkun, Jan./Feb. 1990, at 57-60; see also M.A. Glendon, supra note 12, at 50-58 (abortion as a woman’s issue); Rosenblum & Marzen, Strategies for Reversing Roe v. Wade Through the Courts, in Abortion and the Constitution, supra note 13, at 195, 205-06.
missed by simply invoking "reproductive freedom." Women, even more than men, do take seriously moral and theological issues that are not fully entailed by a rigid categorical feminism: three-fourths of American women report that they consider religious faith the most important influence on their life. Even apart from moral/theological issues, the particular rhetoric of "privacy" and "choice" may represent an effort to universalize a particular and class-based instance of feminism.


We of course recognize that regulatory abortion laws speak directly to the lives of women, as they do not to men, and that one should at least be wary of moral pronouncements largely developed by male theologians when only women are the recipients of their instruction. Thus, in an important sense abortion is properly regarded as a woman's issue. Nevertheless, we cannot accept that those perceptions lead necessarily to the successful deployment of "reproductive freedom" as a close-out argument that renders abortions, at least within the Roe v. Wade scheme, immunized from any meaningful public moral debate. As mothers know (and the one of us with that capability has had four full-term pregnancies) from experience, there is a time when the experience of "being pregnant" becomes the experience of nurturing and protecting a little life. The point is not to suggest that we recriminalize abortions, but to appreciate that there is more to the pro-life position than can be flicked away with words like "freedom" or "choice." See C. CONDR, supra note 4, at 74 n.5. Condit also notes that the "reproductive freedom" claim belongs more to the world of academic feminists and activists, than to the stories and lives of "ordinary" women.

And at some point the claim of "freedom" collapses back into the rhetoric of "choice." See L. FRIEDMAN, THE REPUBLIC OF CHOICE 182-85 (1990). Friedman's book is simultaneously an historical sociology and celebration of "choice" as the dominant cultural motif for our contemporary notion of "freedom." Yet his discussion of abortion, the issue that surely tests the dominance of "choice," ends in nothing but the conflict, confusion and incommensurability we have described earlier, casting some doubt on Friedman's entire thesis.

R. WUTNOW, THE RESTRUCTURING OF AMERICAN RELIGION: SOCIETY AND FAITH SINCE WORLD WAR II 226 (1988). The gap between female and male membership in churches is lessening. In 1985, 73% of women and 63% of men were church members. Id. at 226 n.15. Notably, however, a gender gap persists even when young women with college educations and full-time jobs are compared with male counterparts. "Rather than being simply a peripheral issue that can be relegated to the dark corners of the past, religion remains a vital aspect of the public and private lives of the vast majority of American women." Id. at 226.

Moreover, a growing literature is questioning, on both epistemological and moral/political grounds, the more extreme versions of feminist "essentialism," which universalize the experience of all women as against that of all men, often reducing all social/cultural issues to ones of gender at the same time. Thus, a number of authors have suggested that claims made on behalf of all women may reflect little more than the experience and privilege of...
With respect to the pro-life side, we reject the persuasive power of the theological close-out. If theological discourse has a place in public moral debate (which we see as still an open question) it cannot be of the variety of “It’s my religion, so shut up and don’t question me about it.” That position, too, is no more than a renewed invitation to the barricaded scene of the protest. If theological argument is to play a valuable role in public debate, it must appeal not to privileged sectarian authority but to some version of the common good, as Catholic tradition has in fact recognized. Moreover, even while seeking to be universal rather than sectarian, it must do so in the face of a pluralist reality that may render universalism impossible, a problem that lies at the heart of the church/state dilemma.

We are of course far from being able to have public discussions about the common good. Consensus is no substitute for substantive moral dialogue, for when consensus breaks down we have nothing to appeal to but rampant and incommensurable subjectivity. Such is the case with abortion. The alchemical fantasy of liberalism—that process can turn itself into substance—is belied by the reality of conflict. The larger question is whether we can recover any sort of meaningful moral vocabulary. Thus the issue of abortion quickly becomes one of substantive morality in post-En-

white middle-class professional women. See, e.g., E. Spellman, Inessential Woman: Problems of Exclusion in Feminist Thought (1988); Harris, Race and Essentialism in Feminist Theory, 42 Stan. L. Rev. 681 (1990); Kline, Race, Racism and Feminist Legal Theory, 12 Harv. Woman's L.J. 115 (1989); see also Geertz, A Lab of One's Own, N.Y. Rev. of Books, Nov. 8, 1990, at 19 (questioning the existence of “feminist” science). To allow women their particularity would welcome the richness and difference of their experiences, including religious and cultural differences, which is a strength of F. Ginsburg, Contested Lives, supra note 13.

The usual left response that the women on the wrong side (pro-life) must be victims of “ideology” or “false consciousness” seems increasingly facile and outmoded. Cf. C. Geertz, Ideology as a Cultural System, in The Interpretation of Cultures 193-233 (paperback ed. 1973).

We do not intend to suggest that this is a simple dichotomy. Starkly sectarian views may well play a valuable role in public moral dialogue. The bottom line is a willingness to engage in such dialogue. For an excellent introduction to these issues, see Panel Discussion with Richard Neuhaus, Robert Cover, Lisa Cahill, reprinted in Theological Perspectives, 5 J.L. & Religion 95-108. For more discussion of these issues, see infra text accompanying notes 652-80.

lightenment Western Culture: is there any substantive space between the incoherence of Kantian formalism and the grim reality of Nietzschean nihilism? Can a revival of theological traditions, which after all serve to mediate our relationship with death itself, and are at once seemingly moribund and surprisingly vital, serve such an enterprise?

Since much of the pro-life side of the abortion debate is couched in theological terms, we decided to try hard to understand abortion as a theological issue, principally a Christian one (given the pub-

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25 As noted above, Alasdair MacIntyre perceives the same problem with his version of Aristotelianism as the only solution. See A. MacIntyre, supra note 1.


27 Thus we will give scant attention to the Jewish theological position on abortion. For the most part, Jewish teaching on abortion is rooted in the particularistic and technical realm of halakah (Jewish law). And from that realm comes a variety of positions on the issue, ranging from a traditional opposition to all but a narrow category of therapeutic abortions to a liberal pro-choice position supported by Reform Jewish theologians. The most thorough review of this issue that we have found concludes that Jewish law prohibits abortion “for less than a serious reason” and mandates “a solemn awareness of the potential life involved.” For the author, serious reasons include pain to the mother, but not “ordinary pain,” and certainly not “economic or social inconvenience.” D. Feldman, Birth Control in Jewish Law 251-94 (1968). For other examples of the restrictive view, see Jakobovits, Jewish Views on Abortion, in Abortion and the Law 124-43 (D. Smith ed. 1987); Resher, The Jewish Attitude Toward Abortion, in Contemporary Jewish Ethics 257-69 (M. Kelner ed. 1978); Klein, Abortion and Jewish Tradition, in Contemporary Jewish Ethics, supra, at 270-78. For liberal Jewish positions, see Brickner, Judaism and Abortion, in Contemporary Jewish Ethics, supra, at 279-83; Margolies, A Reform Rabbi’s View, in Abortion in a Changing World 30-33 (1970) (to be discussed further at infra text accompanying note 686). For the view that Jewish law “presents a number of central opinions that, when carried to their logical conclusions, lead to a range of possible rulings on abortion in Jewish Law,” see Biale, Abortion in Jewish Law, Tikkun, July/August 1989, at 26.

Moreover, in our experience (largely in the academic world), ethnic Jews have preferred and even insisted on the propriety of secular, not theological, moral discourse: “American Jews, especially the liberal-to-moderate majority, have long held that integration would be fostered by advancing the tolerant pluralism of middle-class liberalism and adopting a universalistic ethic, allowing them at least nominal continued identification as Jews.” W. Roof & W. McKinney, supra note 26, at 225. On the outsider-as-insider motif in American Jewish experience, focusing on the particular case of Felix Frankfurter, see R. Burt, Two Jewish Justices: Outcasts in the Promised Land 37-61 (1988).
lic rhetoric). We also sought to situate the particular abortion issue in the larger setting of the substantive and institutional role of theology in fashioning or influencing American public morality, especially in the period since World War II. We have made every effort to comprehend these theological issues in their own terms; the result is a discourse that may well be alien and forbidding to many law review readers, if not threatening and anxiety-inducing. We hope you will bear with us in the service of replacing stark incommensurability with something closer to mutually respectful dialogue.

Part I of this Article offers a comparative perspective on animals and abortion, leading up to the confrontation of both with nature and Nazis. Part II picks up with the Nazis as representing the ultimate challenge to the presumption of Western morality. The remainder of Part II describes two important moral traditions that were concerned with their relationship to the potential or actual


Finally, we are well aware of and applaud the efforts of Ruth Colker. See Colker, Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom, 77 CALIF. L. REV. 1011 (1989). Colker placed the abortion issue in a generalized theological setting, with its sources, for her, in selected Buddhist and Catholic writings, along with one Jewish source, Martin Buber. Id. at 1011 n.2. Our own effort, which to some extent parallels Colker's, is to recover a more historically specific theological debate within explicitly Christian tradition, given both the overwhelming presence of Christianity in American culture and the particular Christian character inherent in much of the pro-life position.
THE POLITICS OF VIRTUE

threat of Nazism. The first of these is the natural law tradition, associated primarily with Catholicism, that saw a period of vigorous revival in the post-World War II American legal culture (especially in a journal called the *Natural Law Forum*, which will be referred to interchangeably as the *Forum* or the *Natural Law Forum*). The second is the tradition of Protestant neo-orthodoxy. Influential in the 1950s and 1960s, even in some secular intellectual circles, that tradition is associated particularly with Karl Barth and Dietrich Bonhoeffer, who were expelled and executed, respectively, by the Nazis, for espousing a theology that formed the only institutional religious challenge to the Nazis in Germany. Part II closes with a look at the emergence of the abortion issue in particular, through the lens of natural law, as it was presented in the *Forum*.

Part III surveys the institutional setting of religion and morality in 1960s America, describing the relationship between the rise of conservative Protestant evangelicalism, an important source of pro-life support, and the decline of mainline Protestantism, which had played an important moral/institutional role in American tradition. Part III also investigates the “secularization” of American religion, reaching its heyday in the 1960s with the “liberal” Catholicism that followed Vatican II and the Kennedy Era, and an increasingly “liberal” Protestantism, reaching its most extreme versions in “situation ethics” and “God is Dead” theology.

Part IV focuses on a pair of conferences in 1967 and 1968 dealing with the public debate about abortion by examining the publications they produced. Through a comparison of these materials, we will show how an almost entirely secular version of the abortion debate triumphed, leading to the constitutionalization of abortion rights under the rubric of privacy. Lost in the process was the continuing possibility of a genuine and ongoing moral debate about abortion.

I. LIFE AND DEATH/NATURE AND NAZIS

A. Animals and People

In the past few months (Fall/Winter 1990-91), a spate of media attention has focused on the problem of “political correctness” on
campus. Of particular concern has been the seeming expectation, fostered by both faculty and students at some of the nation's most elite liberal arts schools, that students must follow a left/liberal "party line" on a number of controversial issues to avoid ostracism, humiliation or even reprisal, academic or otherwise. More striking than the mere existence of this phenomenon is its substantive content: we are told that to be "politically correct," one must be militantly pro-choice on the abortion issue (Catholics, other than lapsed ones, are regarded as politically "incorrect" almost by definition), yet display an equal fervor in favor of environmentalism and animal rights (including, we assume, things such as opposition to animal experimentation, factory farming, hunting and wearing of fur).

As teachers of environmental ethics (including issues of animal rights and welfare), we are perplexed by this juxtaposition, for, despite disavowals from both sides, animal rights supporters have more in common with their pro-life counterparts than with those who are pro-choice on abortion. While some of these commonalities, particularly at the superficial level of rhetoric and style, are unappealing, others, more substantive, prove compelling. In fact, those who advocate respect and reverence for life, animal or fetal, may share, more than they realize, a moral and theological common ground.

Negatively, a singular and selective fanaticism characterizes some of the activists on behalf of both issues. Many animal rights activists, for example, are "one-issue" people: middle-class white women who deviate from class interest only for the sake of ani-

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28 See, e.g., Adler, Taking Offense, Newsweek, Dec. 24, 1990, at 48. For a serious reflection on the curricular implications of this issue, see Searle, The Storm Over the University, N.Y. Rev. Books, Dec. 6, 1990, at 34-42. However caricatured its media depiction, we are persuaded by our own anecdotal evidence that there is in fact a problem of "political correctness" on college campuses. Moreover, it is a phenomenon not unrelated to the ascendancy of an elite, secular world view that came to dominate acceptable public moral discourse for a time and figured so significantly with respect to the abortion issue. See infra text accompanying notes 574-93 & 680-89.


A notable exception to the whiteness of the movement is novelist Alice Walker. See, e.g., Walker, Am I Blue? "Ain't Those Tears in Those Eyes Tellin You?", MS., July 1986, at 29
mals. The combination of fervent concern for the suffering of helpless animals with an apparent indifference to the suffering of, for example, people with serious illnesses who might be helped by animal experimentation, undercuts the moral persuasiveness of their position. One is reminded of Gordon Gekko's quip in the movie, *Wall Street,* that "the thing about WASPs is that they love animals, but they hate people."\(^\text{30}\)

To the extent that the right-to-life movement has been infiltrated or appropriated or exploited by those whose arch-conservatism translates into unwillingness to spend public funds to relieve human suffering, one is similarly taken aback. One finds it hard to swallow the admonitions of such writers as Patrick Buchanan when he tells us in his syndicated column that

\[
\text{[a]bortion is not about money, where compromise is possible. It is about right and wrong, about who we are. It is a moral issue[;]}
\]

or that

\[
\text{[a]bortion on demand is the great evil of our time, the ultimate act of selfishness and cruelty, the defining statement of the Me Generation in the Now Decade.}^{31}\]

The problem lies not in singleness of purpose, for any seriously committed activist must focus energies, nor does it lie in the content of statements such as Buchanan's, which are certainly within the bounds of robust public debate on a difficult moral issue. Instead, the contradiction arises when pious advocates of "life," like Buchanan and the Bush administration, oppose even minimally benevolent social measures. How can one credibly be for "life" yet oppose programs designed to help children in poverty?\(^\text{32}\)

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(discussing the feelings animals have toward humans).

The animal rights movement is also one of the largest instances of mass political energy in our culture. *Newsweek* reported in May 1988 that "Congress had received more mail on the subject of animal research than any other topic." Adler, *Emptying the Cages: Does the Animal Kingdom Need a Bill of Rights?, Newsweek,* May 23, 1988, at 59.

\(^{30}\) (Twentieth Century Fox 1987).

\(^{31}\) Buchanan, *No Time for GOP to Cower on Abortion* (October 1989 syndicated column distributed by Tribune Media Services on file with authors).

\(^{32}\) As just one example, a panel of Bush administration officials, who studied the problem of infant mortality, concluded that delivery of routine clinical care and social services to pregnant women could substantially reduce high infant mortality rates without even tam-
Fanatic singularity of purpose becomes more explicable when one turns to the imagery frequently employed to promote the pro-life and animal rights movements. Animal rights groups graphically depict the plight of helpless, innocent creatures who are tortured or killed solely for the sake of commercial gain and human self-indulgence. Pictures show rabbits being painfully blinded by the Draize test, a grotesque procedure once routinely used by cosmetic companies, and an "easy case" compared with the ethically more complex issue of medical research. The analogous visual portrayal of fetuses has been one of the most recurring rhetorical ploys of the pro-Life movement. The power of these images is undeniable. Indeed, any graphic depiction of an innocent sacrificial victim appeals to Christian themes deeply embedded in our culture.

To universalize both issues as fully encapsulated by the image of the sacrificial slaughter of innocents is ultimately too facile. It is easy to take the side of life as against the side of death, especially when death claims for its own the helpless and the innocent. Yet by graphically isolating these issues in their purity and simplicity, advocates avoid the ethically troubling fact of human responsibility for both life and death. One suspects that the real opponent is death itself—as if by building a wall of absolute protection around fetal or animal life, one could pretend away the reality that the life periling with income distribution, reducing poverty levels or spending billions of dollars. Yet even that measured proposal, which could prevent one-quarter to one-third of infant mortality, remains in limbo within the administration, which has no intention of even disseminating its own findings. See N.Y. Times, Aug. 12, 1990, § 4, at 5, col. 1.

For the close link between opposition to abortion and opposition to government spending on social programs generally, see R. Wuthnow, supra note 21, at 223. As a more positive approach, pro-Life groups have established homes that provide help for women during pregnancy and provide day care and other services for unwed mothers. See N.Y. Times, May 13, 1990, at 1, col. 2.

33 For some graphic examples, see the most recent issue of The Animals' Voice, Dec. 1990, at 7, a slick and elegantly produced magazine intended "to reach mainstream audiences with our message of animal rights." The cover depicts an apparently still-alive monkey staring helplessly at us with a metal hoop circling its skull through which, at frequent intervals, screws have been driven directly into the monkey's flesh. Inside, with appropriate warnings in advance, are similarly gruesome pictures. See id. at 10-15, 33-47. P. Singer, Animal Liberation 140 (paperback ed. 1975) (photo insert) makes use of similar photos to support his philosophical argument.

34 See C. Condit, supra note 4, at 79-92.

35 The appeal is made explicit by pro-life depiction of infant dolls on crosses, as used in demonstrations. See R. Wuthnow, supra note 21, at 213.
of some will inevitably carry with it the death of others, that “choice” over questions of life and death is part of the human condition.

Graphic images of helpless victims, nevertheless, do serve as an effective antidote to a similar ploy of death avoidance by the other side on both issues. Pictures remind us that a forlorn dog in the testing laboratory does not become a “thing” merely by being called the “subject of the test” or assigned a number rather than a name. So too we are properly reminded by pro-life graphics that a fetus or embryo is in fact a developing child. We do violence to that reality (however complex its ethical implications) by denial through objectifying labels like “mere tissue” or “products of conception.” Some will insist that the images appeal to “irrational” fears and anxieties; yet even philosophers concede that there is no meaningful line between “emotional” and “logical” arguments on moral issues such as these.36

Both movements further amplify the rhetorical power of their visual imagery by deploying what has become the moral close-out in twentieth-century political discourse—the identification of oppressors with Nazis and concomitant association of victims with the Holocaust: “[T]oday’s medical abortionists are doing the same thing to the unwanted unborn as the Nazis did to their victims . . . .”37 Animal rights guru Peter Singer has analogized animal experimentation to the grotesque practices in Nazi concentration camps.38 Similarly, both movements try to analogize themselves to

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36 See, e.g., M. MIDGLEY, ANIMALS AND WHY THEY MATTER 33-44 (1983) (examining emotions toward animals and seeking to justify those emotions); R. RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 188-92 (paperback ed. 1979). Rosalind Hursthouse illustrates the gap between analytic philosophy and “ordinary morality” with her apt example “We can’t take Laura on holiday, why don’t we drown her,” to which the ordinary morality response would be “But that would be killing a baby!” The context is her review of two philosophical traditions, one of which would regard as irrelevant the fact of “killing,” while the other would regard as equally irrelevant that the victim is a baby. See R. Hursthouse, supra note 13, at 179-80.


38 P. SINGER, supra note 33.

Under the Nazi regime in Germany, nearly 200 doctors, some of them eminent in the world of medicine, took part in experiments on Jews and Russian and Polish prisoners. Thousands of other physicians knew of these experiments, some of which were the subject of lectures at medical academies. Yet the records show that the doctors sat through medical reports of the infliction of horrible injuries on these “lesser races” and then proceeded to discuss the
abolitionism and other movements of human liberation. Hence "specism" is likened to racism and sexism, and Roe v. Wade to Dred Scott v. Sandford. By raising these specters, whether fairly or unfairly, advocates force us to confront again their moral implications. How do we recognize our responsibility for making decisions about the lives and deaths of others without becoming the moral equivalent of Nazis or slaveowners? From whence do we derive limits to our power to choose the death of others?

At the level of substantive moral argument, both pro-life and animal rights positions are characterized by their appeal to a priori, absolutist categories as constituting the necessary limit to our power over others. As applied, however, the categories invoked by each have troubling implications for the other. Two leading animals rights theorists, Tom Regan and Peter Singer, have taken positions consistent with permitting not only late abortions but also infanticide. For Regan, a neo-Kantian, moral rights attach to any being who fits the category "subject-of-a-life," which in turn de-

medical lessons to be learned from them without anyone making even a mild protest about the nature of the experiments. The parallels between this attitude and that of experimenters today toward animals are striking. Id. at 76-77. See also Francione, "Harassment" and "Terrorism," THE ANIMALS' VOICE, Oct. 1990, at 53. "[T]hose who have a reverence for all life may legitimately regard as the real 'terrorists' those who kill, torture, and maim, nonhumans for commercial gain." Id.

One particularly telling incident occurred when we sponsored, for our seminar, a showing of the Fredrick Wiseman movie, Meat, which is a lengthy, matter-of-fact documentary about precise activities in a modern slaughterhouse. A militant animals rights activist of our acquaintance, whom we had invited, watched the slaughterhouse workers on screen for a while, then stood up and angrily left, proclaiming, "Those people are just like Nazis; they should be killed."


40 E.g., J. NOONAN, A PRIVATE CHOICE, supra note 9, at 81-84. President Ronald Reagan told us that "this is not the first time our country has been divided by a Supreme Court decision that denied the value of human lives. The Dred Scott decision of 1857 [Dred Scott v. Sandford, 19 U.S. (1 How.) 393 (1857)] was not overturned in a day, or a year, or even a decade." R. REAGAN, ABORTION AND THE CONSCIENCE OF THE NATION 19 (1984) quoted in C. CONDIT, supra note 4, at 50. For other examples, see ABORTION AND THE CONSTITUTION, supra note 13, at 15, 17, 57, 92-93.

The December 1990 issue of The Animals' Voice contains a full-page advertisement for itself and its related foundation, The Compassion for Animals Foundation, which explicitly invokes the tradition of militant abolitionist William Lloyd Garrison, to the point of quoting his famous proclamation in the first issue of The Liberator, "I will not equivocate, I will not excuse, I will not retreat a single inch. And I will be heard." THE ANIMAL'S VOICE, at facing-page 49 (pull-out insert).
pends upon whether it has "beliefs, desires, and the like." While many (but not all) adult animals are included in the category, he regards inclusion of "newly born or the soon-to-be-born" humans as "an open and much debated question." Singer has gone even further. With his utilitarian emphasis on "capacity to suffer" as defining the primary relevant category, he has argued for the moral legitimacy and logical consistency of both abortion and infanticide. Utterly predictable is the outraged reaction of pro-lifers to those who advocate respect for animal life but would deny protection to fetal and infant life. A leading pro-life philosopher, John Finnis, observes that "[t]he animal rights publicists, who are generally the same people who defend abortion and infanticide, are denying humane quality when they accuse 'prolifers' of 'speciesism.' They are laying foundations of a new range of discrimination and denial of rights more devastating than racism."42

41 T. Regan, supra note 39, at 319.
42 Id.
43 See P. Singer, Practical Ethics 122-26 (1979), prompting Rosalind Hursthouse to ask: "Would not one expect someone arguing against the way we slaughter animals to be rather 'pro-life' in general, and hence against abortion and infanticide?" R. Hursthouse, supra note 13, at 155-56. She goes on to criticize Singer's utilitarianism for both its inconsistency and its failure to give even adequate protection to animals. Id. at 155-58. For a utilitarian who takes both issues seriously and who is committed to consistency, see L Summer, supra note 13. For his specific views on animals, see id. at 139-40, 198-200.

On the other hand, conceding the difficulty of positing absolutist, universally valid ethical norms may compel hesitation even with respect to practices like infanticide, which seem so morally repugnant to most of us. Consider two culture-specific examples:

Anthropologist Nancy Scheper-Hughes observed the practice of "selective neglect" (or "passive infanticide"), whereby mothers in poverty-stricken Northeastern Brazil, with a great deal of stoicism and equanimity, decide whether particular infants are "thirvers and survivors" or "born already 'wanting to die.'" Scheper-Hughes, Death Without Weeping: Has Poverty Ravaged Mother Love in the Shantytowns of Brazil?, NATURAL HISTORY, Oct. 1989 at 8, 10. The mothers nurture those perceived as survivors, while "stigmatized, doomed infants were left to die, as mothers say, a mingua, 'of neglect.'" Id. The local Catholic churches have been at odds with themselves over the practice. The traditional approach was "patience and resignation" in the face of domestic tragedy, with elaborate funerals for the deceased infants. Id. at 16. Newer, "liberation theology" priests, however, find themselves opposed to condoning in any way the cultural accommodation of infanticide. Id.

Families on the verge of starvation among the Inuit people of the Far North would also sometimes place newborn infants in the snow to die. Yet, according to legend, this could be done only before the child had been named, for, if named, the child would acquire a soul, and, if killed, become an angikak, a "child of the living dead," who, even as its flesh decayed, would live on as a spirit, seeking revenge. For a vivid mythological account, see Furies of the Far North, in TALES OF TERROR 70, 74-76 (TIME-LIFE ENCHANTED WORLD SERIES, 1987).

44 Finnis, Natural Law and the Rights of the Unborn, in ABORTION AND THE CONSTITU-
In contrast, pro-life advocates support their position by reliance on the single category "person," with rights, security and protection attaching by virtue of membership in that category. This approach draws on a basically theological tradition associated with Aquinas, Descartes and even Kant, all of whom categorically distinguished (rational) humans from (irrational) animals, largely on the basis that only the former have souls.\textsuperscript{46} Novelist Milan Kundera sums up our Cartesian heritage in this respect:

Man is master and proprietor, says Descartes, whereas the beast is merely an automaton, an animate machine, a \textit{machina animata}. When an animal laments, it is not a lament; it is merely the rasp of a poorly functioning mechanism.\textsuperscript{46}

John Finnis, as a natural law theorist, insists on preserving precisely that rigid human/animal dichotomy:

\textit{[T]he injunction "Treat like cases alike" must be taken in a more than merely formal sense; it must, for example, implicitly treat all human beings as alike in their humanity and in their basic entitlement to be treated differently from animals . . . . Those who propose that animals have rights have a deficient appreciation of the basic forms of human good . . . . The basic human goods are not abstract}

\textsuperscript{46} For a good summary, see J. Serpell, \textit{In the Company of Animals: A Study of Human-Animal Relationships} 122-30 (1986). For a sampling of these views, as well as some of their critics, see \textit{Animal Rights and Human Obligations} 51-169 (T. Regan & P. Singer eds. 1976) [hereinafter \textit{Animal Rights and Human Obligations}]. On Kant's position with respect to animals, which denied them the status of "moral agent," but imposed duties of kindness toward them so as not to stifle human feelings toward one another, see \textit{id.} at 122-23; see also R. Hursthouse, \textit{supra} note 13, at 94-96 (describing the extension of Kant's "person" to non-human beings and how this would change the way humans treat non-human "persons"); T. Regan, \textit{supra} note 39, at 84-85 (determining the Kantian sense of autonomy does not apply to animals while the preferential sense of autonomy does); L. Sumner, \textit{supra} note 13, at 140 (examining Kant's position and A. Meldon, \textit{Rights and Persons} 204 (1977), where Meldon writes that, because only humans are capable of moral agency, these natural rights belong to humans).

forms, such as "life" or "conscious life": they are good as aspects of the flourishing of a person. And if the proponents of animal rights point to very young babies, or very old and decayed or mentally defective persons (or to some asleep?), and ask how their state differs empirically from that of a flourishing, friendly, and clever dog, and demand to know why the former are accorded the respect due to rights-holders while the latter is not, we must reply that respect for human good reasonably extends as far as human being, and is not to be extinguished by the circumstance that the incidents or "accidents" of affairs have deprived a particular human being of the opportunity of a full flourishing.47

The tradition of categorical, hierarchical human self-importance, with its concomitant domination of nature, led historian Lynn White in 1968 to blame the entire Judeo-Christian tradition for our modern ecological crisis insofar as that tradition celebrates and validates the instrumental exploitation of nature in the service of human need.48 Thus it would seem, at least on the surface, that the very same Judeo-Christian religious tradition invoked by pro-life advocates to oppose abortion serves equally well to rationalize our indifference to the plight of non-human animals.

Nevertheless, many modern scholars are recognizing that Lynn White overstated the negative case and that the rigid dualism mandated by Descartes and echoed by Finnis is not all that our theological traditions have to offer. The upshot is that animals and abortion raise similar moral dilemmas, and that both might be better served by recognizing overlapping concerns.

For one thing, emotional responses play a key role in both issues. Although both sides of both issues would have us resolve everything by reference to neat categories ("sentience," "capacity to suffer," "personhood," "viability") that lead to "in" or "out" conclusions, the experiential reality seems more to be one of degree, of varying levels of affinity rather than clear lines of demarcation. We


48 White, The Historical Roots of Our Ecological Crisis, in Machina ex Deo: Essays in the Dynamism of Western Culture 75 (1968).
respond differently to the suffering of puppies or kittens than we do to that of baby snakes or insects. Similarly, photos of nineteen-week fetuses are more compelling than those taken at eight weeks, which are in turn more compelling than those of two-week embryos. Most of us would save our children from fire before saving our dogs, and might save our children before those of strangers, or care more about our immediate neighbors than those at some distance. As philosopher Richard Rorty puts it, with specific emphasis on the animals issue, the facts needed to make such difficult moral judgments are "not discoverable independently of sentiment." And it may be that issues requiring the guidance of sentiment are better understood as theological ones.

What, then, of our theological traditions? Is there really such a divergence with respect to animals and abortion? For one thing, the unchecked domination of nature denounced by Lynn White may be more the result of secular, Enlightenment descendants of Christianity than of a more constrained religious tradition. Religious tradition, while validating human freedom with respect to nature, also imposed responsibilities that limited that freedom.

The same Jewish tradition that makes abortion a matter of grave concern imposes a strict ethic of stewardship with respect to animals. While the notion of "dominion" ("Let him [Adam] have dominion over the fish of the sea, and over the fowl of the air,

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49 R. RORTY, supra note 36, at 191. Rorty is talking about the problem of constituting a moral "community," to which our moral prohibitions will extend, a crucial issue with respect to both animals and fetuses. He concludes that it is "notorious that moral philosophers are of little help in deciding what is to count as a moral agent, as having dignity rather than value." Id. He concludes:

The emotions we have toward borderline cases depend on the liveliness of our imagination, and conversely. Only the notion that in philosophy we have a discipline able to give good reasons for what we believe on instinct lets us think that "more careful philosophical analysis" will help us draw a line between coldness of heart and foolish sentimentality.

Id. See also, M. MIDGLEY, supra note 36, at 28-32 (discussing membership/community issue and focusing on its complexity); L. WEINEB, supra note 15, at 301 n.26 (examining whether animals "count as significant others").

So concludes Kent Greenawalt, with respect to both animals and abortion. See K. GREENAWALT, supra note 14, at 98-110 (animals), 120-37 (abortion). For a similar conclusion with respect to animals, see Freeman & Mensch, supra note 46.


See supra note 27.

See generally E. SCHOCHET, ANIMAL LIFE IN JEWISH TRADITION: ATTITUDES AND RELATIONSHIPS (1984). We recommend especially his "Biblical Portrait." Id. at 9-79.
and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth."

54 served to separate Judaism from more totemistic religions which deified or mythologized animals, that did not render the world a mere instrumentality for the satisfaction of every human whim. Ancient Jews included in their notion of dominion a clear obligation of respect and care, growing from the recognition that the world had been lovingly created by God. 55


55 A number of injunctions laid down in the Torah speak specifically to the decent treatment of animals. The obligation to rest upon the Sabbath includes the obligation to provide a day of rest for all domestic animals and beasts of burden. Deuteronomy 5:14. The muzzling of an ox, while he treads grain upon the threshing floor, is forbidden, for the animal is entitled to enjoy food, as is any human laborer. Deuteronomy 25:3; 23:25-26. An animal fallen beneath the weight of its burden must be assisted to rise, even if it is the beast of one's enemy. Deuteronomy 22:4; Exodus 23:4-5.

Beyond enunciating specific prohibitions, scripture also expresses the deep kinship of people and animals, who share a common mortality. "For that which befalleth the sons of men befalleth beasts; even one thing befalleth them: as the one dieth, so dieth the other; yea, they have all one breath; so that man hath no preeminence above a beast; for all is vanity. All go unto one place; all are of the dust, and all turn to the dust again." Ecclesiastes 3:19-21. Whatever words scripture uses to describe life—a mist, a fleeting breath, a cloud, a dream, a shadow, a flower or grass—apply to both people and animals. See E. Schochet, supra note 53, at 52-53.

Similarly, as Schochet points out, Biblical terminology reflects the unity of humans and beasts. Ruach hayyim ("spirit of life") can refer to both people and animals, as can nefesh hayyah ("living creature"). The word Basar ("flesh") refers literally to the softer parts of the body of an organism, or to the body in general, or to humanity; and the phrase kol Basar ("all flesh") can denote all living creatures, animal as well as human. While Basar can refer to food, more generally it connotes "Frailty," the perishable nature of all living entities. See id. at 53.

Indeed, animals are specifically included in God's covenant with Noah: "Behold, I establish my covenant with you . . . and with every living creature that is with you, of the fowl, of the cattle, and every beast of the earth with you." Genesis 9:9-10. Not surprisingly, then, the prophetic, messianic vision, depicting the final fulfillment of the covenant, is a vision of renewed harmony among all members of the animal kingdom:

The wolf shall dwell with the lamb
And the leopard shall lie down with the kid;
And the calf and the young lion and the fatling together;
And a little child shall lead them.
And the cow and the bear shall feed;
Their young one shall lie down together;
And the lion shall eat straw like the ox,
And the sucking child shall play on the hole of the asp,
And the weaned child shall put his hand on the adder's den.

Isaiah 11:6-9. In this passage, Isaiah harkens back to the Garden of Eden, which was, as described in the first chapter of Genesis, a time of peaceful vegetarianism for both people and animals; the fulfillment of the covenant means a return to such a state. This message is
The Christian half of the Judeo-Christian tradition is also far from unproblematic with respect to animals. It is true that St. Paul dismissed the idea that God's providence extends toward animals in the same way that it extends toward persons. Later, Aquinas said that "by divine providence they are intended for man's use in the natural order." Even John Calvin, despite his differences with the Catholic Church, readily agreed that God "created all things for man's sake." Yet, there is another side to the story.

Even Aquinas conceded that irrational creatures might be loved out of charity. Meanwhile, his contemporary in thirteenth-century Italy, St. Francis of Assisi, drew on the tradition of the Celtic Saints and desert monasticism, characterized by reciprocity and harmony among all creatures, to exemplify a love for non-human as well as human creatures. His teachings gave rise to a still-living tradition of rich Christian piety. America's own greatest Christian theologian, Jonathan Edwards, with an extraordinary understanding of the limits of Enlightenment rationalism, rejected both the spirit/nature dualism and the separation of human society from the rest of nature. He quite explicitly saw in our abusive treatment of animals and the natural world (already apparent to him in eighteenth-century New England), evidence of sin for which we would be held accountable; he also saw nature as inseparable

emphasized by Hosea as well, who describes the time when God would once again renew his loving relationship with the errant Israel:

And I will make for you a covenant on that day with the beasts of the field, the birds of the air, and the creeping things of the ground; and I will abolish the bow, the sword, and war from the land; and I will make you lie down in safety. And . . . I will betroth you to me forever; I will betroth you to me in righteousness and in justice, in steadfast love, and in mercy.

Hosea 2:18-19.

"Is it for the oxen that God is concerned? Does he not speak entirely for our sake?" 1 Corinthians 9:9-10. Later, he explains that the passage is really about the right of preachers, like Paul himself, to be paid a suitable wage. 1 Timothy 5:17-18.

Aquinas, Difference Between Rational and Other Creatures, in ANIMAL RIGHTS AND HUMAN OBLIGATIONS, supra note 45, at 58-59.

See J. Passmore, MAN'S RESPONSIBILITY FOR NATURE: ECOCLOGICAL PROBLEMS AND WESTERN TRADITIONS 13 (2d ed. 1980) (quoting 1 J. Calvin, INSTITUTES OF RELIGION, bk. 1, at 182 (F. Battles trans. 1961)).


Animal rights proponent and philosopher Stephen Clark, himself a Christian, repudiates the Cartesian duality that justifies human instrumentalism, and concludes with respect to “the Christian attitude to the non-human” that, “There isn’t one.”\footnote{Id. at 119 (quoting P. Tillich, \textit{supra} note 64, at 96).} His summary:

All educated Christians should agree that they [animals] do not belong to us. All should agree that there are limits on what we may properly do with God’s creatures. But all do not agree on the nature or extent of those limits; nor do all agree on what office God has designed for us.\footnote{Id. Clark is both an avid advocate for animals and an opponent of abortion. On the latter, see \textit{id.} at 74-75, 128.}

Anglican scholar Andrew Linzey, drawing on the work of Paul Tillich, has taken up the challenge of reformulating Christian doctrine with respect to animals.\footnote{See Linzey, \textit{The Place of Animals in Creation: A Christian View}, in \textit{Animal Sacrifice: Religious Perspectives on the Use of Animals in Science} 115-48 (T. Regan ed. 1986) (citing P. Tillich, \textit{II Systematic Theology} pt. 3, at 96 (1978)).} Returning to what he regards as the central meaning of Christianity, Linzey argues that the doctrines of creation, incarnation, reconciliation and redemption, taken together, cannot be limited to human beings. When Christ became “flesh,” he became part of what humans share with the animals; furthermore, reconciliation must logically include all that was previously unreconciled, a state humans have shared, according to scripture, with nature. As Tillich writes, “Man cannot claim . . . that the infinite has entered the finite to overcome its existential estrangement in mankind alone.”\footnote{S. Clark, \textit{The Moral Status of Animals} 195 (1984).}

In a recently published collection of essays, Catholic theologian James Burtchaell, author of \textit{Rachael Weeping: The Case Against Abortion}, offered these views:

It is not technology itself that is sinister, nor even its method, which is to restrict its gaze to the problem at
hand. The damage comes when a technologist (or any professional) acts only on the competence of his or her discipline, while blind to any wider view of the fuller human agenda. The technologist goes berserk and becomes the sorcerer's apprentice when she devises tactics in ignorance of what strategy or policy or ethic they are going to serve.

The ecological movement, now well underway, is the first effectively persuasive rebuke to a belief that had grown apace with modern science and technology since the Enlightenment. The doctrine held that human purpose and choice would encounter no limits in its dominion over nature. Or, to put a finer point on the doctrine: it held that there was no nature, no creation with an ingiven character and requirements quite beyond what we could choose to infuse in things or bleach out of them.

But the environmental disillusionment was all to do with the elements and with plants and animals. We have yet to be persuaded that there are given, natural forces and needs in humanity ourselves that may be as aloof from our willful preferences and choices as are the tides of the ocean that make sport of our retaining walls and waterways.66

Also interesting in this regard is a series of ads placed in the local edition of Newsweek by the Catholic Archdiocese of Buffalo.67 These pro-life ads depict a mother and infant and ask "What do I believe in?," answering, in part, "I believe in marigolds, when they're only a few dry seeds. In butterflies, when they are still grey cocoons. In the song of birds before their eggs begin to hatch." Is there perhaps a sense in which a call for respect for potential life inevitably becomes a call for respect for all life, including non-human life? An ad seemingly intended to elicit attitudes of reverence, humility and wonderment does so by suggesting the unity of life rather than the Catholic tradition of human/animal duality.

67 Newsweek, Sept. 24, 1990, opposite page 67 (Buffalo regional ed.).
B. Women, Nature and Nazis

To speak of our relationship to or responsibility for "nature," is all too often to obscure the contingency of what we choose to label "natural." Is there anything natural about our millions of pampered pet dogs and cats or the unwanted thousands who die daily to support our collective affectation? Is there anything natural about the millions of animals bred specifically by humans for experimentation or for food? If we grant them their "rights," do we let them go or kill them painlessly? In fact, environmentalists and animal rights advocates often disagree about such issues. Ecologists, concerned with habitats, "ecosystems" or species survival, may be indifferent to the suffering or even survival of individual animals. Is there anything natural about marauding suburban deer or animals in zoos or wildlife "parks," often funded by and for hunters who are permitted to "manage" animal populations?

The great traditional claim of natural law is that we can infer a morality from observable nature, from the essential reality of the objective natural order. That requires a nature which reveals itself to our careful reason, perhaps only with an accompanying faith in a transcendent God. What, however, if we cannot infer any such truths, and cannot even know what is out there in the "natural world"? How do we then fit in? Is it natural for us to eat meat, to employ technology, to kill our fellow creatures, to kill our fellow humans?

The question of what is natural becomes especially acute with respect to gender difference. Are men and women the same, except for culturally contingent role definitions easily transformed, with childbearing capacity nothing more than a gender-specific controllable variable? Or are there intractable, essential differences in role, attitude, perception or behavior attributable to some mix (that cannot be sorted out) of culture, history, tradition and biology? For reasons both negative and positive, women have been identified, and have identified themselves, with nature in our his-

44 On the serious practical and theoretical differences between animal rights advocates and those favoring a deeper and more comprehensive environmental ethic, see Callicott, Animal Liberation: A Triangular Affair, 2 ENVTL. ETHICS 311 (1980). On the problem of even defining what we mean by an objective ecosystem, and the consequent quandary for environmental ethics, see B. Boyer, Ecosystem, Legal System, and the Great Lakes Water Quality Agreement (unpublished manuscript on file with authors).
While, as we noted earlier, most animal rights activists are women, there has usually been no particular correspondence between animal rights activism and feminist activism as such. One significant exception to this usual divergence occurred in turn-of-the-century England, where for a time feminists and antivivisectionists formed a strong alliance. Women at the time could easily identify their own domination and victimization with cruelty to animals, an identification which accounted for the enormous popularity of *Black Beauty.* This association was particularly acute given the cruel gynecological procedures of charity hospitals—justified explicitly by the stereotype of woman as animal-like. (A woman doctor, horrified by the medical treatment of poor women, explained that “[p]aupers are thus classed with animals as fitting subjects for painful experiments, and no regard is shown to the feelings of either.”)

While poor men also experienced the lower-class fear of charity hospitals, for women that fear was intensified by the element of lewd sexual domination. Indeed, Victorian pornography was closely related to gynecological practices, and both in turn were associated with the treatment of animals. (Women were “put in stirrups,” “broken to the bit,” made to “show their paces” and “present themselves.”) Thus, women came to see their own condition “hiddiously and accurately embodied in the figure of an animal bound to a table by straps with the vivesector’s knife at work on its flesh.” Given that legacy, it is not surprising that some feminists otherwise committed to reproductive choice are nevertheless hesitant to endorse the rapid advance of objectifying reproductive technologies; and even simple, painless abortions can be experienced as technological violence.

A growing body of scholarship has, in fact, been exploring the deep ideological connection between the domination of women and the scientific objectification of nature. Carolyn Merchant, for example, has traced the emergence of the dualistic imagery which de-

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69 For this account, we are indebted to Coral Lansbury's brilliant and persuasive account of this brief alliance. See generally C. LANSBURY, supra note 29.

70 *Anna Sewell, Black Beauty: Autobiography of a Horse* (1877).

71 C. LANSBURY, supra note 29, at 86-87.

72 *Id.* at 112-29.

73 *Id.* at 84.
scribed nature as a dark, mysterious, feminine force to be subdued by aggressive rationalist scientific “penetration.”" As she quotes Bacon: “For you have but to follow and as it were hound nature in her wanderings, and you will be able when you like to lead and drive her afterward . . . . Neither ought a man to make scruple of entering and penetrating into these holes and corners.” Bacon insisted that direct experimentation should replace the abstract theorizing of the scholastics, for nature is a force that must be “bound into service” and made a “slave,” put in “constraint,” to be “molded” by the mechanical arts. “Nature must be taken by the forelock”; and a science which does not include experimentation will “permit one only to clutch at nature, never to lay hold of her and capture her.”

Merchant is careful not to take an essentialist position on the relationship between women and nature—while male scientific discourse has historically linked the objectification of nature with domination of women, that male history does not mean that women are in fact somehow more “natural” than men, as a matter of inescapable essentialist reality. On the other hand, the history of identification has provided feminists with a valuable vantage point from which to assess Baconian dualism, with its inflated claims to universal, ahistoric validity, as well as Bacon’s (now scientifically

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75 Id. at 168.

76 Id. at 169-70. Compare the similar terminology used by noted historian of science Thomas Kuhn in characterizing Baconian science, in T. KUHN, Mathematical versus Experimental Traditions in the Development of Physical Science, in THE ESSENTIAL TENSION: SELECTED STUDIES IN SCIENTIFIC TRADITION AND CHANGE 31, 41-59 (1977). “[T]hey wished to see how nature would behave under previously unobserved, often previously nonexistent, circumstances.” Id. at 43. Kuhn also uses the phrases “the control of nature,” id. at 48; “[t]o experiment or to constrain nature was to do it violence,” id. at 55; and the “impetus toward power over nature through manipulative and instrumental techniques.” Id. at 59. See generally L. LEISS, supra note 51. For debate about the “ecofeminism” movement emerging from the perception that women have a peculiar historical, cultural or biological affinity with “nature,” see Cheney, Eco-Feminism and Deep Ecology, 9 ENVTL. ETHICS 115 (1987); Fox, The Deep Ecology-Ecofeminism Debate and Its Parallels, 11 ENVTL. ETHICS 5 (1989); Warren, Feminism and Ecology: Making Connections, 9 ENVTL. ETHICS 3 (1987); Zimmerman, Feminism, Deep Ecology, and Environmental Ethics, 9 ENVTL. ETHICS 21 (1987). The debate is another version of the “essentialism” issue. See E. SPELLMAN, supra note 22, at 159-59. For a poetic rendition of the issue that is at once powerful and problematic, see S. GRIFFIN, WOMEN AND NATURE: THE ROARING INSIDE HER (1978).
outdated) legacy for modern attitudes toward nature.

The challenge is to make critical use of historic identification, without allowing it to set the terms of self-identification. The line between the two is not always easy to draw. By reference to reproduction, women have been traditionally associated with their "natural" capacity for nurturance. At times this has offered an alternative to a mainstream masculine culture of selfish acquisitiveness. Faye Ginsburg has described, with much sensitivity, the fear among pro-life women that pro-choice activists have simply adopted the values of the mainstream masculine culture. Consider, in this regard, the views of Sidney Callahan:

Faced with a choice between men and women, prolife feminists choose women, and faced with a conflict between women and the fetus, the choice is made for the fetus, by analogous reasoning. In tragic conflicts and choices, one must give the benefit of the doubt to the more powerless and renounce solutions that do harm to human life. Thus, most feminist prolife advocates are, like myself, not only for the ERA, but also against capital punishment, against nuclear arms, against the draft, and for redistribution of income. Perhaps the most important feminist prolife demand is for family allowances, health care, day care, and the end of society's virtual abandonment of women and children, which increases pressure

\[\text{\textsuperscript{77}}\text{With respect to the study of animals, for example, there has been a gradual but dramatic revolution in scientific thought in recent years. Many careful researchers have come to recognize the need to study animals in their own settings to learn about their own cultures and ways of life in stark opposition to the presumptuous claims of laboratory experimenters. Virtually demolished are the twin presuppositions that have been the compelled orthodoxy of animal scientists: the injunction against anthropomorphism and the insistence that the principle of parsimony comports with the behaviorist view of animals. The upshot is a rejection of Baconian science in favor of practices more akin (yet notably careful and painstaking) to Aristotelian scientific tradition. For an excellent overview by a noted scientist, see D. Griffin, \textit{Animal Thinking} (1984); see also V. Hearne, \textit{Adam's Task: Calling Animals By Name} 224-44 (1986). Most people are aware of the breakthroughs in knowledge achieved by Jane Goodall with respect to chimpanzees, and by Diane Fossey with respect to gorillas (there was even a movie, \textit{Gorillas in the Mist} (Warner Brothers Universal Pictures 1989)); there are, in fact, many other examples revealing the reality of animal culture. See, e.g., C. Moss, \textit{Elephant Memories} (1988) (elephants); S. Strum, \textit{Almost Human} (1987) (baboons); B. Lopez, \textit{Of Wolves and Men} (1978) (wolves); Thomas, \textit{Reflections: The Old Way}, \textit{The New Yorker}, Oct. 15, 1990, at 78 (lions).}

\[\text{\textsuperscript{78}}\text{See F. Ginsburg, supra note 13, at 172-93.} \]
for abortion as the quick, less expensive solution. To be consistently prolife, we must challenge the status quo and all the expedient utilitarian values so embedded in a world indifferent to suffering.\textsuperscript{79}

The pro-life movement, suggests Ginsburg, exists in some historical continuity with a long line of women's movements—including the temperance movement, the women's suffrage campaign and progressive-era women's reform groups—which, despite some differences, shared similar assumptions about women's natural and distinct nurturant role.\textsuperscript{80} Such movements drew on the values associated with motherhood and domesticity to tame and "domesticate" some of the worst aspects of a male-dominated culture. Jane Addams, for example, talked of extending "household" values into the broader social/economic arena.\textsuperscript{81} The Women's Christian Temperance Union (WCTU) is now easier to ridicule for its appeal to a ("feminizing") Victorian moral righteousness that was outdated even in its own time, despite the political success of prohibition; nevertheless, the WCTU did raise real concerns, not just about the family abuse and dislocation which came with excessive male drinking, but with male domination and exploitation generally.\textsuperscript{82}

\textsuperscript{79} Callahan, supra note 19, at 296-97. Callahan regards her view as "holistic," id. at 291, and sums up her outlook, in contrast to the "Enlightenment model of a rational, pragmatic human being":

Feelings of sacrificial love and gifts of self to others are called for. Empathy and nurturing feelings are focused on the fetus, which is fiercely identified with, either as a family member or as a powerless, helpless being in need of protection. Communal memberships and the giving and receiving of love are seen as the highest emotional fulfillments, and attractions to achievement and independent autonomy are secondary.

\textsuperscript{80} See F. Ginsburg, supra note 13, at 227-47.

\textsuperscript{81} Id. at 236.

\textsuperscript{82} One of the more insightful studies of the culture of domesticity traces its relation to the religious experience of women in the 19th century. See B. Epstein, The Politics of Domesticity: Women, Evangelism, and Temperance in Nineteenth-Century America (1981). Epstein compares the First Great Awakening, the Second Great Awakening and the temperance movement specifically from the vantage point of female experience. During the First Great Awakening, which occurred in Calvinist New England in the mid-18th century, Epstein found little or no relation between the intense experience of conversion and gender hostility, and in general men's and women's experiences were similar. Id. at 11-44. At that time, of course, the farm/household still functioned as the primary social and economic unit, despite some Calvinist fears that an emerging merchant class and acquisitive culture would destroy the old order. Id. at 24-30.
Especially as women join the workforce in greater numbers, the distinct sphere of female domesticity becomes constricted, confined to the "natural," physical process of reproduction itself. It is hardly surprising that reproduction then becomes an arena of social conflict. Some women find it painful to surrender this last source of distinct gender identity to the dominant culture's rhetoric of privatism and self-interested "choice": that surrender seems to entail losing the one remaining source of values at odds with a selfish, commercialized American culture. For that reason Joan

Responsibility for the farm and household was basically shared, despite some gender-specific tasks. Notably, too, the shared category "parent" was culturally far more significant than "mother" or "father" as distinct from each other, and parents were considered deserving of huge respect. Id. at 33. New England Calvinist theology still assumed female subordination to males, but all earthly relations of subordination (which were justified as designed for social cohesion and the exercise of social responsibility) were viewed as contingent and provisional; the primary concern was one's relationship to God, and in that women were equal to men. Women were relatively better off in Calvinist New England than were women elsewhere at the time (better off than under the common law, for example). A man who abused his wife (or even dared, as in one case, to call her "servant") was both morally and legally answerable to the whole community. See id. at 23.

By the time of the Second Great Awakening, the emergence of a market economy (with the most significant economic relations taking place outside the family for many of the middle class) facilitated the creation of "domesticity" as a female-dominated sphere separate from market relations. This sphere was in part the creation of women themselves, although it was also a response to the constraints imposed by the dominant culture, especially limits on full female participation in economic and political life. Increasingly religion became associated with domesticity, although church hierarchy was still male-dominated. Then, Epstein finds, the conversion experience became an arena in which women acted out gender antagonism. By claiming to be answerable to Christ even over and above their husbands, women were empowered to defy growing male resistance to religion. When women did draw men into the Awakening, there was some victory in seeing them submit to an authority even greater than worldly male power—yet the victory could only be partial, since the only available cultural categories rendered male conversion a (temporary) victory of domesticity as against a dominant male culture. See id. at 45-87.

In the WCTU middle-class female resentment against the isolation and economic dependency of domesticity was, in a sense, projected onto the single issue of drinking. Id. at 103-04. Even while that projection limited the scope of feminist analysis within the temperance movement, appeal to religion and domestic values did empower women to assert themselves. Under the leadership of Frances Williard, the WCTU took on a broad range of issues relating to female inequality, including suffrage, labor conditions for both men and women, legal issues relating to sexual abuse and so forth. While the WCTU never quite lost its middle-class, Protestant, essentially Victorian perspective, especially in relation to sex, it did push that frame of reference to its limits, and in some important ways transcended it. Id. at 146. According to Epstein, there is still some tendency for feminist ideology to draw on the perspective of a relatively privileged middle class. In modern times that means an educated, secular perspective which does not necessarily speak to the concerns of the working class on issues like family and abortion. Id. at 150.
Williams asks whether the pro-choice movement might appeal to the values of domesticity, rather than repudiating them so thoroughly with the rhetoric of private choice. Women do, after all, often choose abortions out of concern for family welfare, not as pure assertion of self-interest.

Nevertheless, as Williams has also argued, an appeal to domesticity is a double-edged sword, for the distinct sphere of domesticity as experienced in American culture was itself a constraining invention of the post-Revolutionary War period. Then, the powerful anti-patrimonial ideology of the Revolution threatened to upend all established hierarchies, including the household hierarchy of man (as father/husband/master/surrogate-king) and dependents (servants, unmarried women, wife and children). This hierarchy was conceived as serving economic and political goals as well as what we now consider "private" familial functions. Implicitly, political challenge to the English crown entailed challenge to that whole hierarchical family structure; indeed, for a fleeting period after the Revolution, some even expected that in the new republic women would participate as equals with men in politics and economic life. Instead, the dominant culture constrained that impulse toward complete equality, transforming it into an assertion of autonomy within a distinct sphere of household domesticity, a sphere which was increasingly conceived as existing apart from economic and political life. Women were in theory free to cultivate their natural impulses toward nurturance and selflessness (which Victorians were often to describe, with some self-contradiction, as "higher"

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83 See Williams, Assuring Success to Passion: Virtue and Oppression in Pragmatic Social Theory (unpublished manuscript on file with authors).
84 See Williams, Deconstructing Gender, 87 Mich. L. Rev. 797 (1989) (arguing that feminists can attack "male norms" without appealing to domesticity).
86 E.g., S. Evans, supra note 85, at 45-66; M. Grossberg, supra note 85, at 3-30; M. Norton, supra note 85, at 170-94, 228-55.
87 E.g., S. Evans, supra note 85, at 67-92; F. Ginsburg, supra note 13, at 229-31.
virtues, even though “natural” to women). Of course that new separation of spheres was no more “natural” than the old hierarchical unity of family, economy and polity, which had also once been vigorously defended as natural. While it provided women a stance from which to challenge the values of the mainstream culture that created it, setting in motion a dialectic of simultaneous legitimation and critique, the critical dimension was destined always to be partial. (Prohibition may have been its greatest victory, and that turned into an exercise in futility.) In effect, that which was labelled by the dominant culture as feminine, and therefore particular, could never really counter those values that were treated as universal—that is, male.

It is tempting to conclude that the problem lies, not really with either side of the abortion debate, but rather with that initial “artificial” split between economic and domestic, or between, as is often said, public and private. That artificial split almost forces one to adopt a self-limiting rhetoric. The language of domesticity repeats a vocabulary which has particularized and trivialized women’s lives, yet the language of private individual rights used in defense of abortion replicates acquisitive male culture. We have yet, it seems, to find a rhetoric that somehow undoes that artificial split, making possible a “real” moral discourse about abortion—about the processes of life and death and human responsibility in the face of those mysteries.

If the family/market split is artificial, what then is “natural”? Ecofeminists claim to have access to that knowledge, not through the social contrivance of domesticity, but rather through a holistic appreciation of natural life processes. They celebrate a special feminist sense of connectedness to nature, unshackled by the dualistic structures which have characterized masculine rationalized thought. In our culture the male ego defines itself, some say, by

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90 See generally C. Merchant, supra note 74. Rosemary Ruether offers a sympathetic, yet cautionary account of a similar venture launched at the end of the 19th century, when a disparate group of “post-Christian” women sought to recover an ancient, pre-Christian, matriarchal worldview and in so doing largely projected their pre-existing Victorian familial values onto their premodern “discoveries.” See Ruether, Radical Victorians: The Quest for an Alternative Culture, in III Women and Religion in America: 1900-1968, at 1-47 (R.
separating itself simultaneously from nature and woman, a dualistic subject/object split women do not require for a mature sense of identity. Women therefore (at least in our culture) may be better able than men to look to nature itself for an understanding of the human role in the natural order, and our responsibility toward it.

Any appeal to "nature," however, must be tempered with a great deal of humility. One must remember, as the great British biologist, Haldane, is reported to have observed, that, if nature reveals anything at all to us, it is that "God has an inordinate fondness for beetles."91 Less ironic are the tragic observations of those who wanted to celebrate the beneficence of nature, but discovered instead that nature has a "more hideous face, blighted and polluted by its own forces," that it may be "bleak, depraved, and hostile, at least by human standards," a reality of "extinction, conflict, depravity, terror."92 Even Thoreau was aware of the "maniacal hooting" of owls.93 The danger lies in forgetting that we live, after all, in a "fallen world."94

The risk is greater than just an excess of pride, for the celebration and romanticization of nature may have serious moral and political consequences. We might perhaps be wary of seemingly contemporary ecological observations:

[T]his planet once moved through the ether for millions of years without human beings and it can do so again some day if men forget they owe their highest existence, not to the ideas of a few crazy ideologists, but to the knowledge and ruthless application of Nature's stern and rigid laws.

Ruether & R. Keller eds. 1986) [hereinafter Women and Religion].

93 See id. at 122.
94 See id. at 115-29.
At the end of the last century the progress of science and technique led liberalism astray into proclaiming man's mastery of nature and announcing that he would soon have dominion over space. But a simple storm is enough—and everything collapses like a pack of cards.

The author? Adolf Hitler.95

Nazi ideology was premised upon views about nature which were very much in the mainstream of Western thought at the time, and which are regaining currency with the modern sense of environmental crisis.96 It is well known that Hitler was a vegetarian, and that top Nazi officials, like Himmler, recognized the rights of animals. More significantly, Nazi ideology represented an attempt to transcend the dualities of body and spirit, man and nature, which pervaded traditional Western science and theology. The new man brought into being by National Socialism would see himself in and of nature, not over and above it, finding infinity not in a transcendent God, but in life itself. He could achieve this connectedness in part by reaching inward to redevelop that "special" affinity of the pagan Aryan volk for the life spirit.

Jews, of course, were said to have no such affinity. Their religious traditions and their history as city dwellers closed them off from nature, and made them "parasites" within the natural order—as were the disabled and the otherwise "unfit." And so these Nazi celebrators of life, paradoxically employing technical and instrumental rationality, became

purveyors of death, and the most idealistic of them wore

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96 Consider the advice of a Nazi scientist:
A new National Socialist science cannot create, as if by sorcery, arbitrary and amateurish world systems and conceptions—only infinite damage could come of this. Rather, it must reverentially immerse itself in nature itself, and in the great Nordic discoverers and interpreters of nature, to find there the essence of German being in glorious abundance. . . . "Natural science is not a root, but a blossom. Let us take care of the roots. The blossom will appear by itself."
the death's head as a sort of absolving talisman. Finite beings can never, of course, "embrace life"; but, they can fetishise death .... Justifiably, the ultimate expression of that negativity which was the core of National Socialist "life-bound" nationalism, is viewed as policies of extermination. Yet, at all times, it would seem that the most important of the "life-affirming" bearers of National Socialist religious principles were always at their best in the valley of the shadow.  

II. SOURCES OF MORAL DISCOURSE SINCE WORLD WAR II

A. The Nazi Shadow

Which of us can claim to celebrate life without also being a purveyor of death? Pro-life literature shows photographs of the discarded bodies of concentration camp victims, and then, next to those pictures, photographs of fetuses stuffed into plastic garbage bags for disposal. Some of us who have had abortions have troubled doubts. Questions have been raised, of course, about the illegitimate appropriation of Jewish experience for Christianizing purposes. Does not equating routine early abortions with the horror of the Holocaust deprive Naziism of moral significance and debase Jewish history by exploiting it for sectarian Christian goals?

Yet, the West German Constitutional Court drew the same parallel in its 1975 decision overturning a 1974 provision for complete decriminalization of first-trimester abortions:

The priority given to the value of life in the West German constitutional order is ... a reaction to the taking of innocent life in the years of the "final solution." Not only the protection of life ... but also the express prohibition of the death penalty ... have to be read, against the background of Germany's experience with a regime which classified certain forms of human life as worthless.

All categorical objectification is frightening, in part because of

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97 R. Pois, supra note 95, at 59.
98 See Binder, supra note 27, at 1345-49.
99 For the quote and its context, see MA. Glendon, Abortion and Divorce in Western Law, supra note 12, at 26, 25-33.
that Nazi history. When, then, are we entitled to treat the other as a disposable object? Before birth? When the other is part of a statistically necessary risk? (When $B > PL$)\textsuperscript{100} When the other is a murderer? Disabled? Comatose? Severely retarded? A member of a different class, race, gender or species? An enemy soldier? An "enemy" civilian? Which of these categories is appropriate, which obviously illegitimate, and on what grounds?

Again, who is not a purveyor of death? The "French pill" is not distributed by the World Health Organization for fear of American "pro-life" outrage: Globally, roughly 500 women a day die from complications due to abortions which they often try to induce themselves. Romania's unwanted children, "protected" from abortion by restrictive laws, stare out at us in their suffering from the pages of the New York Times; but we too, even with our liberal abortion laws, discard unwanted children, in a foster care bureaucracy which cannot cope, and which too often destroys their lives.\textsuperscript{101} Our society has chosen to allow many of its children to grow up amidst unspeakable violence and dismal poverty—especially, one assumes, because so many of the poor are not white. Kozol, who has studied the problem of homeless families and is careful not to indulge in rhetorical excess, draws tentative parallels to Nazi policies of extermination.\textsuperscript{102}

When is the parallel legitimate, when not? When does it merely trivialize, and when does it make us confront a moral reality we would rather ignore? In living we all cause death. Vegetarians, if they consume dairy products, contribute to the production of veal, the cruelest of mass meat-producing practices. Even growing grain destroys animal habitats. Yet we are not all Nazis, and we cannot be ethically immobilized, refusing, for example, to be concerned about destruction of the environment because the Nazis preached an ethics of the natural. Ours is a world in which death is bound

\textsuperscript{100} The familiar "Hand formula" from tort law, derived from Learned Hand's opinion in United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947). See generally C. Gregory & H. Kalven, Cases and Materials on Torts 76-77 (2d ed. 1969).

\textsuperscript{101} On the plight of Romania's children, see Hunt, The Romanian Baby Bazaar, N.Y. Times, Mar. 24, 1991, § 6 (magazine), at 24. On foster care in America, see N.Y. Times, Sept. 21, 1990, at 1, col. 5 (describing foster care as a system of "confusion and misdirection, overwhelmed by a profusion of sick, battered, and emotionally scarred children").

\textsuperscript{102} See J. Kozol, Rachel and Her Children: Homeless Families in America 181-84 (1988).
up with life, not an idealized world, cleansed from darker realities. The challenge, both social and individual, is to confront rather than avoid those realities, and to make the life and death decisions we must make in a morally responsible way.

One cannot understand the current abortion debate without situating it in the particular historical context of post-World War II American culture. Nazis then represented the ultimate affront to the presumptuous complacency of Western culture, an affront that was political, moral and ultimately theological. How, people asked, could the Enlightenment political tradition produce dictatorship and hysterical despotism? How could the highest and most refined members of "high" culture endorse grotesque barbarism, and legality itself be turned into a finely tuned bureaucratic engine of oppression? And finally, how could a long tradition of serious Christian theology yield itself institutionally, almost without exception, to political idolatry?

One could try to pretend that the Nazis were sui generis, a unique case of tribalism run rampant, produced by the intersection of peculiarly decadent German sensibilities and post-World War I frustrations. Whatever the element of truth in that account, appeals to utter specificity never work. Genocide in Western culture could not be dismissed as uniquely German. Americans, after all, had their own history of ethnic genocide with respect to Native Americans. Across the Atlantic, the legacy of English barbarism toward the Irish is such that hatred has persisted for over 500 years. And Freudianism described too many dark impulses lurking within the human psyche for Americans to be absolutely confident that "it could never happen here!" Milgram's experiments in the 1960s only confirmed the worst of earlier fears.

For legalists after the war a principal mission was to develop in-

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103 This is the question posed, for example, by Thomas Mann in his long and searching novel, Doctor Faustus, whose lead character, Adrian Leverkuhn, is a bizarre fusion of Beethoven and Nietzsche. T. Mann, Doctor Faustus (1948).

104 Professor Stanley Milgram began in the 1960s a series of experiments in human obedience to the commands of authority. The experiment was calculated to test the extent to which an individual would take harmful action against an innocent person in compliance with the command of an authority figure. In his basic experiment, roughly two-thirds of the subjects administered what they believed to be extremely serious, painful shocks to the innocent victim, achieving a level of compliance well beyond that predicted by lay and expert opinion solicited before the experiments were conducted. For the full report, see S. Milgram, Obedience to Authority (1974).
stitutions that would serve to immunize American society and Western culture generally from resurgent Naziism. In particular, a central goal was to articulate a jurisprudence supporting the principle that no human life could again be legally categorized as unsuited and unfit, and therefore expendable.

B. Natural Law and Catholic Tradition

Prevailing legal theory had little to offer. For decades American and English jurisprudence had been dominated by Austinian positivism, which, in its simplest form, defined law in Hobbesian terms as no more than sovereign command, devoid of moral content beyond the sovereign's power to punish.105 Nothing in legal positivism repudiated Hitler's version of legalism as "illegal."

Meanwhile, the American legal realists had performed a thorough-going, swash-buckling demolition of all the fixed categories that gave coherence to American constitutionalism. The realists showed that legal categories were not pre-existing entities located somewhere in nature, but were a function of the legal decisionmaking process itself. Sociology, psychology and political science might be employed usefully to understand why and how legal decisions were made, but after the realists it was difficult to believe that the conceptual language which judges employed was about anything other than judging.106

Thus, for those who wanted assurance that "it would never happen here," American jurisprudence offered nothing better than the bleakness of moral and jurisprudential relativism. In 1947, a number of scholars, seriously seeking to shore up traditional Western values, began a project which, in retrospect, might appear somewhat quaint: a forum and journal dedicated to a reconsideration of natural law. By the time the first volume of that journal, the *Natural Law Forum*, appeared in 1956,107 the move toward natural law was in fact well within the mainstream of legal and political thought.


107 1 NAT. L.F. (1956).
One well-publicized example was Walter Lippman. He considered joining the Catholic church because it offered communion in a “moral order above the whims of transient majorities and the dictates of tyrants”; and in The Public Philosophy, in 1955, he argued that the “decline of the West” could be countered only by adherence to that “doctrine of natural law” which held that there was a law “above the ruler and the sovereign people ... above the whole community of mortals.” The book received mixed reviews, given its anti-democratic appeal to a strong executive as well as to natural law. Learned Hand for example, responded to Lippman with his own view that natural law was a poor refuge from the horrors of totalitarianism. Nonetheless, the book sold well.

Meanwhile, the ABA Journal published a series of articles exploring the natural law implications of the philosophy of Oliver Wendell Holmes, as opposed to the Holmes who was known only for debunking absolutism. In 1955 the same journal published an article by George Goble, which many scholars considered to be a sign of reversing trends: Goble’s roots were “in the watery sands of Holmesian skepticism,” but he was now searching for a deeper metaphysics of law.

Since other law journals had, like the ABA Journal, already published symposia on natural law, by the time the Natural Law Forum appeared it could with some confidence herald itself as the standard-bearer of a rising tide. The Forum began under the auspices of Notre Dame Law School, and its associate and advisory editors included names that are still familiar: Lon Fuller, Friedrich Kessler, Jerome Frank, Robert Hutchins, Edward Levi, Leo Strauss, Myres McDougal, F.C.S. Northrop, Edward Corwin, Jac-

108 Lippmann told a group of Catholic theologians in 1941 that the people were doomed to be unsatisfied because they had lost sight of a higher moral order and had “accepted the secular image of man.” R. Steel, Walter Lippmann and the American Century 491 (1950).
109 Id. at 492.
110 Id. (quoting W. Lippmann, The Public Philosophy (1955)).
111 Id. at 494-95.
112 Id. at 495.
115 Constable, supra note 113, at 97.
ques Ellul, William Curran,117 Carl Friedrich118 and John Noonan (the latter not among the original editors, but eventually editor-in-chief.)119 A number of editors and contributors were from England and the continent, and a few from elsewhere, for the goal was to reestablish a foundation for Western legal thought generally, not just for American law.120

One would not expect to see some of the foregoing legalists poring through their Thomas Aquinas, but their earnestly stated goal was to explore, “with all the resources of scholarship and modern science, the full extent of the contribution natural law can make to the solution of today’s problems.”121 From their perspective, a jurisprudence premised on relativism alone posed an intellectual and political crisis:

Totalitarian excesses . . . have made it increasingly diffi-

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117 1 NAT. L.F., facing page 1 (1956).
119 7 NAT. L.F., at iii (1962).
120 E.g., A.P. d’Entreves (Turin University and Oxford); Felice Battaglia (University of Bologna); Guido Fasso (University of Parma); Eustaquio Galan (University of Valladolid, Spain); Eduardo Garcia Maynez (National University of Mexico); Freiherr von der Heydte (University of Wurzburg, Germany); Jacques Leclercq (University of Louvain, Belgium); Luis Legaz y Lacambra (University of Santiago de Compostela, Spain); Luis Cabral de Macedo (University of Coimbra, Portugal); Radhabinod Pal (University of Calcutta); Rene Thery (Ecole Libre du Droit, Facultes Catholiques, Lille, France); Antonio Truyol (Universities of Lisbon, Portugal and Murcia, Spain); Erik Wolf (University of Freiburg, Germany). See 1 NAT. L.F., facing page 1 (1956).
121 O’Meara, Foreword, 1 NAT. L.F. 1-2 (1956) (O’Meara was then Dean of Notre Dame Law School). For another entry in the natural law revival, see B. Patterson, The Forgotten Ninth Amendment: A Call for Legislative and Judicial Recognition of Rights Under Social Conditions of Today (1955). In his introduction, Roscoe Pound hailed the book for its contribution to the “marked revival of natural law ideas throughout the world.” Pound, Introduction to B. Patterson, supra. The author believed that the ninth amendment was the constitutional text through which we could reaffirm that “[i]dividual freedom, and the recognition and development of the spiritual nature of mankind are the essence of democracy,” id. at 1, and recall the “inherent natural rights” with which individuals are “endowed by their Creator.” Id. at 4. For the author, individual freedom means the recovery of “the identity of the religious, spiritual, and noble principles upon which this government was founded.” Id. at 58. Moreover, it was clear to Patterson that the price of individual liberty was acceptance of obligations and duties, such as the “obligation to maintain a reverent belief in God as the guide of the destiny of this nation, and to encourage an attitude of gratitude, humility, and worship of the Supreme Being.” Id. at 78-79.

Why the fuss over an obscure book? Because, ironically, ten years later, the Patterson book would figure prominently as support for the majority in Griswold v. Connecticut, 381 U.S. 479 (1965), the case that announced the privacy doctrine that supplied the basis of Roe v. Wade. For further discussion of Griswold, see infra text accompanying notes 681-82.
cult to acquiesce in the positivist conclusion that the ideology of one person or nation is as valid as that of any other. This is the great jurisprudential issue of our day. Can natural law resolve it? . . . The editors believe that all aspects of natural law, from its claimed foundation in human nature to its last implications for concrete practice, need to be critically examined and rethought in our time.122

Perhaps not every aspect of natural law's "foundation" or every detail of application was covered, but the scholarship was extensive. The first volume alone contained a serious opening review of arguments for both positivism and natural law by A.P. d'Entreves of Oxford, eminent natural law scholar and emigré from Italian fascism.123 In the same first volume the classical and medieval history of natural law, and its relation to jurisprudence in Europe received much attention (with many historical footnotes in German and French);124 so too did Edmond Cahn's 1955 book The Moral Decision,125 which was also an effort to reintroduce moral (and explicitly Biblical) discourse into legal decisionmaking. That book was faulted, however, because it slighted the natural law tradition of Aquinas and therefore failed adequately to articulate a moral standard wholly extrinsic to legal case analysis—Cahn's own moral tradition was, of course, Judaic.126

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122 Statement of Policy, 1 Nat. L.F. 3 (1956).
124 See generally id. at 5-166.
125 E. CAHN, THE MORAL DECISION, supra note 27.
126 Cahn was applauded for his resistance to legal positivism, yet chided for contextualism, intuitionism and his rejection of what he saw as the absolutism and authoritarianism of the natural law tradition. See Witherspoon, Book Review, 1 Nat. L.F. 146, 163 (1956) (reviewing E. CAHN, THE MORAL DECISION, supra note 27).

Lost in this dismissal of Cahn was a serious Jewish entry in the possibility of genuine dialogue between the essentialist and rationalist morality of natural law, on the one hand, and the morality of context and particularity, also rooted in religious tradition. Cahn, for one, drew upon both the Jewish and Christian Biblical traditions. He bemoaned the decline of religious discourse in public moral debate; he was hardly a legal positivist:

From ancient times, religion has exalted the value of individual personality and has summoned men to understand their neighbors as nearly as possible after the manner of God's understanding, for—we are told—in his eyes all men, created in his image, are equal and alike, yet every man is distinct, unique, and filled with the splendor of human dignity. This is religion's own insight. Applied wholeheartedly in the law, it could help us shape decisions of
Myres McDougal, the legal realist, rang in with his usual call for a law school curriculum organized around an understanding of law as socially constructed reality—"[t]he social and power processes of a community." Even McDougal (whose "science" had little room for Aquinas) postulated certain values "described as the values of human dignity in a free and abundant society," but McDougal located those values wholly in the "stream of the rising common demands and expectations of our time." He considered external validation from religion, natural law, science and metaphysics unnecessary, since his postulated values were clearly part of a "general trend" in human history, despite occasional glitches like "feudal residues and the counter-currents of totalitarianism." The Natural Law Forum's introductory article, by A.P. d'Entreves, based on four lectures he delivered at Notre Dame, was apparently selected to represent the spirit and purpose of the new journal. D'Entreves was internationally respected as a scholar of political theory and, specifically, of natural law. The lectures are striking in their anticipation of issues that would dominate the individualized and creative justice.

E. Cahn, A Lawyer Looks at Religion, in CONFRONTING INJUSTICE, supra note 27, at 207, 220. It is time to recognize that the foremost existential question of our era is not whether one believes in God but whether one believes about Him is sufficiently worthy. . . . The highest aim of the religious enterprise is to persuade a just, righteous, and compassionate God that He can believe in us.


For a serious and sophisticated attempt by a Protestant theologian to locate Cahn in moral dialogue about the limits and possibilities of natural law by juxtaposing him with Catholic theologian Jacques Maritain, see P. Ramsey, Jacques Maritain and Edmond Cahn: The Egypt of the Natural Law, in NINE MODERN MORALISTS 209 (1962) [hereinafter P. Ramsey, The Egypt of the Natural Law] (Ramsey's Nine Modern Moralists will hereinafter be referred to as NINE MODERN MORALISTS): P. Ramsey, Jacques Maritain and Edmond Cahn: Man's Exodus from the Natural Law, in NINE MODERN MORALISTS, supra, at 233.

128 Id. at 67.
129 Id.
130 See d'Entreves, supra note 123.
131 His works at the time included, among others, A.P. d'Entreves, THE MEDIEVAL CONTRIBUTION TO POLITICAL THOUGHT (1939); A.P. d'Entreves, DANTE AS A POLITICAL THINKER (1952); A.P. d'Entreves, AQUINAS: SELECTED POLITICAL WRITINGS (1948); and A.P. d'Entreves, NATURAL LAW (1951).
American liberal legal scene in the 1970s. D'Entreves carefully traced and gently refuted the ploys typically invoked by those who debate the “fundamental rights” jurisprudence so central to the credibility of *Roe v. Wade*. Those recurring moves are the appeal to consensus or “shared values,” on the one hand, and the appeal to process on the other. For d'Entreves, only the natural law tradition, which he presents in its richness and subtlety, offers a secure moral basis for law. The following summary of his argument should serve to question whether any of us can talk about morality without in some sense resorting to natural law methodology.

D'Entreves begins by conceding that a relativistic legal positivism dominated English and American jurisprudence, nowhere more so than at his own Oxford. Nevertheless, he notes, citing both Kelsen and H.L.A. Hart, some positivists were already in retreat from the grim purity of Hobbesian extremism. Hart, for example, although he had not yet published the *Concept of Law* with its primary and secondary rules of recognition, had already described in his inaugural address at Oxford his “rules of the game” analogy, which was an approach then current among English philosophers. While games of cricket were more complex than mere commands, so that the analogy could be taken as an analytic advance over Austin, d'Entreves finds the game analogy more whimsical than satisfying. As someone who had experienced totalitarianism firsthand, he gently comments,

[i]f we want at all costs to stick to the analogy between law and the rules of a game, let us admit that it is a peculiar game which we are asked to play, and one which has little to do with the placid setting of a sunny English afternoon.

Game theory, he points out, “leave[s] us entirely indifferent to the

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133 d’Entreves, supra note 123, at 7.


137 d’Entreves, supra note 123, at 13.
kind of game that is played. Nor does it tell us why on earth we should choose to play it.” 138 While it answers formal concerns, the substantive ones remain unsolved (a distinction drawn from scholastic natural law theory) 139—unless, of course, “games” are infused with all the moralistic aura of the English public school cricket match, which d’Entreves dismisses as mere romanticism.

D’Entreves next points to a set of lectures, Goodhart’s English Law and the Moral Law, which had concluded that law was about “obligation” rather than mere force. 140 Goodhart, however, had still refused to acknowledge the existence of natural law, even while noting the “revival of ‘natural law’ thinking” as an expression of the legitimate search for law’s “moral” underpinnings. 141 His main point had been that, even without recourse to natural law metaphysics, English law, as a kind of self-enclosed social system, provided a happy combination of positive law and moral obligation as mediated by precedent. 142

Goodhart’s depiction of harmonious England, where law served simultaneously as external authority and internalized norm, did not, for d’Entreves, solve the problem of relativism. Criticizing Goodhart, d’Entreves insists on the distinction between law, an externality involving coercion, and morality, involving the internal processes of motive. 143 That distinction had emerged most dramatically in the seventeenth century and heralded the modern state: 144 Unlike the church, Leviathan demands obedience, but not inner conviction; it requires outward conformity, but leaves conscience to the individual. 145 Indeed, one might blame the Protestant Reformation, with its insistence on the difference between law and grace, for setting the stage not only for the separation of law and morality but also for legal positivism and the secular modern state.

D’Entreves, interestingly, did not blame the Reformation, insisting instead that the law/morality distinction was in fact well known to Aquinas, in more subtle form than one might assume

138 Id. at 16.
139 Id. at 15.
140 Id. at 16 (citing A. GOODHART, ENGLISH LAW AND THE MORAL LAW 19 (1953)).
141 Id. at 17 (citing A. GOODHART, supra note 140, at 30).
142 Id. at 18-20.
143 Id. at 20-21.
144 Id. at 21.
145 Id.
from simplistic accounts of Thomist natural law theory. On the one hand, there are laws, Aquinas says, which are merely "penal," which oblige not in conscience, but only in that one must pay a penalty for non-obedience (precisely Holmes' "bad man" conception). Conversely, there are also limits on the extent to which law can make a person virtuous. Thus, while Aquinas insisted that law should, on the whole, have moral content by being rooted in natural reason, he was not saying that law can enact morality; "bad" people will, after all, "conform to the law without . . . becoming virtuous."147

The Reformation would, in a sense, use the truth of that last concession to challenge the whole structure, taking it to be the core, not peripheral, truth about law. D'Entreves did not pursue that Reformation point—he wanted to salvage natural law, not demolish it. Yet he needed more than Goodhart's complacent description of English Law: Whatever may be true in England, on the Continent, people "have not always been very happy in their political experience." On the whole, he thought, the English do obey the law in conscience as well as externally (no matter how rigorous the positivism of their jurisprudence), but on the Continent, even in the best of political times "law is never much more than a necessary nuisance, an external regulation which must be observed . . . but certainly not for the sake of a joyful con-

146 Id. at 22.
147 Id. Moreover, Aquinas had also been careful to state that civil law could never coincide with the rules of perfect virtue:

Now human law is laid down for the multitude, the major part of which is composed of men not perfected by virtue. Consequently, all and every vice, from which virtuous men abstain, is not prohibited by human law, but only the gravest vicious actions, from which it is possible for the major part of the multitude to abstain, and mainly those—like homicide, theft, etc.—which are harmful to others, and without the prohibition of which human society could not be preserved.


Human law can lead people to virtue, but only "gradually"; if the unvirtuous are required to abstain from every kind of evil, they will only "plunge into worse evils." Id. One problem of abortion is, of course, whether its frequency (even when illegal) means that a human law proscribing it represents an unrealistic and, in Thomistic terms, a morally counterproductive attempt to legislate "perfect virtue," or whether abortion as "homicide" is the sort of "vicious action," with victim, which is appropriately made a violation of human law.

148 d'Entreves, supra note 123, at 23.
Significantly, this continental attitude derived not only from a different political experience but also from the fact of religious bonds, for on the continent one belongs “as it were by birthright, to a society different from the ‘State,’” to a church which “openly proclaims against the State” its authority over both conscience and behavior.150

D’Entreves made this complex point, about how the conception of secular law is influenced by church/state relations, but then, as a believer in natural law, he also affirmed the necessary connection between legal and moral obligation: “Law may or may not be obeyed for the sake of its obligatoriness. But there is only one ground for the obligation of the law, and this is a moral ground.”151

The question is how to achieve a “good society,” which can in fact be defined as a situation in which there is no divorce between legal and moral authority—a condition in which, as Aristotle said, “the ‘good man’ is also a ‘good citizen.’”152 In that sense the question of law’s relationship to morality is basically a question of politics.

The modern answer to the question is, of course, democracy. Rousseau outlined the case for democracy as the “good society” precisely on the ground that only by means of the democratic principle can legal and moral obligation be brought to coincide.153 D’Entreves cited two passages from Rousseau. In the first, Rousseau stated that the fundamental problem of politics is to find an association in which “each, while uniting himself with all, may still obey himself alone, and remain as free as before.”154 The second extraordinary passage reads: “We might, over and above all this, add . . . moral liberty, which alone makes him truly master of himself; for the mere impulse of appetite is slavery, while obedience to a law which we prescribe to ourselves is liberty.”155 Here d’Entreves was explicit in finding the source of Rousseauian democracy in the Reformation: becoming a true citizen is like a rebirth, a radical transformation; the new Adam as citizen, obeying

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149 Id.
150 Id. at 24.
151 Id.
152 Id.
153 Id. at 25.
154 Id. at 25 (paraphrasing J. Rousseau, Social Contract 109 (1898)).
155 Id. (paraphrasing J. Rousseau, supra note 154, at 114).
only himself, reunites moral and legal obligation.\textsuperscript{156} Rousseau’s notion of citizenship is as dangerous as it is stirring. One moves rather directly, d’Entreves said, from Rousseau through the Hegelian state to modern totalitarianism. Totalitarianism works, he wisely reminds us, \textit{not} by crude coercion or brainwashing, but by fulfillment of the Rousseauian moral promise:

They claim to be the good society because they maintain that, by belonging to them, the individual leads \textit{the} good life, that, in other words, by finding in the State his “real self,” his true moral nature, man will cease to obey out of fear, but obey out of conscience and full conviction.\textsuperscript{157}

(In Geneva, too, Calvinists concluded that if the only valuable obedience sprang from freedom, and if true freedom showed itself in obedience, then the people should, in effect, be forced to be free.)\textsuperscript{158} Thus, neither culture (Goodhart) nor democracy (Rousseau) serves to reconcile moral and legal obligation. And natural law cautions us with its lesson that politics (including \textit{democratic} politics) is always “a method rather than an end.”\textsuperscript{159}

In his last two lectures d’Entreves described two versions of natural law. The first, practiced by Roman legalists, was a kind of “technology” or craft. He found in Lon Fuller’s work a modern version of the same natural law technology, given Fuller’s reference to “a natural order” in group life which the sensible lawyer or judge should try to discover in order to perform tasks well.\textsuperscript{160} Fuller’s apt comparison was to a cook trying to solve the problem of a flaky piecrust.\textsuperscript{161}

Drawing on Kant, d’Entreves pointed out that the imperatives one finds in Fuller are necessarily “technical” rather than “categorical”—they fail to bridge the gap between the “is” and the “ought,” between “fact” and “value,” between legality and

\begin{thebibliography}{99}
\bibitem{156} Id.
\bibitem{157} Id. at 26.
\bibitem{158} Id. at 26.
\bibitem{159} Id. at 31.
\bibitem{160} Id.
\bibitem{161} Id. at 31.
\bibitem{162} Id. at 32.
\end{thebibliography}
morality.\textsuperscript{163} To be serious enough to bridge the fact-value gap, natural law must start with ontology, with a willingness to "seize the bull by its horns":\textsuperscript{164} "[t]he ontological approach welds together being and oughtness, and maintains that the very notion of natural law stands and falls on that identification."\textsuperscript{165} Natural law is first and foremost a "conception of an order of reality,"\textsuperscript{166} established "in its essence by God's wisdom"\textsuperscript{167} in which human beings participate because they are rational creatures. The "real" is the foundation for the "good"; it is participation through reason in the "order of reality" that provides a basis for human knowledge of it, and knowledge of the "order of reality" is the "condition and the source of all laws pertaining" to human beings.\textsuperscript{168} As d'Entreves emphasized, the whole majestic structure of natural law rests on that ontological position about reality itself, which allows for an intimate connection between nature, reason and law, premised on the existence of a divine benevolent being.\textsuperscript{169} That structure, with its explicit ontology, was, for d'Entreves, the only antidote to legal positivism and moral relativism.

That ontology does not require that we look to revelation for the content of the law. While it is true that d'Entreves' precursors, the natural law theorists of the middle ages, had devised an intricate structure of law to mediate the infinite distance between human and divine, that structure, for the most part, did not depend on revelation. Thomistic natural law itself represented a fusion of Christianity with Aristotelian essentialism, and for most affairs of the world natural reason would suffice: Aquinas had carefully stated that the divine law, revealed through grace, perfects, but does not overturn, the human law that is based on natural reason.\textsuperscript{170}

The question, with respect to such moral issues, is whether there exists in the world any discernible moral order that reveals itself to

\textsuperscript{163} Id. at 33.
\textsuperscript{164} Id. at 34.
\textsuperscript{165} Id.
\textsuperscript{166} Id. at 35 (quoting H. Rommen, The Natural Law 161 (1947)).
\textsuperscript{167} Id.
\textsuperscript{168} Id.
\textsuperscript{169} Id. at 34-36.
\textsuperscript{170} See A.P. d'Entreves, Natural Law 41-42 (1951).
us through the application of reason to the nature of humanity. For example, while a proper understanding of the Trinity would depend on revelation, as interpreted by the Church and accepted in faith, a prohibition against genocide can in theory be rooted in natural law itself, in an understanding of the nature of humanity that is accessible to natural reason alone.\textsuperscript{171} Similarly, Catholic doctrine takes abortion to be a violation of natural law, which means that understanding it to be a wrong should not require Christian faith or church authority.\textsuperscript{172} Jacques Maritain, the well-known modern natural law theorist, made the ontological point absolutely clear. Citing Antigone as "the eternal heroine of natural law"\textsuperscript{173} (although she was no Christian), he then spelled out the basically Aristotelian assumption:

Since I have not time here to discuss nonsense ... I am taking it for granted that we admit that there is a human nature, and that this human nature is the same in all men. I am taking it for granted that we also admit that man is a being gifted with intelligence, and who, as such, acts with an understanding of what he is doing, and therefore with the power to determine for himself the ends which he pursues. On the other hand, possessed of a nature, or an ontologic structure which is a locus of intelligible necessities, man possesses ends which necessarily correspond to his essential constitution and which are the same for all—as all pianos, for instance, whatever their particular type and in whatever spot they may be, have as their end the production of certain attuned sounds. If they do not produce these sounds they must be tuned, or discarded as worthless. But since man is endowed with intelligence and determines his own ends, it is up to him to put himself in tune with the ends necessarily demanded by his nature. This means that there is, by the very virtue of human nature, an order or a disposition which human reason can discover and according to which

\textsuperscript{171} J. Maritain, supra note 147, at 88-89.
\textsuperscript{173} J. Maritain, supra note 147, at 85 (citing Sophocles, Antigone, at ii, 452-60).
the human will must act in order to attune itself to the essential and necessary ends of the human being. The unwritten law, or natural law, is nothing more than that.

When I said a moment ago that the natural law of all beings existing in nature is the proper way in which, by reason of their specific nature and specific ends, they should achieve fullness of being in their behaviour, this very word should had only a metaphysical meaning (as we say that a good or a normal eye “should” be able to read letters on a blackboard from a given distance). The same word should starts to have a moral meaning, that is, to imply moral obligation, when we pass the threshold of the world of free agents. Natural law for man is moral law, because man obeys or disobeys it freely, not necessarily, and because human behaviour pertains to a particular, privileged order which is irreducible to the general order of the cosmos and tends to a final end superior to the immanent common good of the cosmos.

Let us say, then, that in its ontological aspect, natural law is an ideal order relating to human actions, a divide between the suitable and the unsuitable, the proper and the improper, which depends on human nature or essence and the unchangeable necessities rooted in it.174

We have interrupted the description of d’Entreves with the long Maritain quotation in order to highlight the central dilemma of essentialism. The familiar issue implicit here is that of freedom and necessity. As we observe animal cultures, for example, we form judgments about their intrinsic norms. We can study wolves, baboons or elephants and infer the way such creatures should behave to be successful ones of their kind. While much traditional learning had it that the animals behaved the way they were supposed to because they merely followed instinct (necessity), recent scholarship assigns more weight to notions like thinking and problem-solving, and pays attention to local differences in species behavior, validating the use of terms like “culture” to describe animals.

174 Id. at 85-88.
The basic claim of natural law is that we can comprehend our own animality in the same way, that there are better, or more correct, ways of being human. Even allowing for great diversity across historical time and geographical space, the assumption is that there are underlying, even invariant, norms of human behavior, the violation of which amounts to denial of our essential nature.

On the other hand, whatever the norms we articulate, we must confront their widespread disregard. Widespread violation of norms—badness, or sin, as some would have it—is the reality of people in the world. But that is precisely why, for those like Maritain, the subject is morality, not just sociobiology. Our burden, our responsibility, which, at least in conventional theory, distinguishes us from animals, is our freedom. To discover the norms is not to obey them. We are free to choose, and are therefore placed in an endless dialectical engagement between duty (necessity) and desire (freedom).

Thus, the essentialism of natural law is not a surrender to the necessity side of the freedom/necessity duality. It is merely an assertion that we can talk about whether human beings are behaving the way such creatures are supposed to behave, and that such conversation is relevant to the particular exercise of our freedom. In that sense, natural law is surely a challenge to the hubristic presumption of human agency associated with existentialism or, currently, with the postmodern pose of unlimited contingency, the claim that we “can do it all,” can “be whatever we want to be.” What we can be or do is ultimately constrained by who we are.

The method of natural law, as d’Entreves went on to explain, sees law as always containing an element of force and an element of value, even if the only value expressed is the value of force itself. (As the realists, too, had pointed out, value choice is inherent in every legal decision). For example, the Napoleonic Code’s inheritance law disallows complete disinheritance of children, thereby preferring the value of family obligation to that of complete testator autonomy. The methodology of natural law requires first that one discern those values, rather than pretend them away, as do the positivists. Once they are discerned, however, the question of relativism remains. Whose values are to be preferred?

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175 d’Entreves, supra note 123, at 41-42, 43-44.
176 Id. at 42.
Should family obligation trump autonomy? Unless one can answer that question one is still simply describing a cultural “is,” albeit one which properly includes values as part of the culture.

D’Entreves’ answer implicates both epistemology and, again, ontology. He insisted that one cannot simply retreat into Hobbesian epistemological subjectivity, but must confront the world as an objective reality. His example comes from Coleridge via C.S. Lewis: in describing a natural wonder as “sublime,” one is not just saying “I have feelings associated in my mind with the word ‘sublime.’” Rather, one is saying something about the quality of the natural wonder itself, something not captured by the word “pretty,” for example. Just as some responses to a natural wonder are more “just,” “ordinate” or “appropriate” than others, so in human society, and human nature itself,

[t]here are certain ultimate standards or values which determine approval or disapproval, assent or dissent; and I believe that it is these same values that determine our judgment as to whether a law is “just” or “unjust”: in other words—to use a very ancient language that seems perfectly appropriate at this point—whether we are bound in conscience to obey it or not.

Moral language, in other words, cannot be dismissed as merely emotive. As to the content, d’Entreves did not disagree with McDougal’s articulation of basic values; he insisted only that they are not mere subjective “preferences,” but rather rooted in natural law, that is, appropriate to an objective reality about the nature of human beings and human society.

D’Entreves was a meticulous scholar, but on two points he was at best evasive, at least as compared to Maritain, whose work he knew and cited with respect. First, while d’Entreves mentioned the issue of historical relativism, he quickly dismissed it—with a quote from Strauss to the effect that, if natural law is rational, “its discovery presupposes the cultivation of [natural] reason.” Presumably not every person or every society will perform the neces-

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177 Id. at 45.
178 Id.
179 Id. at 46.
180 Id. at 39 (stating “no lesser authority than Professor Maritain”).
181 Id. at 47 (quoting L. STRAUSS, NATURAL RIGHT AND HISTORY 9 (1953)).
sary cultivation.

Maritain was more careful and took more interest in the definition of reason itself. He argued that the Thomistic notion of natural law is not one of rational knowledge, nor of "concepts and conceptual judgments."\textsuperscript{182} For that reason natural law cannot be expected to be uniform through the ages or across cultures. Instead, Maritain insisted that when Aquinas speaks of human reason discovering the regulations of natural law, he does so by reference to "inclination."\textsuperscript{183} Knowledge through inclination is "obscure, unsystematic, vital knowledge by connaturality or congeniality, in which the intellect, in order to bear judgment, consults and listens to the inner melody that the vibrating strings of abiding tendencies make present in the subject."\textsuperscript{184}

It was probably wise of d'Entreves not to lecture his audience of American law scholars on "vibrating strings" and "the inner melody"; this was surely an audience more used to "concepts." But Maritain was making a crucial point about relativism. "Inclination," unlike the fixed norms one usually associates with natural law, is in a process of continual refinement. It exists, Maritain said, in only rudimentary form in "primitive" societies (which is why their practices may be so varied), but with the advance of civilization and the increase in moral knowledge, "inclination" becomes ever more capable of discerning the specifics of natural law.\textsuperscript{185}

This might be taken as routine Western presumption, but it also goes to the elusive relation between natural law and Christianity. By "civilization" Maritain clearly means Christian civilization. By "inclination" Maritain insists on something that is being refined by the precepts of a culture with a Christian tradition. Maritain's solution to the problem of relativism is, in effect, to Christianize natural law—or, at least, natural law as it is understood by a person in our culture.\textsuperscript{186} Its full understanding awaits, he said, the fulfillment of the gospel.\textsuperscript{187}

\textsuperscript{182} J. Maritain, supra note 147, at 91.
\textsuperscript{183} Id. at 91.
\textsuperscript{184} Id. at 91-92. See also A.P. D'Entreves, Natural Law 40-41 (1951) (also stressing "inclination").
\textsuperscript{185} J. Maritain, supra note 147, at 93-94. He cites as one rudimentary truth that "[taking] a man's life is not like taking another animal's life." Id. at 93.
\textsuperscript{186} See P. Ramsey, The Egypt of the Natural Law, supra note 126, at 215-23.
\textsuperscript{187} J. Maritain, supra note 147, at 90.
the more typical claim, that one in our culture can do “moral reasoning” in a manner that completely transcends the Christian tradition of reason—the claim MacIntyre has exposed as self-deceiving. But it raises afresh the problem of relativism (and, implicitly, of the social construction of culture), unless one assumes that Western (traditionally Christian) culture is not just one more culture among many in a world of utterly relativized difference. But on what basis does one make that latter assumption, except by reference to Christian norms?

The Enlightenment concept of “rights” is the second point on which d’Entreves parallels Maritain while being somewhat evasive. D’Entreves mentioned that the Enlightenment version of natural law as a structure of natural rights (as in America’s Declaration of Independence) was probably more familiar to moderns than was scholastic natural law. “Rights” simply do not appear in antiquity or Aquinas. He commented that “the time was not ripe,” in classical antiquity or in the Middle Ages, for a conception of rights. He also made the logical point that there is no “right” without a legal duty, so that “the very notion of a subjective claim presupposes that of an objective order.”

For Maritain the problem runs deeper, however. Maritain did not dispute that the notion of rights, properly understood as an expression of natural law, represents an advance in political thought. “Properly understood,” however, does not mean the rationalist conceptualism of the Enlightenment. Then, “artificial systematization” and a prideful “geometrising reason” replaced a true conception of natural law, which can only be discovered “within the being of things as their very essence is, and . . . precedes all formulation.” (Here he is, in effect, criticizing not only the Enlightenment formulation of rights, but also the parallel and aggressive Baconian approach to nature, which had displaced the Aristotelian respect for beings in their essence with a Reason which conquers and subdues.)

188 See A. MacIntyre, supra note 1, at 51-78.
189 d’Entreves, supra note 123, at 39.
190 J. Maritain, supra note 147, at 82.
191 Id.
192 d’Entreves draws the analogy explicitly in Natural Law. Grotius is cited as the first promulgator of a natural law wholly premised on Enlightenment rationalism—a secular natural law that would remain true “even if God did not exist,” so great was the capacity of
Inevitably, Maritain argues, this aggressive and self-sufficient Enlightenment conception of Reason resulted in a philosophy of rights which ended, as in Kant, "by treating the individual as a god and making all the rights ascribed to him the absolute and unlimited rights of a god." Finally, "human Will or human Freedom . . . was to replace God . . . as supreme source and origin of Natural Law[,] . . . [which] was to be deduced from the so-called autonomy of the Will."

D'Entreves was, again, probably wise not to raise with his audience the deep conflict between traditional natural law and "rights" as conceived during the Enlightenment. If American post-war scholars had wanted a rousing call for fixed legal norms rooted in reason, they had already received a far more subtle and complex configuration than they had expected. The appeal of natural law was in its offer of moral security, civility and a baseline of decency as against the encroachments of anarchy, chaos and amorality; yet its acceptance demanded a surrender to commands rooted in Aris-

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unaided natural reason. A.P. D'Entreves, Natural Law 53 (1951). This was clearly a departure from medieval natural law theorists, who would never have so completely separated natural law from theology, thereby separating what Aquinas and the later Schoolmen had taken pains to join, id. at 52, when they reconciled Aristotle with Christianity. Enlightenment natural law, moreover, was so determined to celebrate the capacity of human "geometricising" reason that it also rejected the Aristotelian attention to the historical world of actual, factual reality. Hence, if natural law consists in a set of rules which are absolutely valid, its treatment must be based upon an internal coherence of necessity. In order to be a science, law must not depend on experience, but on definitions, not on facts, but on logical deductions. . . . Such a science must be constructed by leaving aside all that undergoes change and varies from place to place.

Id. at 53.

The specifically Enlightenment version of natural law formed the basis of Langdell's assertion that law was a science; when Holmes asserted the role of "experience," he was not necessarily rejecting the medieval (Aristotelian) conception of natural law, but only the particular, arguably distorted, form it took during the Enlightenment. On Langdell, Holmes and law as "science," see S. Presser & J. Zainaldin, Law and Jurisprudence in American History: Cases and Materials 712-34 (2d ed. 1989).

193 J. Maritain, supra note 147, at 83.


D'Entreves also pointed to the implicit radicalism of the Enlightenment rights formulation. See A.P. D'Entreves, supra, at 57-61. Moreover, d'Entreves is less unequivocally critical of the Enlightenment than is Maritain. See generally id. at 48-62.
totelian essentialism and in pre-Enlightenment epistemology.

Complete rejection of natural law implies, however, a bleak and incontestable relativism. Celebrating that relativism by locating it in the subjective freedom of post-Enlightenment selves who exercise autonomy and choice is satisfactory only so long as that freedom is exercised in a manner at least minimally consistent with the demands of traditional religiously rooted morality. Yet if the very theory of freedom displaces the authority of tradition, the substantive content of tradition will eventually be relegated to irrelevance.

Thus the ultimate irony of the natural law revival: faced with the moral monstrosity of Naziism, post-war intellectuals who were otherwise epistemological agnostics or skeptics scurried to seek solace in the anticipated moral certainty of the natural law tradition. Soon those secular intellectuals would forget their flirtation with natural law, losing themselves in the heady liberalism of the 1960s. Then, that same natural law tradition would offer the most authoritative philosophical source of opposition to abortion, while the intellectual heirs of those earlier, anxious liberals would now close ranks in support of their Enlightenment, secular, individualistic world view.

The Natural Law Forum continued as such until the late 1960s. Meanwhile, however, most of mainstream legal thought turned away from the hard questions of natural law (although there may be a current rerevival—as Maritain once commented, “[e]very fair and every war brings forth a new natural law”). Throughout the 1970s, thoroughly secular and non-Aristotelian legal philosophy achieved its hegemonic hold on American legal thought—the universe was composed of utilitarians and deontological liberals and the ambitious few who might try to reconcile those two tradi-

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195 J. MARITAIN, supra note 147, at 83. There is clearly a revival of interest in the natural law tradition in moral philosophy, see, e.g., J. FINNIS, supra note 47; R. HITTINGER, A CRITIQUE OF THE NEW NATURAL LAW THEORY (1987); A. MACINTYRE, supra note 1; and even in mainstream legal thought, see L. WEINREB, supra note 15.


197 E.g., R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977). At the extreme, however, they become (conservative?) libertarians. E.g., R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974).
It is perhaps a fitting symbol that in 1969 the *Natural Law Forum* changed its name to the *American Journal of Jurisprudence*, having published in its last *Forum* volume articles by both John Rawls and Robert Nozick.

The same last issue of the *Forum* also featured a very different kind of essay, *Karl Barth and Natural Law*, by Louis Midgley. The essay raised a troubling point that seemed, oddly, not to have occurred to the earlier enthusiastic revivers of natural law, although it is well-known to theologians: the only serious Christian institutional opposition to Hitler in Germany arose, not on the basis of natural law, but rather quite explicitly and emphatically in the context of rejecting natural law. That extraordinary irony was not mentioned in the pages of the *Forum* until the 1968 volume, and then only in a half-hearted effort to claim that the rejection was not so emphatic after all.

### C. Neo-Orthodox Protestantism

That rejection of natural law in Germany was rooted in the Reformation. Legal scholars often find Reformation theology less congenial than the stately and familiar principles of natural law. Nevertheless, an uncompromising reaffirmation of the Reformation inspired the German Confessing Church to refuse to compromise with Naziism and formed the basis for the Barmen Declaration of 1934, a declaration of opposition to Hitler.

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198 The most celebrated of such in the 1970s was J. Rawls, *A Theory of Justice* (1971), which sought to combine Kantianism with the contractarian tradition to defeat utilitarianism. Rawls' initial and ambitious aim was the alchemical one of turning procedure (contracting) into substance (morality), but he gradually yielded to the fuzzy reality of intuitionism. For a good critique, see R. Wolff, *Understanding Rawls* (1977).


202 Id. at 123-26.

203 See E. Jungel, *Karl Barth: A Theological Legacy* 25-26 (1986) (describing the state of Karl Barth's theology when he took part in drafting the Barmen Declaration). Meeting in Barmen on May 31, 1934, the first synod of the "Confessing Church" adopted the Barmen Theological Declaration written principally by Barth. Barth refused to take the unconditional oath of loyalty to the Fuhrer, which led to his dismissal from the Chair of Systematic Theology at Bonn; although he successfully appealed the dismissal, he was "pensioned off" and German publication of his works was thereafter prohibited. Following his June 1935 expulsion from Germany he returned to Basel, where he continued to oppose Hitler and produce, as well, his monumental works in theology, which included the multivolume...
At a time when Hitler was seeking, with great success, both loyalty and submission to civil authority from the German Lutheran Church, the dissenters unequivocally rejected the false doctrine that the Church, as the source of its proclamation, could and should, over and above God's one Word, acknowledge other events, powers, images and truths as divine revelation. . . .

. . . the false doctrine that the form of her order and mission can be left to the discretion of the Church or to the ideological and political views that happen to prevail . . . or that she can set up, or allow herself to be given, special leaders with sovereign powers.204

The Declaration was a theological rather than a political statement, but when it proclaimed, in 1934 Germany, that "[w]e repudiate the false teaching that there are areas of our life in which we belong not to Jesus Christ but another lord, areas in which we do not need justification and sanctification through him,"205 its political implications were inescapable. At the end of the Barmen synod, some ten thousand persons gathered for a worship service. As they departed, they sang Luther's hymn, A Mighty Fortress is Our God, which became a symbol of resistance throughout the Nazi period.206

Karl Barth, the great "neo-orthodox" Protestant theologian, was the principal author of the Barmen Declaration, at a time when many more "liberal" German Lutherans were using a modernized version of natural law (one more "imprudent," Barth said, than real Thomism)207 to justify embracing Hitler. Catholics, often he-

207 See Barth, NO!: Answer to Emil Brunner, in Natural Theology 65, 96 (P. Fraenkel transl. 1946); see also K. Barth, The Church and the Political Problem of Today (1939); K. Barth, The German Church Conflict (1965); Glenthoj, Karl Barth and the German Salute, 32 J. Church & St. 309 (1990).
roic in their individual efforts to thwart Hitler and help Jews, found their church, for the most part, silent on what natural law required. The Confessing Church stood out in frank and utter opposition. Karl Barth was expelled from Germany; he returned to his native Basel. His theological and political ally, Dietrich Bonhoeffer, chose to remain in Germany and eventually joined the secret resistance; he was imprisoned in Berlin in 1943, transferred to Buchenwald following the failed attempt to kill Hitler, and summarily executed on April 9, 1945.

Given that history, which would seem to suggest at least an ini-


There is reason to believe that the legacy of Dietrich Bonhoeffer played a significant role in sustaining the religious resistance in East Germany that led to the dramatic collapse of the Communist regime in 1989. It is more than fortuitous that the round table discussions that paved the way for new government began at a recently constructed Protestant conference center in East Berlin called the Dietrich-Bonhoeffer-Haus. See Pierard, Religion and the East German Revolution, 32 J. Church & St. 501, 505 (1990). On the political role of the East German Evangelical Church, see generally Burgess, Church-State Relations in East Germany: The Church as a “Religious” and “Political” Force, 32 J. Church & State 17 (1990).
tial claim to ethical credibility, and also given the profound influence of both theologians in modern theology (including Catholic theology), it may be surprising that they were ignored by the post-War legal world—even at a time when the legal world was taking theology seriously. In part, the explanation is an odd quirk of misinterpretation. When Barth's work was first becoming known in America, Reinhold Niebuhr was the leading American Protestant theologian, whom legal scholars were most likely to associate with Protestantism. Niebuhr's own powerful work had seemed to reach a dead end at a time when Protestantism generally was also foundering. \[211\] George Kelly has characterized the Protestantism of the period as a cacophony of frustrations, a motley collection composed of: fundamentalism's "defensive suspicion of all treatments of Scripture . . . [except] literal inerrancy; sugar-coated liberal modernism that forsook dogmatics for a soft and safe bourgeois ethic; self-righteous pacifism and quietism; sectarian extravagance; and Social Gospel extremism that reduced Christianity to a kind of idealistic case work." \[212\] Moreover, Niebuhr himself unaccountably failed to understand Barth, attributing to him positions which were almost precisely the opposite of the ones he actually had taken. \[213\] Meanwhile, even Paul Tillich, who read Barth more carefully, objected to his extreme anti-essentialism and his strong stand against natural law. \[214\]

By the 1960s, when Bonhoeffer's *Prison Letters* were becoming almost faddishly well known even in secular America and Barth's work had been more thoughtfully interpreted, the law world was shifting its attention away from theology altogether—it had been, at most, a brief flirtation. To the extent that Naziism was remembered as raising metaphysical questions, "these were," as Peter Berger writes, "typically anthropological rather than theological in character: 'How could men act this way?' rather than 'How could God permit this?'" \[215\] Yet the appearance of Midgley's essay


\[213\] See Midgley, *supra* note 201, at 113-16.

\[214\] Id. at 116-21.

in the Natural Law Forum does remind us—as did the best of legal realism in relation to law—that theology need not rely on normative, essentialist categories to be serious about ethical responsibility.

Bonhoeffer, when later popularized, was often treated as a secular existentialist or a utilitarian rather than as a devout Christian. Serious theological study of Barth and Bonhoeffer was confined to the realm of academic theology, where once-influential departments had become intellectual backwaters, curiosities in a secular age. The two points are related, for Bonhoeffer was surely in some sense an authentic existential hero, yet secular intellectuals, however impressed by Bonhoeffer, could no longer take theology seriously on its own terms, as being something that might be real or important, rather than just another cultural of political phenomenon to be studied and dissected for its functional value, like labor unions, television shows or zoological societies. For secular elite intellectuals, religion was simply not visible, almost too embarrassing to take seriously. As Gary Wills describes them, these intellectuals “have a serene provincialism, dismissive of the ordinary torments of people less optimistic, irreverent, and pragmatic than they.”

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24, at 160.
216 See infra notes 501-07 and accompanying text.
217 Id.
218 See G. WILLS, UNDER GOD: RELIGION AND AMERICAN POLITICS 89 (1990). Wills’ particular, yet representative, examples are historians Henry Steele Commager and Arthur Schlesinger, Jr. See id. at 86-93.

A striking example of such “serene provincialism” is the treatment of religion in that bastion of literary sensibility, the New York Times Book Review. The Dec. 2, 1990, issue offers us the “best” (14) and most “notable” (309) books of 1990. Of the 323 titles listed, only six of the “notable” ones (and none of the “best”) were in the category “Religion,” the same number as “Science Fiction” or “Spies and Thrillers.” By way of comparison, the category “Autobiography and Biography” contains 51 entries, many of which are so obscure in subject matter as to offer a literal definition of the word “esoteric” (“known only to a chosen few”). N.Y. Times Book Rev., Dec. 2, 1990, at 3, 48-70. Of the six titles actually listed under “Religion,” none is a theological work. Two are about the politics of the Catholic church, one offers a sociological profile of American Catholics and another is from the “Bible as literature” school, coming with the imprimatur of elite literary critic Harold Bloom. Id. at 69. Two of the books, while not works of theology, share our perspective about the importance of religion as such in American life. One is G. WILLS, supra; the other is R. COLES, THE SPIRITUAL LIFE OF CHILDREN (1990).

For Coles, our “cosmological yearnings” may actually offer “a little help in knowing what this life is about,” for “the issue is the nature of our predicament as human beings, young or old—and the way our minds deal with that predicament, from the earliest years to the final
Karl Barth and Dietrich Bonhoeffer were concerned with those “ordinary torments,” basic issues of life and death, of pain and suffering, the realities that serve constantly as antidotes to our pride and arrogance, as reminders of our ignorance and inability to master our own fate. We will therefore offer a survey of their moral landscape, knowing full well that we are inviting most of our readers into a territory that will seem strange and alien to them. Their discourse is starkly theological, with lots of “God-talk,” and we will take it seriously as such. Yet the issues are familiar to contemporary purveyors of critical theory—freedom and necessity, subject and object, fact and value, contingency and timelessness. In fact, such issues, treated with far more sophistication than our recent forays, have been the stuff of Reformation thought for over 400 years. Perhaps we still have something to learn about morality and human agency from Martin Luther, John Calvin or Jonathan Edwards, as well as their latter-day expositors and interpreters—just as we have more to learn from the subtlety of real Thomist natural law thought than we usually suppose.

Many have credited (or blamed) the Reformation for making modern scientific and liberal moral/political thought possible. Its insistence that salvation comes only from faith had the unintended but perhaps inevitable effect of relegating theology to the realm of private, subjective desire. If faith and grace alone led one to God, then reason was “freed,” as it were, to master the objective “facts” of nature or outline rational principles of secular governance and morality. By the time of the Enlightenment, God had become, as Barth said, an “‘old Lord,’ to whom regard must occasionally be

breath.” R. Coles, supra, at 7. He therefore regards it as “particularly ironic to find both Freudian and Marxist thought so arrogantly abusive when the subject of religion comes up.” Id. at 7-8.

And arrogance and abuse are just what one finds in the same New York Times Book Review when it offers a secular liberal review of the “fundamentalist” publishing scene, which lumps together all manner of various strands of religious belief to take a lot of cheap shots. See Lifton & Strozier, Waiting for Armageddon, N.Y. Times Book Rev., Aug. 12, 1990, at 1, 24-25. For a sampling of the critical response elicited, see Letters, N.Y. Times Book Review, Sept. 9, 1990, at 46. Ironically, if the thousands of books sold in “religious” stores were counted in the weekly tabulations, they would probably dominate the Times Best Seller List.

had, but who is not normally considered.”

At their best, however, Protestant theologians have a maddening knack for toppling and upending ostensibly comfortable and seemingly stable structures of thought. Scholastic natural law theory, for example, created an elaborate hierarchical structure that seemed to mediate the supposedly infinite distance between human beings and God, and between nature and grace. Thus, it was said, grace “perfects” nature, but does not overturn it. It almost seemed as if, through natural reason, people could ascend the hierarchical ladder of speculation which led from the earthly to the divine.

The Reformation seized upon that point of perfecting, but not overturning, as one of infinite distance, beyond the capacity of human mediation. Hence, the elaborate scholastic structure, which, exactly at that point had seemed to reconcile Aristotle and Christianity, began to crumble. Perhaps the most easily accessible legal analogy to the critical edge of Protestant theology is to the realists, with their knack for taking the dilemma of the “hard case” and showing it to be, not peculiar and peripheral to an otherwise intact structure, but rather, at the core of the whole structure, the problem of legal reasoning itself.

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220 III K. Barth, Church Dogmatics, pt. 3, at 124 (1960) [hereinafter III K. Barth, Church Dogmatics].

221 See Mensch & Freeman, supra note 194, at 587-88, 587 n.14. More specifically, Aquinas had sought to reconcile notions of natural law, drawn largely from the Romans, and the Aristotelian conception of both politics and nature, with the Augustinian perception that human sin renders the Earthly City naught but illusion and vanity. See A.P. d'Entreves, Natural Law 36-37 (1951).

Aquinas himself insisted that “[i]f ‘Grace does not abolish Nature,’ neither does nature abolish grace”—the law of nature is “only a step, although a necessary step, towards perfection.” D’Entreves observes that the “proud spirit of modern rationalism is lacking.” Id. at 45. Nevertheless, the harmony Aquinas sought to establish between human and Christian values was bound to be unstable; and the Reformation was a reassertion of the Augustinian side of that unstable medieval “harmony.” See, e.g., P. Miller, The New England Mind 3-34 (1939).

222 Karl Llewellyn, for one, became acutely aware of this correspondence:

I am therefore driven back upon faith, as conditioned by temperament. The important factors of temperament seem to be: a rebelliousness; an optimism and interest in underdogs; an insistence on seeing clean.

. . .

But it promptly appears that the rebelliousness does have something to work on. I can meet the Lord without reservation, and just merge into the work He seems to want; and do it for us and Him. But I don’t want any intermediaries. It has taken me thirty years to get here. And the Lord under-
Barth was a master of that critical technique, by which he affirmed the central Reformation teaching that, as he said often by tautology, “God is God”—hence, “we humans may not speak of God by speaking of ourselves in a loud voice,”223 which is what he stands the stiff neck quite as well as He understands the drive for craftsmanship and the fact that only by driving for technique could I have reached the deeper things.

... Yet the whole job is a sort of rebel job. It is like appealing to Jesus before there was Paul. It is essential heresy, in that I am trying to do a Paul my way. Because what Paul did was to put structure, carrying-power, under Jesus' teachings. I find I feel about Paul the same way I feel about great lawyers whom I think to have gone sometimes off the track. He over-intellectualized, so far as he wrote.

... Let me then stay as close as I may to Jesus and to Paul's living rather than—or better, together with—his writing. With this, “rebel” and “non-rebel” begin to line up. I observe with amusement that I am duplicating in religion a twenty-year road in legal work. But I think the Lord is equally amused. He never let me meet Him until I had cut under “authoritative” hogwash in law, and then gone on and sweated into contact with the real tradition. He was out of sight and hearing while I was merely fighting authoritative nonsense, or trying to “construct” nonsense of my own. It was only when I began to feel for the real underneatness, as vouched in the tradition, and then to work toward giving workable form to that, that the Lord let me meet Him. As if He had left some jobs of creation over for His creatures to do, and watched to say “Good kid;” “Now go on and do the next one better.”

... I don't trust any intermediary machinery. My whole contact with the Lord depends on having gotten down under machinery, and on finding that when I managed to start working the real juice of human need into more effective machinery, the Lord stepped in and took over. But direct. So I can't go through any Church that won't leave me that direct contact, even if I do have to join up.

K. LLEWELLYN, POSITION RE: RELIGION (1943) (Karl Llewellyn Papers, University of Chicago Law School). We are grateful to Michael McConnell for providing us with a transcription of the document.


223 For a clear statement of the centrality of that message, see III K. BARTH, CHURCH DOGматICS, supra note 220, pt. 3, at 124; Rumscheidt, The First Commandment as Axiom for Theology: A Model for the Unity of Dogmatics and Ethics, in THEOLOGY BEYOND CHRISTENDOM: ESSAYS ON THE CENTENARY OF THE BIRTH OF KARL BARTH, MAY 10, 1886, at 143 (1986) [hereinafter THEOLOGY BEYOND CHRISTENDOM].

The relation between the critical mode and the affirmation of “God is God” is clarified in such Barthian passages as:

In announcing the limitation of the known world by another that is unknown, the Gospel does not enter into competition with the many attempts to disclose within the known world some more or less unknown and higher form of exis-
took natural law theorists to be doing. Barth was therefore not surprised when natural law theorists offered so little resistance to the idolatry of Naziism.  

Given its emphasis on the frailty of over-confident human structures of thought, Protestant theology depicts a reality that is both paradoxical and dialectical, one that cannot be captured by analytic, conceptual categories. Thus, the gospel is described as the overcoming of a series of completely contradictory categories: “nothing new, but the oldest; not particular, but the most universal; not historical, but the presupposition of all history,” while simultaneously “not an old acquaintance, but a new one; not universal, but the most particular; not a mere presupposition, but history itself.” Similarly, being faithful to Kierkegaard’s insistence on the “‘infinite qualitative distinction’ between time and eternity,” Barth described divine encounter with the world as the “impossible possibility,” as “a moment with no before and no after.”

As metaphor for such formulations, Barth drew, not on Aristotle, for whom our existing reality was self-contained, but rather on Plato, for whom the reality we name was never more than provisional. For example, the metaphor for the moment of “no before


tence and to make it accessible to men. The Gospel is not a truth among other truths. Rather, it sets a question-mark against all truths. The Gospel is not the door but the hinge. The man who apprehends its meaning is removed from all strife, because he is engaged in a strife with the whole, even with existence itself. Anxiety concerning the victory of the Gospel—that is, Christian Apologetics—is meaningless, because the Gospel is the victory by which the world is overcome. By the Gospel the whole concrete world is dissolved and established.

K. Barth, The Epistle to the Romans 35 (6th ed. 1933) [hereinafter K. Barth, The Epistle to the Romans].

Rumscheidt, supra note 223, at 150-51.

E. Jungel, supra note 203, at 32 (quoting K. Barth, Der Römerbrief 7 (1919)). Barth’s later work could be described to some extent as a move from dialectics to assertion, yet it never became undialectical. See generally id. at 33-51.

Id. at 66 (quoting K. Barth, The Epistle to the Romans 10 (2d ed. 1922)).

Id. at 50. In The Epistle to the Romans, Barth, citing Kierkegaard, said that “Jesus as the Christ . . . can be comprehended only as Paradox.” K. Barth, The Epistle to the Romans, supra note 223, at 29 (citing Kierkegaard) (emphasis added). Thus, “[a]s Christ, Jesus is the plane which lies beyond our comprehension. The plane which is known to us, he intersects vertically, from above.” Id. This is a somewhat different “geometrising” than that associated with Enlightenment rationalism and Enlightenment versions of natural law. See supra note 192.

See E. Jungel, supra note 203, at 67.
and no after” can be found in Plato’s description of rest and motion. Rest and motion, as we conceive them, by definition exclude each other, yet the reality of the world is constituted by transition from one to the other, by a moment which can only be defined negatively, the essence which is in no place, or as Schleiermacher translated it “this incomprehensible essence, the moment.”229 With no place and occupying no time, this moment nevertheless constitutes both space and time: “That which cannot be identified spatially or temporally in this world is that which holds the world together at its core.”230

Barth’s favorite among his own works was a study of St. Anselm’s proof of the existence of God, which, for Barth, turned an absolute prohibition on thought into an affirmation that made human thought possible.231 Anselm’s proof was rooted in a formulation, a name, for God: “That than which nothing greater can be conceived.”232 Notably, states Barth, this name is not “that which is the greatest of all things,” as it had been misinterpreted.233 That would be an affirmative claim, which would amount to placing God in the realm of the ontic.

229 Id. at 68.
230 Id. at 67-68. For the continued difficulty of describing the relation between motion and rest, compare M. Kline, Mathematics in Western Culture 404-05 (1964) with G. Zukav, The Dancing Wu Li Masters: An Overview of the New Physics 122-29 (1979). See also K. Barth, Epistle to the Romans, supra note 223, at 46 for the Platonic assertion that “behind the visible there lies the invisible universe which is the Origin of all concrete things.” For Barth, however, that recognition never becomes simple idealism. For example, referring to the “irony of intelligence,” Barth states,

> We know that God is He whom we do not know, and that our ignorance is precisely the problem and the source of our knowledge. We know that God is the Personality which we are not, and [that] this lack of Personality is precisely what dissolves and establishes our personality. The recognition of the absolute heteronomy under which we stand is itself an autonomous recognition; and this is precisely that which may be known of God. When we rebel, we are in rebellion not against what is foreign to us but against that which is most intimately ours, not against what is removed from us but against that which lies at our hands.

Id. at 45-46.
231 For the following discussion we are indebted to C. Rasmussen, Karl Barth on St. Anselm: A Theological Response to the Dilemma of Liberal Theory (unpublished manuscript on file with author). On Barth and Anselm, see also Nebelsick, Karl Barth’s Understanding of Science, in Theology Beyond Christendom: Essays on the Centenary of the Birth of Karl Barth 165, 193-205 (J. Thompson ed. 1986).
232 C. Rasmussen, supra note 231, at 17.
233 Id. at 20.
Instead, Anselm had located that point of radical and complete disjuncture analogous to the gap between finite number and infinity (Anselm had in effect defined infinity many years before mathematicians had done so).231 By naming God only through prohibition and negation, Anselm affirmed our inability to name God at all, giving us knowledge of our finitude. Again, the perhaps too slick analogy is to numbers—we have knowledge of finite numbers as such only with reference to infinity, which we can name but cannot comprehend.233

Similarly, in discussing human attempts to formulate laws of nature, Barth zeroed in on the inevitable gap between human prediction and the actual occurrence of events, which he called the gap between the noetic and the ontic—the lack of necessary connection between what is apprehended by mere thought and what actually occurs:

No high measure of noetic certainty or clarity can give to laws known to us, i.e., discovered and guaranteed by us, the character of ontic laws . . . .

. . . Concerning the actuality of the laws known to us we will already think rather more modestly because we will be aware that they cannot in any case originate or effect the event itself and as such, that even presupposing their validity they must still be referred to the fact that the event takes place at all only on the basis of a completely different operation [which, for Barth, was “foreordination”].236

Humility, a sense of the finitude and contingency of human

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231 This particular analogy is ours. For a discussion of the definition of “infinity,” see P. Wolff, Breakthroughs in Mathematics 129-30 (1963):

An infinite quantity is not enumerable—it cannot be counted. And conversely, anything which can be counted—any quantity, no matter how large, to which a number can be assigned—is by that token not infinite. No number can ever be said to be infinite, for every number always has a next one; hence the former number cannot be called infinite, since there is at least one number greater than it. In fact, a good definition of infinity states that infinity is larger than any number you may name and that consequently, infinity itself is not a number.

See also M. Kline, supra note 230, at 395-409.

233 Compare: “God is He Whom we do not know,” an “ignorance” which is then both “the problem” and the “source of our knowledge.” See supra note 230 (quoting Barth).

236 III K. Barth, Church Dogmatics, supra note 220, pt. 3 at 127.
thought in the face of what can really be known only from the (im-
possible) vantage point of infinity, makes, as Barth points out, for
better science. We should

leave the laws known to us open to the revision of con-
tent and formulation which may become necessary as a
result of our encounter and their confrontation with new
and actual occurrence. These laws are as it were arrows
pointing in the direction of real order and form, i.e., of
the order and form which are objectively immanent in
and proper to actual occurrence itself. But for this reason
they can never become absolute dogmas, nor assume the
character of ontic law.237

Barth, in fact, did not reject science, but audaciously reclaimed
theology as a science. As against skeptics, he argued that all sci-
entific knowledge is necessarily contingent, with its particular meth-
do-logy suited to its own specific object of study; and that all sci-

237 Id. Barth was not denying the existence of order in the natural world. He affirmed: “It
is not chance which rules but constancy, not caprice but faithfulness. All occurrence, inas-
much as it takes place at all, takes place within the framework of a definite rule.” Id. at 128.
Nevertheless, he insisted,

[w]e will acknowledge this the more seriously and proclaim it the more effec-
tively, the more scrupulously we cease trying to equate even one of the laws
known to us, even the law which we perceive with what we imagine to be the
greatest clarity and certainty, with the order and form or constancy and faith-
fulness which rule in that causal nexus, with the rule to which all occurrence
within it is subject. Only as we cease doing that do we give evidence that in the
laws perceived and described and formulated by us we are aiming at real law;
at the ordering and forming which takes place in the occurrence itself and not
simply in our experience and thinking, which is not merely an ordering and
forming but also an effecting and calling forth of the actual occurrence itself. It
is remarkable enough that the less we believe that the laws known to us have
anything at all to do with the real foreordination of creaturely occurrence, the
more they really have to do with it, the more clearly they testify by their own
particular, that is, noetic, clarity and certainty that there are indeed valid laws,
that in the causal nexus in which each individual activity has its place and by
which it is conditioned there does rule a unitary and—we can now legitimately
use the description of Goethe and say—an “eternal” law . . . .

Id.

Barth’s insights about the subject/object problem in Enlightenment science bear a close
resemblance to those of America’s greatest theologian, Jonathan Edwards, whose analysis of
Newtonian physics and Lockean epistemology was more sophisticated and “modern” than
that of any of his eighteenth-century contemporaries. As both Barth and Edwards under-
stood, the world is more relentlessly “objective” than any human statement of its laws can
describe. See P. MILLER, JONATHAN EDWARDS 43-99 (1949).
ence is rooted in a faith that the object of study will reveal itself, at least provisionally, through the method fashioned by scientists within their traditions. Thus understood, science was actually much more akin to theology than to its own presumptuous and complacent nineteenth-century positivism:

In realizing the tentativeness, the transitoriness, the dependence of every science upon an object that is too large for its own comprehension, along with the knowledge that no science is complete in itself but depends upon a meta-science that itself is incomplete, modern science resembles proper theology much more than it resembles the classical seventeenth-century Newtonian science and even less Aristotelian science.

In a criticism of positivism strikingly similar to that of Barth, physicist Werner Heisenberg noted that both science and theology are compelled to speak in “images and parables,” that “Truth dwells in the deeps.”

For Barth, then, to do theology as a scientist meant that one must be “fully cognizant of his presuppositions, his method, the time-boundedness or temporality of his thought, and hence the

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238 For a full discussion of Barth's notion of theology as science see Nebelsick, supra note 231, at 165-214.
239 Id. at 197.
240 See W. HEISENBERG, PHYSICS AND BEYOND: ENCOUNTERS AND CONVERSATIONS 205, 210-12 (A. Pomerans transl. 1971). Barth had not realized the parallels between his theology and modern physics, assuming natural science remained stuck in its “pre-modern” positivist mode. Barth, after all, was still battling the tendency of “liberal” religion to humble itself before the arrogant rationalism of post-Enlightenment scientific rationalism. Given that misunderstanding, he declined to join the Gottingen Theologian-Physicists conversations (1949-61), despite the efforts of his friend Gunter Howe, and lost the opportunity to engage Heisenberg, who was a member of the group. See Nebelsick, supra note 231, at 199-200.

Heisenberg himself saw in the variety of religious formulations “the clear impression that all such formulations try to express man’s relatedness to a central order.” W. HEISENBERG, supra, at 214. With respect to ethics, moreover, the meaning of that “central order” was clear. Secular “pragmatism” offered little on its own:

If we ask Western man what is good and what is evil, what is worth striving for and what has to be rejected, we shall find time and again that his answers reflect the ethical norms of Christianity even when he has long since lost all touch with Christian images and parables. If the magnetic force that has guided this particular compass—and what else was its source but the central order?—should ever become extinguished, terrible things may happen to mankind, far more terrible even than concentration camps and atom bombs.”

Id. at 217.
Theology, being “entirely dependent upon God’s decision rather than upon any independent decision of its own,” knowing “only the actuality of being bound (Bindung) to its object, the object of its faith, . . . knows itself to rest on sheer contingency.”

Thus Barth, in taking a “scientific” approach to theology, repudiated not only the self-deluding claims of Baconian positivism, but also the certainty people invented for themselves in the name of “religion.” In fact, both Barth and Bonhoeffer were known for advocating “religionless Christianity,” for “Religion forgets that it has a right to exist only when it constantly does away with itself.”

Barth’s greatest concern was not to expose the fallacies of positivist science, but to combat instead a Protestant return to a natural law theology that tended to elevate contingent human projects to the status of natural or essential reality. This tendency was becoming a theological excuse for alliance with Nazism, to the extent that it suggested a correspondence between the natural order and the political order of the German state. When a former friend, Emil Brunner, wrote in support of a doctrine of “orders of creation,” by which he meant a return to a form of natural theology, Barth’s famous answer was entitled, simply and dramatically, “Nein!”

Brunner had argued that even the Reformers taught that the world was the creation of God, that humans were endowed with conscience and that God graciously preserves both natural life and

\[\text{241} \text{ Nebelsick, supra note 231, at 174.} \]
\[\text{242} \text{ Id. at 182-83. No science could be more dialectical, since God is both its object and subject: “God may be known only as he reveals himself. He is both the object of knowledge and the means by which knowledge of himself may be gained.” Id. at 199. See also id. at 203.} \]
\[\text{243} \text{ E. Jungel, supra note 203, at 59 (quoting K. Barth, Biblical Questions, Insights and Vistas, in THE WORD OF GOD AND THE WORD OF MAN 66 (1928)). Thus Barth read the Bible as self-demythologizing: “The biblical piety is not really pious; one must rather characterize it as a well-considered, qualified worldliness.” Id. In addition, Barth believed Jesus simply had nothing to do with religion. The meaning of his life is the actuality of that which is not actually present in any religion—the actuality of the unapproachable, the unreachable, the incomprehensible, the realization of the possibility, which is not a matter of speculation: “Behold, I make all things new!”} \]
\[\text{Id. (quoting K. Barth, supra, at 88).} \]
\[\text{244} \text{ See Brunner, Nature and Grace, in NATURAL THEOLOGY 16 (1946).} \]
\[\text{245} \text{ See Barth, supra note 207, at 65.} \]
the "ordinances" of historical and cultural life, such as marriage and the state, and the civil and secular functions and offices.240 These ordinances can be recognized as good and necessary by "rational man" alone, through the exercise of natural reason. It is "peculiar to the preserving grace of God that he does his preserving work both by nature acting unconsciously and by the reason of man."247 If this sounds like St. Thomas, Brunner had announced, then so too did Calvin, who used the term "lex naturae," and also "order of creation."248 Brunner had conceded that both lex naturae (the will of God implanted on creation) and the ordinances of creation were "somewhat obscured" by sin and must be made known afresh by Christ; but the original order still "clearly shows through" despite sin, and can be recognized by the light of natural reason.249 Brunner was in effect suggesting the possibility of discovering a self-sufficient rational system, "with which sin 'has . . . nothing to do.' "250

Barth answered with scorn. Even St. Thomas, he said, by incorporating Augustine, had rejected so brazen a claim for natural reason. As he reminded Brunner, Catholics had a doctrine of prevenient and preparatory grace, which made the correct operation of reason in nature possible: "[R]eason, if left entirely without grace, is incurably sick and incapable of any serious theological activity. Only when it has been illumined, or at least provisionally shone upon by faith" can it produce statements of truth about the human and natural world that can be considered truths of reason rather than revelation.251 In other words, within Catholicism "[t]here can be no question of separating nature and grace 'neatly . . . by a horizontal line.' "252 (This point is often obscured both by Protestant critics of natural law and by Thomists who want to make it more accessible to non-Christians.)

Thus, according to Barth, Brunner oversimplified the question of nature and grace, and was so confident about the unsullied capacity of reason, as to offend any "Roman Catholic theologian who

246 Brunner, supra note 244, at 28-30.
247 Id. at 31.
248 Id. at 36-37.
249 Id. at 39-40.
250 Id.
251 Barth, supra note 207, at 96.
252 Id. See also Maritain, supra note 147.
knows his subject at all." But even more offensive was the claim that the ordinances of creation (described by Brunner as representing Reformation thought) were really consistent with the message of God's absolute transcendence. Brunner had blunted and tamed the critical existential Reformation claim, leaving the way open for Protestants who called themselves "German Christians" to argue a correspondence between God's will, natural law and the "ordinances" of German nationalism—German culture, the German state, the German race. Barth was unforgiving, saying that Brunner had

gone and calmly claimed Calvin for his own; . . . he has confronted me together with his "Calvin" and has patted me on the shoulder and told me to be a good boy; he has seen to it that the "German Christians" can, if they wish . . . quote now not only Luther but also Calvin in their support. It is the fact that he managed to do all these things which I am so far unable to forgive Brunner.254

Barth thus insisted that natural law offers no basis for real ethical judgment—instead, it opens the way for oppressive ideology by pretending that what is contingent, provisional and merely human is really "natural," as part of the divinely sanctioned nature of creation, its essential reality. What then, can be the basis for ethical decision, if not natural law? Barth and Bonhoeffer forged an answer to that question in the pressing moral and political context of Nazism—ethics was not an abstract question, but one upon which a person could be called upon to stake his or her life, as did Bonhoeffer. Barth's critical methodology had been sharpened by Overbeck, a friend of Nietzsche and an utter religious skeptic; it was Overbeck who had inspired Barth to attack the arrogant pretension of conventional religious thought and, especially, the complacent claims of liberal Protestants.255 Bonhoeffer, too, viewed the problem of ethics as the problem posed by Nietzsche: after criticism, what remains except the Nietzschian claim that power is its own excuse for being?256
Could one reject abstract normative categories, whether derived from natural law or the secularized rationalism of Kant, and nevertheless fashion an ethics that would demand responsible action in the world? The answer for Barth and Bonhoeffer lay not in ethics itself (based on a supposed knowledge of the world and the operation of human reason), but rather in theology: in the dialectical process of looking first "upward," as it were, to the command of God, which is a divinely initiated claim, the call to the covenant "I-Thou" relationship, and then downward, to a particular person in a particular context. The content of the command is known only by virtue of another dialectic—that of incarnation and redemption—so that the (impossible) command is always accompanied by the promise of grace, of the "giving" which is its meaning. (Those are, to put it mildly, unfamiliar terms in modern secular thought—sin and redemption have almost dropped out of the vocabulary, but for Barth and Bonhoeffer they were still central.) Hence, the gospel was the core of ethics—the command that is fulfilled by the life lived wholly for the neighbor.227

73. On Nietzsche, see A. MacIntyre, supra note 1, at 110-20, 256-59. Nietzschean criticism was effective in overcoming the constraints of Enlightenment rationalist complacency, which would otherwise engulf Christianity. The challenge remained, however, to reclaim Christianity from Nietzschean criticism. For Bonhoeffer this necessarily meant affirming the "this-worldliness" of Christianity:

The Christian is not a "homo religiousus" but simply a man, as Jesus was a man . . . I don't mean the shallow and banal this-worldiness of the enlightened, the busy, the comfortable, or the lascivious, but the profound this-worldiness characterized by discipline, and the constant knowledge of death and resurrection.

D. Bonhoeffer, Letters and Papers from Prison 201 (1953).

See also J. Burtness, supra note 210, at 109-07, 146; R. Lovin, supra note 210, at 126-27, 139-43; J. Woelfel, Bonhoeffer's Theology: Classical and Revolutionary 68-71 (1970).

227 See, e.g., J. Burtness, supra note 210, at 43-51, 54-59; E. Jungel, supra note 204, at 45. Similarly:

Who is my neighbour? Does this question admit of any answer? Is it my kinsman, my compatriot, my brother Christian, or my enemy? . . . The answer is: "You are the neighbor. Go along and try to be obedient by loving others." Neighbourliness is not a quality in other people, it is simply their claim on ourselves. Every moment and every situation challenges us to action and to obedience. We have literally no time to sit down and ask ourselves whether so-and-so is our neighbour or not. We must get into action and obey—we must behave like a neighbour to him.

D. Bonhoeffer, The Cost of Discipleship, supra note 211, at 67-68 (the context is that of the lawyer who insists on a preliminary fuss about membership in the "neighbor" category before he can obey the commandment. See Luke 10:25-29). Likewise:

This concept of correspondence to reality certainly needs to be defined more
Barth's ethical method always retained a critical edge—a method designed to undercut ethical categories for the purpose of forcing direct confrontation with the "command." Usually, Barth said, the ethicist produces a prescriptive legal text—by drawing from the Bible, from natural law perceptible to reason or from "particular norms which have been handed down historically in the tradition of Western Christianity and which lay claim to universal validity." Then this text, with its carefully defined categories, is applied to particular cases by the method of casuistry, the working out of detailed exceptions and distinctions. This is a method with much to recommend it, Barth observes, in no small part because it eliminates the "often very oppressive task of making [one's] own orientations and decisions"—for which "everyone will be grateful to the moralist for the superior knowledge" that is thereby brought to the situation.

As always, however, Barth points to the gap which makes this whole elaborate ethical enterprise impossible—here precisely the legal realist point that there simply is no "method or technique of applying this text to the plentitude of conditions and possibilities." That means the legalist model for ethics as premised on exactly. It would be a complete and a dangerous misunderstanding if it were to be taken in the sense of that "servile conviction in the face of the fact" that Nietzsche speaks of, a conviction which yields to every powerful pressure, which on principle justifies success, and which on every occasion chooses what is opportune as "corresponding to reality." "Correspondence with reality" in this sense would be the contrary of responsibility; it would be irresponsibility. But the true meaning of correspondence with reality lies neither in this servility towards the factual nor yet in a principle of opposition to the factual, a principle of revolt against the factual in the name of some higher reality. Both extremes alike are very far removed from the essence of the matter. In action which is genuinely in accordance with reality there is an indissoluble link between the acknowledgement and the contradiction of the factual. The reason for this is that reality is first and last not lifeless; but it is the real man, the incarnate God. It is from the real man, whose name is Jesus Christ, that all factual reality derives its ultimate foundation and its ultimate annulment, its justification and its ultimate contradiction, its ultimate affirmation and its ultimate negation. To attempt to understand reality without the real man is to live in an abstraction to which the responsible man must never fall victim; it is to fail to make contact with reality in life; it is to vacillate endlessly between the extremes of servility and revolt in relation to the factual.

D. Bonhoeffer, Ethics 228 (1955) (footnote omitted).

228 III K. Barth, Church Dogmatics, supra note 220, pt. 4, at 9.
229 Id. at 7.
230 Id. at 9-10.
objective categories simply cannot work. Quoting Bonhoeffer, Barth explains that “[a]n ethics cannot be a book in which there is set out how everything in the world actually ought to be but unfortunately is not,”\textsuperscript{261} for it is the “unfortunately is not” which is the whole point: it is precisely in the real, creaturely world, the world as it is, a fallen world, that decisions must be made.

Legalist ethics thus makes the “objectively untenable assumption” that command comes in the form of “a universal rule, an empty form, or rather a tissue of such rules and forms.”\textsuperscript{262} Instead, “[i]t is always an individual command for the conduct of this man, at this moment and in this situation; a prescription for this case of his; a prescription for the choice of a definite possibility of human intention, decision and action.”\textsuperscript{263} The failure to understand this leads, for example, both Jews and Christians to seek timeless commands in the Biblical texts, rather than to see Biblical injunction as command within a particular historical reality, and therefore, in the covenant sense, as a “witness to God’s special commanding here and now.”\textsuperscript{264} Barth observes:

No wonder, then, that wherever it is treated as a timeless truth, it can only be made applicable and usable with the help of some interpretation which is more or less arbitrary even in relation to the texts, and of all kinds of amplifications and additions drawn from the treasures of natural law and tradition.\textsuperscript{265}

Those efforts to amplify, explain and interpret simply reveal the self-contradiction inherent in the ethical method itself.

Legalist ethics are false, Barth argues, not only because they are logically impossible but also because they lead to two paradoxically related problems. First, unwarranted arrogance: the moralist seeks to “set himself on God’s throne, to distinguish good and evil” through claims that in a “summa of ethical statements compiled by him and his like from the Bible, natural law and tradition, he can know the command of God, see through it and past it, and

\begin{itemize}
\item \textsuperscript{261} Id. at 10 (quoting Bonhoeffer).
\item \textsuperscript{262} Id. at 11.
\item \textsuperscript{263} Id.
\item \textsuperscript{264} Id. at 13.
\item \textsuperscript{265} Id.
\end{itemize}
thus master and handle it . . . like a possession or domain"—the precise opposite of true obedience. At the same time, however, even in this arrogance, casuistical ethics also destroys human freedom. On this point Barth always insists, following Dostoevsky, that the command of God is an appeal to freedom—not a freedom of "choice, preference, or selection" but (again paradoxically) the freedom of obedience.

Thus casuist ethics calls a person away from real responsibility; it "conceals from him the character of his conduct as his own, direct responsibility." An absolutist, categorial ethics does not encroach too much on people, but "too little." As Bonhoeffer said,

The commandment of God is permission. It . . . commands freedom. It is by overcoming this contradiction that it shows itself to be God's commandment; the impossible becomes possible, and that which lies beyond the range of what can be commanded, liberty, is the true object of this commandment. That is the high price of God's commandment; it is no cheaper than that.

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266 Id. at 10-11. Barth explains that, At a safe distance from the ethical battlefield—like a staff officer of the Lord—he manipulates for himself and others a method of correct decisions—correct in the sense of the law . . . . He has in fact made God's will and command the prisoner of this law and his application of it. Casuistry is a mastering of the command and therefore of God Himself, which is certainly conceivable in every kind of philosophical and religious paganism, but is quite impossible in Christianity. Since this is incompatible with the knowledge of grace which God shows to men even in His command, it is a mastering of which a man who knows that he lives by God's grace will not make himself guilty. Casuistry is a violation of the divine mystery in the ethical event.

267 Id. at 11.

268 Id. at 13. What is required is not "external conformity" but "genuine agreement." Id. Compare d'Entreves, supra note 123, on the relation between outward conformity and inner conviction.


270 Id. at 14-15 (quoting Bonhoeffer). Compare the legend of the Grand Inquisitor in Dostoevsky's, The Brothers Karamazov. The Inquisitor, an aged Cardinal of the Church, confronts the Prisoner, who is Christ:

For fifteen centuries [the Cardinal declares] we have been wrestling with thy freedom

. . . . Instead of taking men's freedom from them, Thou didst make it greater than ever! Didst Thou forget that man prefers peace, and even death, to freedom of choice in the knowledge of good and evil? Nothing is more seductive
Bonhoeffer is well-known for phrases that capture the form of that command—the real “cost of discipleship,” which he demonstrated most fully not by words, but by living it, contrasted to the “cheap grace” of the liberal Protestants. Discipleship means being responsible “to and for the neighbor, in his concrete possibility.” A given situation is not “material on which to impress an idea or program”; rather the responsible person may have to prefer what is “relatively better to what is relatively worse, and . . . perceive that the ‘absolute good’ may sometimes be the very worst.”

One may, in fact, have to incur guilt in order to act responsibly; the neighbor and the future, for which we are responsible, do not exist in some ideal world, but in a real world of sin.

Confronted with his insistence on notions like “discipleship” or “sin,” those of us who are not theologically predisposed are likely to dismiss Bonhoeffer as an anachronism, offering little in the way of contemporary moral guidance. We, after all, are so very modern (or even post-modern), complacent in the embrace of secularism and the rejection of foolish “supernatural” world views. Bonhoeffer was just a Lutheran pastor, albeit a brave one, who died almost

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P. LEHMANN, ETHICS IN A CHRISTIAN CONTEXT 326-27 (1963) (quoting F. DOSTOEVSKY, THE BROTHERS KARAMAZOV 276-80 (1956)). This captures the dilemma of the Reformation. Lehmann's contrast is between an ethics of rationalist prescription and koinonia, the fellowship-creating presence of Christ: “The ethical reality of the church is the building up of itself in love . . .” Id. at 54. See generally id. at 45-73.


See D. BONHOEFFER, ETHICS 197-98 (1955).
fifty years ago, as did many others who resisted Hitler. Or, out of sheer admiration for his moral courage, we may be tempted, as were many in the 1960s, not to dismiss Bonhoeffer, but to appropriate him to the pantheon of existential heroes, lonely individuals who affirm for the rest of us the very possibility and nobility of human agency. Both of these reactions, however, are simply off the mark.

Bonhoeffer the existential hero cannot be understood apart from Bonhoeffer the theologian; and Bonhoeffer the theologian was no less the modern for his effort to comprehend the world in theological terms. He grew up in a starkly secular intellectual environment, and was the beneficiary of as sophisticated an education as twentieth-century Europe had to offer. When he chose theology, the profession of his grandfather, over the science more prevalent in his immediate family, he did so initially out of intellectual curiosity, not faith. He had a thorough mastery of and appreciation for not only the legacy of Enlightenment rationalism but also the critical insights of Kierkegaard, Heidigger and, especially, Nietzsche. As an intellectual matter, Bonhoeffer saw the necessity of confronting, not evading, both the tradition of Kant and the criticism of Nietzsche.

With respect to ethics, Bonhoeffer set himself “self-consciously and explicitly” against the tradition of Kant. Like Barth, he did not believe that “ethical formalism” or the “transcendent character of the universal” could reach actual persons in their real historical situations: “Kant seeks to rise above time and history through the principle of universalizability. Bonhoeffer seeks to embrace time and history by insisting on responsible action in concrete times and concrete places." Bonhoeffer thus responded to Kant’s ethics with an insistence on the concrete here-and-now instead of ethereal absolute or formal categories: “The ethical, in this sense of the formal, the universally valid, and the rational contained no element of concretion, and it therefore inevitably ended in the total atomization of human society and of the life of the individual, in unlimited subjectivism and individualism.”

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273 For an account of Bonhoeffer’s family background and education, see E. Bethge, supra note 204, at 3-64.
274 See J. Burtness, supra note 210, at 149-56.
275 D. Bonhoeffer, Ethics 240 (1955). See id. at 231-44; R. Lovin, supra note 210, at 5; J.
From an intellectual standpoint, Bonhoeffer, like Barth, took the teachings of Nietzsche more seriously than those of Kant, for while the latter might merely be opposed, the former had to be assimilated. Bonhoeffer's affirmation of "concrete times and concrete places" meant, as it did for Nietzsche, an affirmation of the earthly "this-worldliness" of our existence. In fact, one of Bonhoeffer's favorite stories was the Greek myth of Antaeus, the giant wrestler and son of Mother Earth, who could not be defeated so long as he remained in contact with the earth, from which he gained constant renewal. Only the shrewd and powerful Hercules knew enough to hold the giant in the air, apart from the earth, until the life had been squeezed out of him.

Despite his fascination with Nietzsche, Bonhoeffer did not embrace "life" as an absolute end in itself. Such "vitalism" "cannot but end in nihilism": "Life in itself, in the strict sense of the word, is a void, a plunge into the abyss; it is movement without end and without purpose, movement into nothing. It does not rest until it has involved everything in this movement of destruction." Bonhoeffer saw such vitalism "running wild in the race, blood, and soil ideology of the Nazis."

Bonhoeffer's descriptions of earthly reality do resonate strikingly with the existential accounts to which we have become accustomed since Nietzsche. Fundamental to our experience in a fallen world is alienation, which Bonhoeffer calls "disunion":

Man knows good and evil, against God, against his origin, godlessly and of his own choice, understanding himself according to his own contrary possibilities; and he is cut off from the unifying, reconciling life in God, and is delivered over to death. . . .

Man's life is now disunion with God, with men, with things, and with himself.

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Woelfel, supra note 256, at 153-54. For a good example of Bonhoeffer's disagreement with Kant, see his essay, *What is Meant By "Telling the Truth"?*, in D. Bonhoeffer, *Ethics*, supra, at 326-34.


279 J. Burkness, supra note 210, at 106-07.
The peculiar fact that we lower our eyes when a stranger's eye meets our gaze is not a sign of remorse for a fault, but a sign of that shame which, when it knows that it is seen, is reminded of something that it lacks, namely the lost wholeness of life, its own nakedness. To meet a stranger's gaze directly, as is required, for example, in making a declaration of personal loyalty, is a kind of act of violence, and in love, when the gaze of the other is sought, it is a kind of yearning.\footnote{D. Bonhoeffer, Ethics 143-46 (1955).}

Also fundamental is ambiguity, best captured for Bonhoeffer by the simultaneous existence of sin and grace:

Sin is a word that describes the whole creation as distorted and grace is a word that claims this distorted creation as the object of God's redemptive work in Christ. The ambiguity arises in the fact that these two conditions exist at the same time and that both conditions penetrate the total reality. Sin and grace therefore mean that there is no place (church authority, civil law, moral expert) to which to go, no part of one's own person (conscience, intuition, reason) to which to go, to find simple guidance for pure behavior.\footnote{See J. Burtness, supra note 210, at 70-71.}

One can hardly imagine a more dialectical account than Bonhoeffer's portrayal of the paradox of God in a "world come of age." Conceding that "God as a working hypothesis in morals, politics, or science, has been surmounted and abolished," and that "the same thing has happened in philosophy and religion," Bonhoeffer concludes that, "for the sake of intellectual honesty, that working hypothesis should be dropped, or as far as possible eliminated." Sounds very Nietzschean, so far? Where does one go? Not back, but instead,

our coming of age leads us to a true recognition of our situation before God. God would have us know that we must live as men who manage our lives without him. The God who is with us is the God who forsakes us (Mark
The God who lets us live in the world without the working hypothesis of God is the God before whom we stand continually. Before God and with God we live without God. God lets himself be pushed out of the world onto the cross. He is weak and powerless in the world, and that is precisely the way, the only way, in which he is with us and helps us. Matthew 8:17 makes it quite clear that Christ helps us, not by virtue of his omnipotence, but by virtue of his weakness and suffering.\footnote{D. Bonhoeffer, Letters and Papers from Prison 195-96 (1953).}

Ethical choice, for Bonhoeffer, is a “venture of responsibility.”\footnote{See R. Lovin, supra note 210, at 138-39.} That responsibility means both freedom and obedience:

In responsibility both obedience and freedom are realized. Responsibility implies tension between obedience and freedom. There would be no more responsibility if either were made independent of the other. Responsible action is subject to obligation, and yet it is creative. To make obedience independent of freedom leads only to the Kantian ethic of duty, and to make freedom independent of obedience leads only to the ethic of irresponsible genius.\footnote{D. Bonhoeffer, Ethics 221 (1955).}

Bonhoeffer's own “venture of responsibility” took its final form in the summer of 1939, when he was safely in the United States, and had received four different job offers through American friends who wanted him to stay. Fully aware of the implications of his choice, he decided on June 20, 1939, to return to Germany. The reason “was simply his readiness to recognize that he now was and would have to remain a German in full acceptance of guilt and responsibility.”\footnote{E. Bethge, supra note 204, at 559.} As Bonhoeffer later explained in a letter to Reinhold Niehbur:

I have made a mistake in coming to America. I must live through this difficult period of our national history with the Christian people of Germany. I will have no right to participate in the reconstruction of Christian life in Ger-
many after the war if I do not share the trials of this time with my people . . . . Christians in Germany will face the terrible alternative of either willing the defeat of their nation in order that Christian civilization may survive, or willing the victory of their nation and thereby destroying our civilization. I know which of these alternatives I must choose; but I cannot make that choice in security.

He returned to become an active participant in the secret German resistance, including the conspiracy to kill Adolf Hitler. After the failed attempt in July 1944, when Bonhoeffer had already been in prison for more than a year, he knew that he faced the certainty of death.

Bonhoeffer's death is best understood, from his own perspective, not as the predictable consequence of heroic action against evil, but as a redemptive act of love. For central to the world view of Bonhoeffer as theologian and Christian was a God who had become flesh, taken on the sufferings of his people and in so doing offered the promise of redemption. Thus, for Bonhoeffer,

[to] be a Christian does not mean to be religious in a particular way, to make something of oneself (a sinner, a penitent, or a saint) on the basis of some method or other, but to be a man—not a type of man, but the man that Christ creates in us. It is not the religious act that makes the Christian, but participation in the sufferings of God in the secular life.

Or,

It is evident that the only appropriate conduct of men before God is the doing of His will. The sermon on the mount is there for the purpose of being done. Only in doing can there be submission to the will of God. In doing God's will man renounces every right and every justification of his own; he delivers himself humbly into the

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286 Id. (quoting Bonhoeffer's letter).
287 For a summary of Bonhoeffer's involvement in the "conspiratorial resistance," see E. Bethge, supra note 204, at 696-702. For the detail, see id. at 626-696; see also E. Robertson, supra note 205, at 156-58, 161, 199-201, 210-13, 218-20, 263-65.
From within this starkly Christian context comes the elemental message that "our relation to God is a new life in 'existence for others,' through participation in the being of Jesus. The transcendental is not infinite and unattainable tasks, but the neighbor who is within reach in any given situation." In its emphasis on "living" and "doing," along with its refusal to seek refuge in the transcendent, absolute or categorical as guides for action, Bonhoeffer's outlook bears ostensible similarity to existentialism. In fact, both Bonhoeffer and Barth were greatly influenced by Kierkegaard, and both found the modern existential description of nothingness close to the Christian conception of evil. The Sartrean social world in which people are constantly objectifying others is, after all, a description of a fallen world, a world without grace. Confronting that nothingness, Barth and Bonhoeffer both believed in a theology that was also existential praxis. Their quarrel with Sartre lay in Sartre's continued Enlightenment presumption that ego cogito, unaided human agency, could successfully confront sin. "Real nothingness," Barth says, "mocks" this "manliness" of spirit. Speaking as a modern existential per-

289 D. Bonhoeffer, ETHICS 166 (1955).
290 D. Bonhoeffer, LETTERS AND PAPERS FROM PRISON 210 (1953). This leads to Bonhoeffer's notion of the "church for others," which is basic to his ethical world view.

The Church is the Church only when it exists for others. To make a start, it should give away all its property to those in need. The clergy must live solely on the free-will offerings of their congregations, or possibly engage in some secular calling. The Church must share in the secular problems of ordinary human life, not dominating, but helping and serving. It must tell men of every calling what it means to live in Christ, to exist for others. In particular, our own Church will have to take the field against the vices of hubris, power-worship, envy, and humbug, as the roots of all evil. It will have to speak of moderation, purity, trust, loyalty, constancy, patience, discipline, humility, contentment, and modesty. It must not underestimate the importance of human example (which has its origin in the humanity of Jesus and is so important in Paul's teaching); it is not abstract argument, but example, that gives its word emphasis and power.

Id. at 211. For an excellent and thorough account of Bonhoeffer's theology as developed in his prison writings, see E. Bethge, supra note 204, at 757-795.
292 III K. Barth, CHURCH DOGMATICS, supra note 220, pt. 3, at 346. Similarly, Barth says sarcastically, "we cannot but admire the virile address and resolution" with which Sartre sets the question of evil behind him, and he calls Sartre the "most virile of modern existen-
son, Barth asks,

Might it not be that in real nothingness I have an adversary who is quite unimpressed by my vaunted sense of responsibility for myself and mankind...? Might it not be that I have to do with a refutation and abolition of the very existence which I boldly assert to precede all essence? This... one who refutes and abolishes my existence, this No which strikes and brackets the Yes with which I try to overcome it, might well be real nothingness. And Sartre does not have the slightest inkling of it... [T]he dragon envisaged by him is comparatively innocuous... It may be made a subject of literary elegance. It may be continually presented and represented as a spectacle which affords the public enraptured dread or dreadful rapture... [but] the sickness unto death, real nothingness, is... unknown to him... 293

D. Abortion and Natural Law

Had Barth and the real dilemmas of essentialism appeared earlier in the pages of the Natural Law Forum, the stage might have been set for a more far-reaching debate within the legal community about the moral implications of abortion—and, not incidentally, about the relation between the essentialism of classical legal thought and the anti-essentialism of legal realism. That debate did, in fact, almost occur. In 1967, John Noonan published in the Natural Law Forum an early version of his controversial history of Catholic teaching on abortion. 294 This was preceded by his brilliant description of natural law approaches to both usury and contraception, also published in the Natural Law Forum. 295 Noonan's goal, especially in describing the latter two issues, was less to stake out a position than to reinsert into legal discourse a particular mode of

tialists.” Id. at 339.
293 Id. at 346-47; see also D. Bonhoeffer, Letters and Papers from Prison 188-89 (1953).
295 Noonan, Tokos and Atokion: An Examination of Natural Law Reasoning Against Usury and Against Contraception, 10 Nat. L.F. 215 (1965) [hereinafter Noonan, Tokos and Atokion].
analysis, the mode described by d’Entrèves. Noonan’s approach was subtle and legally sophisticated—a careful mediation between divine command and the human social condition. Instead of placing the individual always on the razor-sharp Barthian edge of paradox and existential encounter, Noonan provided an explicitly “reasoned” approach to ascertaining values and proscribing moral conduct.

Noonan makes the case for natural law by purposely selecting the legal history of two of the church’s most problematic and controversial prohibitions, those directed at usury and contraception. He concedes with respect to both that the very concept of “nature” or “natural” was manipulated rhetorically and adjusted or reconstructed to suit human conceptions of “function” or “purpose.” He also concedes that the absolute prohibitions initiated in both cases would and did, in time, yield exceptions in response to changes in culture, technology or environment. In short, the absolute was sure to be mediated by the contingent. Nevertheless Noonan, proceeding in the manner laid out by d’Entreves, names with passion the underlying values, themselves ordained by divine command, sought to be realized through the absolute rules: charity and love for usury; and dignity and sanctity of life for contraception. For Noonan, such values are best preserved by prescriptive moral absolutes rooted in an appeal to nature that invites reasoned discourse within, and only within, that particularized rhetorical framework. Noonan rejects the notion that life itself, in any of its instances, might be “purposeless, measureless, uncontrollable, or arbitrary.” The best protection against surrender to purposelessness lies in a structure of absolutes as expressive of values, with exceptions carved out by rational argument; and rational argument is facilitated by an analysis of the “natural,” even though our conception of what is natural may, in any given instance, itself be socially constructed, based on the values or purposes we ascribe to

296 See supra notes 130-72 and accompanying text.
297 See Noonan, Tokos and Atokion, supra note 295, at 224, 229-31.
298 Id. at 224.
299 Id. at 222-23.
300 Id. at 223.
301 Id. at 224-25, 234-35.
302 Id. at 235.
natural processes.\textsuperscript{303}

Applying the same method to the question of abortion, Noonan finds obscure theological questions like "ensoulment" to be equivalent to the basic question of when a person should be treated as "human."\textsuperscript{304} He describes the value being articulated by the traditional anti-abortion Church prohibition as "a refusal to discriminate among human beings on the basis of their varying potentialities."\textsuperscript{305} Attempts to limit humanity by denying the status "human" to any creature conceived by humans parallels other forms of invidious exclusion. The fact, for example, that we may not "think of" a month-old embryo as human should not be decisive; social groups have all too often been known not to "think of" some sub-group (for instance, a particular race) as being quite human.\textsuperscript{306}

In defending the line between conception and preconception, Noonan carefully argues from nature and probabilities. He concedes that the formation of life is a continuous process, without sharp, absolute dividing lines. Nevertheless, as between conceptus and sperm or egg, the line is rationally defensible because only twenty percent of fertilized eggs will spontaneously abort, whereas each spermatozoa must compete with 200,000,000 others to fertilize an egg.\textsuperscript{307} Noonan rejects a distinction based on physical viability or nonviability as too variable and arbitrary given the facts of nature, especially, for example, the fact that infants remain "dependent" well after birth and that some can survive with artificial incubation earlier than others.\textsuperscript{308}

The reasoning technique he is illustrating proceeds, then, from a particularized legal history during which rules are developed, not always with absolute consistency or uniformity. He then moves to an elucidation of the values those rules were instituted to protect, and he states a uniform rule-category designed to give effect to that value (no taking of life after conception). Finally, alternative formulations are carefully considered by reference both to the value being discussed and to the facts of natural life.

\textsuperscript{303} Id.
\textsuperscript{304} Noonan, Abortion and the Catholic Church, supra note 294, at 125.
\textsuperscript{305} Id. at 126.
\textsuperscript{306} Id. at 128-29.
\textsuperscript{307} Id. at 129.
\textsuperscript{308} Id. at 126.
On the complex question of preference for the mother’s life over the fetus, in cases of conflict, he describes the traditional direct/indirect distinction. That distinction allowed for a cancerous uterus, for example, to be removed from a pregnant mother even if removal resulted in the death of a fetus. The doctor’s purpose in such a case was not to kill the fetus; rather, the purpose was to remove the cancerous organ, the death of the fetus being only an unintended, indirect consequence. That exception does not destroy the validity of the general rule, Noonan claims. The exception was limited to cases of ectopic pregnancies and cancerous uteruses, so that the widest protection possible for fetal life was still retained. No rule can be absolute—values must be weighed, even the value of innocent life, and the direct/indirect casuist exception is just a spatial metaphor for the careful weighing of values which constitutes the work of rational moral analysis. The value that ultimately animates this abstract moral analysis, Noonan says, is the scriptural command to “love your neighbor as yourself,” which means that the fetus must be treated as having full value as a human life, even in this process that is concededly one of weighing.

In another, wholly different context, Noonan had similarly observed in the *Forum* that human life was not an absolute. Objecting to H.L.A. Hart’s view that one could find “survival” a sufficient basis for the moral content of a legal order, he observed that individual survival alone can never be an absolute value, noting not only the sacrifice of soldiers in war but also the ordinary laws of domestic society [which] normally are cast on the assumption that individual lives are not our highest value. The whole of automobile tort law rests on the foundation that... one does not have a primary obligation not to use a car; compensation for lives taken is

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309 Id. at 121-125. There was vigorous debate even about such a limited exception and about whether “intention” was really a proper basis for distinction. Id.
310 Id. at 124-25.
313 Id. at 130-31.
preferred to banning of vehicles which assure the existence of other values more highly prized by the society.\textsuperscript{115}

Noonan is too sophisticated, in other words, to argue that we do not weigh values other than life (the facilitation of transportation, for instance) against the value even of life itself; nor does he, to his credit, retreat behind the casuistry of direct/indirect to evade responsibility for the taking of human life. Why, then, is the objectification and depersonalization that takes place whenever one does a statistical analysis to justify killing for the sake of traffic speed a lesser wrong than the depersonalization of the fetus?

Challenging Noonan’s moral assumptions, John O’Connor, a philosopher from Case Western Reserve, wrote a response in the Natural Law Forum disputing Noonan’s insistence that humanity is an attribute that must be acquired at some definite time.\textsuperscript{316} This assumption, O’Connor argues, tilted Noonan’s analysis of alternatives unduly toward the uniform rule of “human being at conception.”\textsuperscript{317} O’Connor emphasizes the relativist point that an attribute is a function of social decisionmaking\textsuperscript{318} (a point which Noonan had been too sophisticated to try to deny, but had not exactly highlighted either). In fact, in an earlier Forum article Margaret Mead had pointed out that while all societies develop criteria for determining humanity, the criteria are quite various—sometimes infants are not included, so that infanticide is allowed.\textsuperscript{319} O’Connor reads Noonan as assuming that, even if the attribute “humanity” is a function of social decisionmaking, not a quality “in” a person, there are some criteria which are objectively better than others, even objectively “right” or “wrong,” for defining the category.\textsuperscript{320}

O’Connor sees no such objective baseline. The correct criteria can never be “discovered,” he says, but are themselves a function of social decisionmaking. For that reason one can look only to the moral assumptions of the particular culture. In modern societies it would be considered reprehensible to kill a baby, and quite possi-

\textsuperscript{115} Id. at 175.
\textsuperscript{116} O’Connor, On Humanity and Abortion, 13 NAT. L.F. 127 (1968).
\textsuperscript{117} Id. at 130-31.
\textsuperscript{118} Id. at 131.
\textsuperscript{119} Id. at 131.
\textsuperscript{120} Mead, Some Anthropological Considerations Concerning Natural Law, 6 NAT. L.F. 51, 52 (1961).
\textsuperscript{121} O’Connor, supra note 316, at 131.
bly a seven-month fetus, but probably not reprehensible to kill a two-month fetus—or a tree. Such views can change, however, depending upon whether people respond to the fetus (or tree) as a creature very like themselves. All societies draw a circle of “alike” somewhere, including some, excluding others. They may change the degree of inclusiveness based on new information or perception, but they cannot “discover” the proper placement of the circle, the boundary that defines the category; they can only decide where to draw it.321

The realist challenge to classical legal conceptualism was, of course, once again playing itself out. As Noonan conceded in his reply to O’Connor:322 “After all, one of the principal insights of modern jurisprudence has been that judges do not ‘discover’ the law. I have always supposed that there was an analogous insight to be followed in moral discourse.”323 Unlike classical conceptualism, however, Noonan’s natural law approach was more explicitly and honestly rooted in moral values, which he seriously sought to articulate in a final reference to divine injunction—the obligation to love thy neighbor.324 Without that reference, Noonan’s categories had no moral content, despite the supposed rationality and objectivity of his methodology.

The realists, like Protestants and O’Connor, were impatient with fixed categories and eager to sweep them away and to demand direct confrontation between the concrete situation and the moral requirement. The content of the moral requirement in law, however, had never been articulated: there had been no realist version of the gospel. With Naziism in the past and abortion on the moral/legal agenda, Noonan had no confidence that legal realism as mere negation could provide moral guidance. To deconstruct the category “humanity,” to treat it as having no objective content whatsoever, as just a function of cultural decisionmaking, meant a world of complete moral relativism. Noonan argued that before claiming, as did O’Connor, that we can only look to the “feelings” of people in a given culture for our membership criteria, we need to recall that “[i]f feelings are the key, many slave owners have felt it per-

321 Id. at 131-33.
323 Id. at 137.
324 Noonan, Abortion and the Catholic Church, supra note 294, at 131.
fectly moral to abuse and even kill their slaves . . . many Nazis felt no twinge of guilt in exterminating Jews and Poles whom they believed not to belong to the human species . . . .  

Noonan ends with the explicit comparison of fetuses to Jews: “The embryo, too, if he could speak, might say like Shylock, ‘If you prick us, do we not bleed?’”

Noonan’s arguments against abortion, especially his earlier ones, deserve to be taken seriously by liberals, precisely because they raise the problem with which the Natural Law Forum had begun its mission: to articulate a legal methodology which would provide a hedge against totalitarianism, whose worst aspect was the treatment of people as expendable objects. Noonan was too sophisticated to suggest a return to simple classicism in legal thought, and he was more honest even than d’Entréves in frankly acknowledging that inevitably the source of moral value in Western culture, including legal culture, has been religion. His method was a delicate interweaving of category as premised on value, rational argument about distinctions based on the objective realities of the natural world, and calculated exceptions based on the values that gave rise to the initial category, along with careful consideration of competing values. Legal argument has not offered a more well-considered methodology.

Nor did Noonan dodge moral responsibility for the exceptions he acknowledged, in the way legalist casuistry often seems to allow—as if a killing is less a killing when it is labeled “indirect.” He was willing to use the word “balance” instead—but only with the pretense that nothing could be allowed to outweigh an individual life except another individual life. That pretense is utterly wrong, as Noonan knows perfectly well from torts—from his own automobile example. Facilitation of traffic speed routinely outweighs human life in our society, as do many other “values.” As his analysis of Palsgraf shows, Noonan is morally troubled by that real-

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325 Noonan, Deciding Who Is Human, supra note 322, at 138.
326 Id. at 140.
327 J. Noonan, Persons and Masks of the Law 111 (1976) (analyzing Palsgraf v. Long Island RR, 248 N.Y. 839, 162 N.E. 99 (1928)). The essay is an elegant depiction of the process by which the legal system depersonalizes the plaintiff in the famous Palsgraf case. Noonan also describes the number of deaths and injuries which occurred each year from the operation of the railroads—a statistically necessary sacrifice if the railroads were to keep running. Id. at 129-30.
ity, and by his accurate perception that we have not developed, culturally, a moral vocabulary with which to deal with it. Yet it cannot be dealt with by the creation of pseudo-categories of absolute protection ("uniform" protection, to be more true to Noonan). It almost seems that Noonan, a person of very real moral sensibility, seeks to avoid the troubling moral reality he sees around him by building a wall of special protectiveness around the fetus. Feminists, of course, are not surprised that women are expected to bear the burden of his need for the comforting category. Yet what does our culture have to offer in its place?

The answer, at least in terms of acceptable public discourse, was rapidly becoming other than traditional and religiously rooted morality. This was surely evident by the late 1960s. Abortion, which had in the 1950s been regarded by dominant cultural norm as morally reprehensible (despite a reality of hypocritical practice) would by the 1970s, despite a sizeable minority of holdouts, be officially assimilated to the generality of "scientific," "medical" decisions and assigned to an autonomy whose subjectivity was to be insulated from public moral rebuke.

III. SCHISM AND SEPARATION: RELIGION AND MORALITY IN THE 1960s

The emphasis of Part II was largely intellectual and theoretical, exploring the traditional modes of moral inquiry that offer alternatives to the various versions of secular autonomous individualism to which we have become accustomed. But there is an inevitable gap between theoretical moral discourse and its translation into the lives of people who are making both individual and social moral decisions. In Part III our emphasis switches somewhat, from philosophy, theology and intellectual history to sociology, and social and institutional history.

For Americans, the key institutional setting for realization of public moral values has been their churches (we use "church" generically to describe more or less institutionalized religion). Churches have served as "mediating structures" between the lives of people who are making both individual and social moral decisions. In Part III our emphasis switches somewhat, from philosophy, theology and intellectual history to sociology, and social and institutional history.

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On churches as "mediating structures," see P. BERGER & R. NEUHAUS, To EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY 1-8, 26-34 (1977); WCzaman, The Church as Mediating Institution: Theological and Philosophical Perspective and The Church as Mediating Institution: Contemporary American Challenge, in DEMOCRACY AND
privatized self and the public realm of government. The late 1960s, in particular, marked a seeming triumph of secular liberal morality with a concomitant repudiation of religious tradition, and thereby of mainline churches in their role as mediating structures. How that triumph of secular morality occurred, and why it was no more than "seeming," is the subject of Part III. Inevitably, Roe v. Wade was taken to be a powerful symbol of that triumph—not because it allowed for moral compromise on the abortion issue, but rather because its "rights" formulation of the issue effectively secularized it, rendering moral/religious debate irrelevant for purposes of public policy.

A. Background: Post-War Dilemmas

The post-War period had been one of both optimism and aridity in denominational religion. On the optimistic side, American churches thrived in terms of numbers and finances, and many heralded a religious revival. During this period of economic prosperity, contributions to churches grew at a pace even greater than consumption expenditures generally; church construction, long delayed by the depression and war, expanded dramatically and the number of seminary students doubled by 1950. Shortly after the War, ninety-four percent of Americans believed in God, and for most this belief was not simply a matter of personal piety, but was linked to association with a church as a social institution. Churches, in turn, were assumed to have an easy "taken-for-granted" alliance with the state, an alliance which transcended denominational boundaries. While anti-Catholicism and anti-Semitism lingered among Protestants, whose values still dominated the culture, all three major faiths saw themselves as transmitters of values that were simultaneously "religious" and self-consciously "American."

On the other hand, as Will Herberg argued in his much-dis-

329 See R. Wuthnow, supra note 21, at 26 (noting that church contributions increased by 64% while personal consumption increased by only 50%).
330 Id. at 36.
331 Id. at 17.
332 Id. at 15. In 1946, 66% of Americans attended services at least once a month, and 42% attended every week. Id. at 16.
333 Id. at 66.
cussed book of 1955, *Protestant-Catholic-Jew*, to be Catholic, Protestant or Jewish had become little more than “alternative ways to be American.” While sociologist Talcott Parsons saw a unified American religion as functioning positively, to provide an integrating value system, Herberg’s depiction of its shallow complacency rang true for many. Subsequent books, like Peter Berger’s *The Noise of Solemn Assemblies* and Gibson Winter’s *The Suburban Captivity of the Churches* raised similar complaints: churches seemed content to supply a cosmetic window dressing to the American way of life, without nerve or spirit to do more than “baptize all that was wrong with society.” Well-publicized events during the Eisenhower years symbolized what was worst about a religion that had become only bland Americanism: the post-war religious revival ushered in a time of “piety on the Potomac,” of presidential prayer breakfasts, Billy Graham’s ‘engineering of mass consent,’ Norman Vincent Peale’s ‘Let the churches stand up for capitalism,’ Msgr. Fulton J. Sheen’s equation of Christianity with Americanism,” and the aligning of Christianity with the anti-communist crusades of the McCarthy period.

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235 See M. HUGHEY, *CIVIL RELIGION AND MORAL ORDER: THEORETICAL AND HISTORICAL DIMENSIONS* 143 (1983). "Parsons echo[ed] Herberg ... in arguing that the Three dominant 'faiths' of American society ... have come to be integrated into a single socio-religious system [and that] ... the basic value pattern common to all three faiths has been at least partially institutionalized at a higher level of generality." Id. (quoting Parsons, *Introduction to Max Weber,* in *THE SOCIOLOGY OF RELIGION* (1964)). The core value matrix was the Protestant one of responsibility for positive action in the world, the instrumental activism of ascetic Protestantism. Hughey’s book explores the extent to which this was always the value system of *some* in American life (largely the successful WASPs of Main Street America and also of Parsons himself), but not others. See, for example, his critique of Warner’s more celebratory sociological description of the Memorial Day Parade in Newburyport. Id. at 109-23.


239 This vividly assembled list is taken from McLoughlin, *How is America Religious?*, in RELIGION IN AMERICA, at ix (1968).

With respect to Billy Graham, his seeming blandness was deceptive, however; the same Graham who lined his platforms with celebrities, and was even scorned by his mentors for selling out to popularity, liberalism and compromise, believed as fervently as one could in an errorless Bible, the Virgin Birth of Jesus, His death and resurrection and the Second
The 1950s, in other words, represented the taming effect that America's "toleration" but "separation" model of church/state relations can have on American religion, as described by Gary Wills:

Thus is religion trapped, frozen, in its perpetual de facto accommodation of power. It becomes a social ornament and buttress, not changing men's lives, only blessing them; not telling men to do this or omit that, just congratulating them for whatever they do or do not do. Religion is invited in on sufferance, to praise our country, our rulers, our past and present, our goals and pretensions, under the polite fiction of praying for them all. The divine is subordinated to the human—God serves Caesar. This is what Americans quaintly call "freedom of religion," and what the bible calls idolatry.340

In fact, however, beneath this public veneer of shallow complacency were both real institutional strengths and complex inner dilemmas. The War had been a chastening experience for American religious leaders: neither religious traditionalism, with its emphasis on sin, nor the particular experience of Naziism provided grounds for complacency, and most religious discourse was in fact a mixture of optimism and apprehension,341 of promise and peril.342 Jews seriously struggled to find the right mix between despair (the Holocaust) and optimism (Israel);343 so, too, Christians urged a "sober serenity"344 in a discourse that linked "threat" with "opportunity." If this reflected some measure of self-importance,345 it also

Coming. The lesson to be learned from Graham was skillful packaging. See M. Marty, Pilgrims in Their Own Land: 500 Years of Religion in America 410-14 (1984). See also, on Graham's "sophistication," "obvious sincerity, his charismatic appeal, and his adroit salesmanship," McLoughlin, Is There a Third Force in Christendom? in Religion in America, supra, at 45, 60-61.

340 G. Wills, Bare Ruined Chors: Doubt, Prophecy, and Radical Religion 260 (1972) [hereinafter G. Wills, Bare Ruined Chors]. Paradoxically, G. Wills, Under God: Religion and American Politics (1990) [hereinafter G. Wills, Under God], celebrates both the vitality of religion in American public life and the way in which the tradition of separation contributes to that vitality.

341 R. Wuthnow, supra note 21, at 44.

342 Id. at 46.

343 Id. at 48.

344 Id. at 49.

345 Id. at 50.

346 These themes resonate with religious discourse at the turn of the century, when reli-
represented a positive sense of social responsibility. Most secular leaders, along with sociologists like Parsons, saw a decent society as dependent upon sound, broadly based cultural values, with religion providing both the capstone and the crucial mediating structures within which those values could be nurtured in a pluralist democracy.

Many clergy were willing to carry out that responsibility even while carefully distinguishing any single worldly social or political accomplishment (including American culture) from divine will. Thus, both liberal Protestants and fundamentalists warned against the tendency to equate particular institutions (even the church) with the true Zion “which cannot be located in any part of earth.” If the churches were critical of communist totalitarianism, many clergy in the 1950s were also critical of America’s over-celebration of material well-being; some recognized that possession and pleasure, when taken as the embodiment of the ultimate good, were, no less than totalitarianism, a form of idolatry. The Kingdom of God, after all, existed over and against any concrete manifestation.

Most church leaders, however, did not question the universality of the basic “values” they taught from the pulpit. They did not see values as relative, as socially constructed or as a function of power, but rather as self-evidently applicable to the whole culture. This was apparently no less so for Protestants than for Catholics, who could in theory draw more confidently on natural law for their tradition of universal values. Nor did they question the direct relationship between good individual values and a decent society. Although there was some expansion of social service programs, the basic religious assumption was that if clergy did their job at the local level, instilling sound (internal) values, then overall (external) social decency would prevail. Later, the intractability of racism

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347 See R. Wuthnow, supra note 21, at 58-60, 66-67. This was, of course, also the assumption of legal academics who also turned to religion after the War.

348 See supra note 328.

349 R. Wuthnow, supra note 21, at 53.

350 Id. at 52.

351 Id. at 50.

352 Id. at 61.

353 Id. at 62-64.
in American society would challenge that naive assumption, but clergy during the post-War period were simply reflecting the view then dominating secular thought as well—for example, in Gunnar Myrdal’s assumption that racism was basically a problem of attitude, a gap between America’s core creed and its behavior which could be remedied by correcting the attitudes of white Americans.354

Two other dilemmas, both of which would play a key role in the unfolding abortion debate, were already closer to the surface of American religious consciousness in the post-War period: the unsettled role of women and the paradoxical character of religious pluralism.

Based on our experience, secular liberal pro-choice advocates tend to perceive religion as a monolithic “other” that exists over and against the lives of women in America, as an oppressive force to be held at bay by the powers of legalistic, secular neutrality. It is as if “religion” and “women” were separate categories, with religion representing either all men or some vague notion of “societal” domination. These perceptions, or assumptions, are flatly contradicted by historical and contemporary American experiential reality.

Religion is not only of paramount significance to the lives of many, if not most, American women, but there is also a long and continuing record of active involvement of women in churches, probably more than in any other American institution. This is not to suggest a clear record of progress toward equality; many struggles continue. What is clear, however, is the variousness of women’s experience with religion, and a continuing commitment, evidenced by the sheer numerosity of participation in church life, to personal fulfillment through religious experience.

Female church membership in America has always exceeded male membership; in the nineteenth century, women comprised

two-thirds to three-fourths of the members of Protestant denominations. While that gap has narrowed, women have consistently retained their numerical majority. Given the cultural link between religion and family values, the proper role of women in the church has tended to be a charged issue for men, especially given the assumption that churches function to safeguard the values of the nation. At the same time, women within the churches have often created important and empowering roles for themselves.

The relation of women to their churches has varied according to faith and according to their experience of the dominant American culture. Jewish immigrant women, for example, often initially found American society less restrictive than the Jewish traditionalism of their native cultures. That experience led some to reject their Judaism altogether and to embrace a secularized version of American culture. This tendency was often encouraged by the public schools and the press, where Jewish attitudes toward women were ridiculed. In effect, “America offered [Jewish] women opportunities for self-fulfillment clothed in anti-Semitism.” Jewish women played key roles in social work, labor and socialist movements, even while being denied a full religious institutional role. Later, with the growth of Conservative and Reform Judaism, Jewish women demanded a greater level of participation in the synagogue as well.

Almost the reverse process can be found in the various branches of evangelical, holiness and pentecostal traditions. There, the emphasis on personal conversion and lay involvement created an early thrust in the direction of male/female equality, even in the home. Male evangelical church leaders before the turn of the century were speaking in favor of a female public ministry. In the Moody Bible Institute, for example, which grew out of the work of Emma Dryer’s School of Bible Work (established in 1873), women

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356 See W. Roof and W. McKinney, supra note 26, at 205.
358 See id. at 137-40.
generally worked with men as full equals, and women were often extraordinarily effective as evangelical preachers even at a time when female ordination was unheard of in the mainline churches. Some men, of course, were ambivalent about this egalitarianism, which was never wholly without restrictions, but the real turn toward entrenched male hierarchy did not occur until the World War II era. In part that turn was due to evangelicalism’s move into the mainstream of American culture. The “professionalization” of the ministry, along with the “bureaucratization” and concern with evangelical “respectability” within general ecclesiastical circles, led evangelicals to the adoption of the male-dominated forms that characterized the mainstream churches.

Later, with a growing penchant for order in the face of modern social instability, feared even as early as the 1950s (mounting divorce rates, juvenile delinquency and consumerist hedonism), many evangelicals, starting with the influential and conservative Missouri Synod Lutherans, adopted a rigid form of male hierarchy based on the old “orders of creation” doctrine. This doctrine was imported from Germany through a translation of Fritz Zerbst’s *The Office of Women in the Church*. Evangelical publishing houses began widely distributing marriage advice that made emphatic use of the doctrine—that because women were created after men, they ranked below men in a divinely ordained hierarchy, a hierarchy that reached back before the fall and was therefore neither of human origin nor transformed by Christ. “As long as ... men are men and women are women, then women are to be subject to their husbands as unto the head.” The doctrine mandated female subordination in both church and family life. Nevertheless,

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360 *Id.* at 227.
361 *Id.* at 224-25, 227. Scanzoni and Setta describe, for example, Lena Shoffner preaching in Alabama on a text from Ephesians. “For he is our peace, who hath made one, and hath broken down the middle wall of partition.” *Ephesians* 2:14. At the time blacks and whites in the congregation were separated by a thick rope. As Shoffner preached on the evil of segregation in a Christian community, the congregation broke down the rope and “women and men of both races wept and prayed together.” Scanzoni & Setta, *supra* note 359, at 225.
362 *Id.* at 233-34; cf. Bendroth, *supra* note 355, at 133-34. As Bendroth notes, the question is far from resolved within evangelicalism.
some evangelical women powerfully resisted that move, drawing in part on modern feminism but also on the egalitarianism which has always been part of the evangelical spirit.\footnote{366}

While more women have become involved in the ecclesiastical structures of traditional mainstream American Protestantism than in any other institution in America,\footnote{367} women were, for the most part, traditionally excluded from the major denominations' church hierarchies. As Frances Willard said in 1892, the men “keep the dimes and distinctions to themselves” and expect women to be mere “hewers of wood and drawers of water.”\footnote{368} As a result, many women chose to form independent societies for missionary, relief and evangelical work.\footnote{369} These were extraordinarily spirited and successful groups. Especially in the more liberal northern churches, separatist societies were pragmatically accepted by churchmen despite qualms about a woman’s more proper “auxiliary” role in the church structure.\footnote{370} Perhaps the most powerful model for a separatist female organization within American Protestantism was the independent Women’s Auxiliary of The National Baptist Convention, the largest black denomination. Formed in 1900 under the leadership of Nannie Burroughs, an outspoken feminist and advocate for black Americans, the group insisted on retaining its independent status despite much male pressure, and became an important source of strength for black Baptists and Protestant women generally.\footnote{371} In particular, the Women’s Auxiliary operated as a counterweight to the restrictive, wooden role many conservative white Southern Baptists began to carve out for women.\footnote{372}

In contrast to the Nannie Burroughs model, during the 1920s many of the most vigorous leaders of separatist women’s societies

\footnote{366} See Zikmund, Winning Ordination for Women in Mainstream Protestant Churches, in WOMEN AND RELIGION, supra note 90, at 368-70.  
\footnote{367} Keller, Patterns of Laywomen’s Leadership in Twentieth-Century Protestantism, in WOMEN AND RELIGION, supra note 90, at 266.  
\footnote{368} Bendroth, supra note 355, at 124 (quoting Frances Willard’s 1892 annual speech to National W.C.T.U. Convention).  
\footnote{370} Bendroth, supra note 355, at 124-25.  
\footnote{371} See Dodson & Gilkes, Something Within: Social Change and Collective Endurance in the Sacred World of Black Christian Women, in WOMEN AND RELIGION, supra note 90, at 88; see also Bendroth, supra note 355, at 129.  
\footnote{372} Bendroth, supra note 355, at 130.
became, as it were, victims of their own success. Usually under considerable pressure from men, they began to merge with the general denominational church structures, receiving in return, at least in theory, a greater role in church governing bodies. Belle Bennett of the Methodist Episcopal Church, South, for example, presided over two strong and autonomous women’s Methodist missionary societies. In 1906 she was pressured to allow these societies to fall under the direct jurisdiction of the General Conference, to be governed by a general missionary board on which women would then have one-third representation. She then effectively used her position to battle for laity rights for women in the general legislative body of the church as well, linking grass-roots organizing for women’s Methodist laity rights to women’s suffrage generally. In that process, however, she sacrificed the autonomy that had come with separatism.  

Similar developments took place within other denominations with respect to women’s laity rights, often following merger of originally separatist organizations. It was only after women had gained significant power as laity that progress was made toward female ordination, and that progress came slowly; Presbyterians, for example, ordained female elders in the 1920s, but women did not formally achieve full equal status until the 1950s.  

The abandonment of separatist societies and the move toward merger did gradually lead toward greater female equality within the denominational structures. Nevertheless, that move came at a cost, especially apparent in the post-War period and still in evidence when the abortion debate unfolded. Women were often effectively excluded from leadership roles in organizations traditionally dominated by men. Most churchwomen in that period were not seeking ordination, and by the 1960s the number of women

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373 Keller, supra note 367, at 269-70. Bennett knew she had compromised female autonomy in accepting the merger. One-third was better than no representation, but it still meant subordination.  
374 See Zikmund, supra note 366, at 347. For a summary of progress in the various mainstream denominations, see id. at 340-48. The Catholic Church has, of course, continued to insist on ordination for celibate males only. For a dissenting view, see G. Wills, BARE RUINED CHOIRS, supra note 340, at 329-37. For a good historical overview of the roles of Catholic women, both in religious orders in the service of education and health care, and as lay social activists, epitomized by Dorothy Day and her Catholic Worker movement, which found in the preaching of the Gospel an alternative to atheistic socialism, see Getz, Women Struggle for an American Catholic Identity, in WOMEN AND RELIGION, supra note 90, at 176.
ministers, always small, was actually declining. Female ordination removed a powerful symbol of inequality, but left most women within the laity adrift in a still male-directed structure; and important church groups, no longer distinctly female, lost much of their old zeal and sense of direction. Nevertheless, the push for female ordination did not abate, finding gradual lay acceptance in many denominations, to the point where by 1980 the percentage of women in the American clergy would be slightly higher than their representation in either law or medicine.375

The second dilemma, which highlights the paradoxical character of religious pluralism, is that of religious versus scientific “truth,” and, ultimately, of religious versus secular morality. As religions, in the name of unity, seek to minimize their sectarian and doctrinal differences, as they did during the 1950s, they inevitably yield on the sureness and certainty of their particular beliefs. Unity succeeds, paradoxically, by reaffirming pluralism; each religious denomination gets to choose particular beliefs or doctrines or practices, but only in the manner of consumer preference, never as “truth.” Each religion becomes a fungible package of belief, available for “religious choice” under the common umbrella of “America’s faith.” Paradoxically, religion, in the ironic name of unity, becomes nothing more than a personal preference to be freely selected, like one’s favorite color or bird, and ceases to serve as a persuasive and constitutive source of truth.

As religions, in their zeal not to offend one another, minimize their claims to truth and allow religious faith to be reduced to a matter of personal preference, or mere “emotion,” they facilitate their own surrender to physical, and then, social science, as the only acceptable modern sources of objective truth, accompanied by an ethical relativism that hears moral assertions as nothing more than expressions of emotion.376 To those for whom religion is the basis of a coherent, integrated life, this surrender represents a sellout. The result is an ever-widening gap between religion and science, between the religious and the secular. Efforts to celebrate pluralism as unity masked these underlying differences for a time, and may have contributed to the consciousness that saw Roe v. Wade as mandated by triumphant secularism.

375 R. Wuthnow, supra note 21, at 226-28.

376 See A. MacIntyre, supra note 1, at 11-14, 16-35.
Put somewhat differently, the centripetal move toward unity in American religion, which was especially strong in the Americanism of the 1950s, inevitably produces a centrifugal counterforce, operating simultaneously at institutional, epistemological and normative levels. Efforts to hail a new religious unity obscured this dilemma for a time, creating the impression of a core, conventional American denominationalism that could mediate the conflict between religious freedom and moral authority. In the late 1960s that inherently unstable denominational center broke asunder. By the 1970s a secular celebration of fragmented lifestyle "freedom" stared, as if across any empty chasm, at a resurgence of religious particularism which was both utterly alien to it, yet also its own mirror image.

During the post-War period, the move toward a unified religious spirit was surprisingly successful. There was much talk about ending petty denominational and interfaith rivalries. Within Protestantism, John D. Rockefeller, Jr. donated more than one million dollars to promote the ecumenical spirit of The World Council of Churches, a kind of religious United Nations, and was a strong force behind The National Council of Churches—which in 1950 opened under a banner with 10-foot letters proclaiming "This Nation Under God" and which included Dean Acheson and Harry Truman as scheduled speakers.

Evangelicals seeking mainstream acceptance and influence were determined to put old controversies behind them for the sake of theological unity. In 1943 the National Association of Evangelicals (NAE) was formed, not for the purpose of challenging the major denominations, but rather to promote cooperation. The NAE encouraged continued activity in the mainstream churches, up-to-date scholarship, north-south unity and a constructive approach to social ethics. For example, Carl Henry, an influential evangelical

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377 R. WUTHNOW, supra note 21, at 15.
378 Id. at 81-82. Dean Acheson and President Truman were unable to speak at the opening due to a snowstorm that day. Id.
379 Id. at 140-41. The older strict fundamentalism was viewed as lacking in "brotherliness." Id. at 173.
380 Such churches, however, were still sometimes viewed as too "bureaucratic" and too given to emphasizing "science, literature, and philosophy, rather than salvation." Id. at 176 (quoting New York lawyer who was active in these evangelical movements). On the NAE, see also M. MARTY, A NATION OF BEHAVERS 86-88 (1976).
writer and leader, said evangelicals should cooperate with other groups in opposing war and racial injustice.\footnote{R. Wuthnow, supra note 21, at 178.} Interdenominational colleges and seminaries, like Wheaton and Fuller, encouraged sophisticated theology and a concern with social ethics, not just a literalist counting of the Biblical days of prophesy;\footnote{Id. at 180; see also Marsden, Evangelicals and the Scientific Culture: An Overview, in Religion and Twentieth-Century American Intellectual Life, supra note 26, at 45-47 [hereinafter Marsden, Evangelicals and the Scientific Culture].} and evangelical groups—centered in northern cities as well as the rural south and midwest—created important ties to business and community leaders.\footnote{R. Wuthnow, supra note 21, at 180.} While some conservative southern groups, like the Missouri Synod Lutherans, were becoming more restrictive in their views toward women and critical of “hedonistic” modern culture,\footnote{See supra note 363-64 and accompanying text.} evangelicals were not generally more conservative than mainstream churchgoers, and in the 1950s may even have moved somewhat to the left, rather than right of center,\footnote{R. Wuthnow, supra note 21, at 185-87.} during a period of quiet but steady growth.

Meanwhile, mainstream churches generally welcomed the vigor of evangelical preachers—Billy Graham was, of course, the most publicized—and agreed that the churches should move in a more evangelical direction, stressing the individual experience of faith and redemption. This evangelical emphasis meant rejection of the older social gospel movement, which had located the fulfillment of the Kingdom of God too optimistically in liberal progressive politics;\footnote{Id. at 56-57, 140-41.} it was also consistent with the emphasis on sound personal values as the key to maintaining a decent society. As testament to the general unanimity on this core centrist theological message, Carl Henry, a leading evangelical, and William Sloane Coffin, later notorious for his left/liberal politics, agreed during this period on the correctness of the Protestant move toward the center.\footnote{Id. at 140-41.}

This ecumenical spirit within Protestantism did not automatically translate into interfaith tolerance. Paul Blanchard published American Freedom and Catholic Power in 1949,\footnote{P. Blanchard, American Freedom and Catholic Power (1949).} a book which raised the specter of a Catholic Church trying to take over the
country; and serious anti-Semitism was often not far from the surface. Nevertheless, Herberg’s tripartite Protestant-Catholic-Jew did describe at least part of the religious reality. Unity was facilitated by the fact that Catholics were entering the mainstream of American economic and social life—moving toward “average” in terms of both education and attitude. As Gary Wills comments, Paul Blanchard may have described priests as sinister foreign agents, but the everyday Catholic church of the 1950s was thoroughly American—its “spirit more easily aroused by a Father Coughlin or Senator Joe McCarthy than by papal encyclicals.”

Indeed, given the combined pressure of no public support for parochial schools, on the one hand, and Catholic commitment to Catholic education on the other, parish priests were in large part fund raisers, a role which demanded practicality and a convivial relationship with local business leaders. When Catholics vied with Protestants over which faith did the best job of instilling American values, Protestants would base their claim on the transformative power of personal faith, while Catholics would base theirs on the soundness of a solid Catholic education. Neither doubted the appropriateness of the goal, nor did either seriously doubt that the goal was common to both faiths, despite lingering suspicions.

This greater ecumenicalism, however, was achieved in part by distancing church members from their own denominational histories. Especially within mainstream Protestantism the tendency was to make only passing references to the past, and then in vague romantic images drawn from more distant times, or from the Bible, without specific denominational content. One Presbyterian pastor explained that dwelling on the past showed a “lack of progress in spiritual things.” Thus, distinct religious traditions lost their power as cultural models. People were less inclined to identify, for example, with being specifically Methodist or Presbyterian, since theological and historical differences among denominations were

588 See generally id.; R. Wuthnow, supra note 21, at 74-77.
590 Catholics were solidly in the mainstream by 1976. R. Wuthnow, supra note 21, at 86-87.
591 G. Wills, Bare Ruined Choirs, supra note 340, at 42.
593 Id. at 24.
595 R. Wuthnow, supra note 21, at 61.
594 Id. at 31.
treated as only minimally important. Thus, church members were, so to speak, culturally severed from their past, and left more open to other cultural influences.\textsuperscript{395}

At the same time, however, differences did continue. Despite the public mainstream stance of basic centrist uniformity, Americans continued to practice widely different religions. While John D. Rockefeller, Jr. was, with much fanfare, promoting world ecumenicalism, a moderate-sized congregation in Dolly Pond, Tennessee, routinely opened services with hymns and poison snakes.\textsuperscript{396} Even by the 1980s four percent of the American population still claimed to speak in tongues, a fairly exotic religious practice. By way of comparison, fewer than that number worked for any party or candidate in the 1980 election.\textsuperscript{397} America's disestablishment, and the privatized, personalist “choice” model of religion that was thereby mandated, created conditions for rich religious diversity, but a diversity ultimately disciplined only by consumerist preference.\textsuperscript{398}

\textsuperscript{395} Id. at 33-34.
\textsuperscript{396} Id. at 15.
\textsuperscript{397} K. WALD, RELIGION AND POLITICS IN THE UNITED STATES 9 (1987).
\textsuperscript{398} Peter Berger has written with special perceptiveness on this subject, employing essentially an antitrust model. The move from “monopoly” (establishment) to a competitive “market” in religion creates conditions for a vigorous religious life, which is one reason why America is more “religious” than Europe. There, the old forms of establishment led to anticlericalism during the enlightenment, and a general sapping of religious spirit. The danger of the competitive model lies in a kind of consumerist “taste” mentality in religion—anything goes, so long as it sells, and churches will engage in intense efforts to do successful product differentiation, within a still essentially stabilized, standardized market. See P. BERGER, THE SACRED CANOPY 137-48 (1967).

Berger, writing in 1967, was perhaps too pessimistic, or even cynical, in this respect. The current vitality of American religion is not just an expression of rampant individualism or consumer preference, but a complex interaction of individual and community, of personal choice and established tradition. To run the consumer model too far is to assimilate religion to the range of styles or experiences selected in the marketplace. This is what Lawrence Friedman does to describe the only form of religion that fits with his “republic of choice,” with religion as no more than just another expression of personal autonomy and individual experience. See L. FREIDMAN, supra note 20, at 164-69. While there are validating examples, like the young nurse, Sheila Larson, described in the book Habits of the Heart, who has fashioned for herself a religion she calls “Sheilaism,” (her “own little voice”), the actual context is more complicated. R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER & S. TIPTON, HABITS OF THE HEART 219-49 (1985).

While choice and freedom are certainly part of the American religious scene, one must not lose sight of the distinctive character of religion, as opposed to other objects of choice (cars, clothes, music, movies and other things), especially insofar as that character represents a quest for shared meaning that is ultimately at odds with secular autonomous individualism. On the varieties of flourishing American religious experience in this regard, see G. WILLS.
The strength of denominationalism had once served as a counterweight to that unchecked freedom of personal choice: as traditional denominational identity weakened, that counterweight was lifted. Also lessened was the ability of denominationalism to contain controversy, both theological and cultural. And despite the general post-War move toward uniformity, unresolved tensions and potential sources of cleavage remained.

While American religion found new unity in the 1950s by organizing itself around a conception of shared values, it left open, most significantly, the nagging question of objective truth—just as the law left unanswered the realist assault on legal objectivity, pretending the problem away by embracing ethical relativism and a more flexible and process-oriented jurisprudence. The greatest potential for religious discord lay not in the simple pluralism of disparate traditions, but rather in the unresolved, underlying challenge to religious “truth” as objective reality, issued by the ascendant realm of secular “science.”

Conventional wisdom tells us that the fundamentalists waged war on science because science challenged the objectivity of religious truth; and, in particular, because evolution challenged the Biblical account of creation. As modern scholars have shown, however, that history is more complex than once assumed. For most of the eighteenth and nineteenth centuries in America, Enlightenment science and Christianity were viewed as compatible. The Reformation had sufficiently severed the old medieval sacral order as to allow for unabashed examination of the natural world, an examination that was welcomed by Calvinist Puritans and by

Under God, supra note 340, passim. For a recent journalistic account, which is sensitive to the problem of consumer orientation, and striking for its placement, see Woodward, A Time to Seek: With Babes in Arms and Doubts in Mind, A Generation Looks to Religion, Newsweek, Dec. 17, 1991, at 50.

399 See Mensch, History of Mainstream Legal Thought, supra note 24, at 24-31.

400 See P. Berger, The Sacred Canopy, supra note 398, at 105-25. The process of secularization could be said to have started with the Old Testament emphasis on an utterly transcendent God whose relationship with human beings is historical, not manifested within natural forces or located in particular places. Medieval Catholicism was more “sacral” than Protestantism, which represented a return to a more Biblical faith, but even during the medieval period, the rivalry of Pope and King represented a refusal to subsume the temporal world within a single, all-embracing sacral order. The “sacral”/“secular” dichotomy, while probably useful and on the surface plausible, might also be too slick. See H. Cox, The Secular City: Secularization and Urbanization in Theological Perspective (1965) [hereinafter H. Cox, The Secular City]; see also infra note 475 and accompanying text.
evangelicals in America as heartily as it was by more religiously skeptical (or indifferent) rationalists. The typical American assumption was that the laws of nature "below," discoverable through the methods of Baconian science, would support belief in the existence of a transcendent God "above." This two-tier formulation dominated American thought. At times, of course, the relation between the details of natural science and religious faith seemed somewhat attenuated, but a "common way of relating Christianity to science was the 'doxological': One should emerge from one's scientific inquiries into nature praising God for the marvels of His creation." Even if some scientists might fail to express sufficient praise, most Christians were nevertheless firmly wedded to a scientific culture.

For that reason, Christian, including evangelical, reaction to Darwin was by no means uniformly negative. Indeed, many of the most committed Bible-believers had already decided that Genesis should be reinterpreted in light of modern geological discoveries. When *Origin of the Species* appeared, a commonplace view among biblicists was that the six days of creation represented eons. Thus, initial reaction to Darwin did not break down along lines of religious conservatism/liberalism, or even lines of evangelical/rationalist.

Indeed, the most serious concern voiced by Charles Marsden has been a consistently knowledgeable and insightful interpreter of the fundamentalist controversies. See also Marsden, *Evangelicals, History, and Modernity*, in *Evangelicalism in Modern America* 94-102 (1984).

"The most formidable American scientific opponent of Darwin was Harvard's Louis Agassiz, a Unitarian. The most formidable supporter was Agassiz's colleague, Asa Gray, an evangelical." Id. at 35.

In fact, Gray was something of an animal rights proponent, reading Darwin, who himself abhorred cruelty to animals, as emphasizing our kinship with non-human animals, and thereby extending our ethical community:

> We are sharers not only of animal but of vegetable life, sharers with the higher brute animals in common instincts and feelings and affections. It seems to me that there is a sort of meanness in the wish to ignore the tie. I fancy that human beings may be more humane when they realize that, as their dependent associates live a life in which man has a share, so they have rights which man is bound to respect.

70 *Monist* 98, 103 (1987) (quoting A. Gray, NATURAL SCIENCE AND RELIGION: TWO LECTURES DELIVERED TO THE THEOLOGICAL SCHOOL OF YALE COLLEGE 54 (1880)). See generally J. Rachels, CREATED FROM ANIMALS: THE MORAL IMPLICATIONS OF DARWINISM 83-86, 93-113
Hodge of Princeton Theological Seminary, the most influential bastion of Biblical conservatism, was not with evolution as such, or with natural selection, but rather with Darwin’s rejection of design or final causes. Harvard’s Asa Gray, America’s foremost botanist, was both a staunch Darwinian and a committed evangelical. He corresponded at length with Darwin on the question of whether Darwin’s evidence necessarily led to rejection of all divine design. Gray thought not and also argued that Darwinism should lead to a new, less prideful and, therefore, decidedly evangelical recognition of the interconnection between human life and animal and plant life. Gray asserted that through Darwin’s work people could also come to understand that other creatures have a moral claim which humans are obliged to respect. Charles Hodge notwithstanding, conservative evangelicals generally favored Gray’s view with respect to divine design, and thereby allowed for reconciliation between Darwin and the Bible. Even at Princeton, where Hodge and the doctrine of Biblical inerrancy reigned, some (including Hodge’s son and successor) thought reconciliation possible.404

Some defenders of the Christian faith, especially in the South, did hold out against Darwinism, but the real move in the direction of fierce warfare came not from the ranks of the Christians, but rather from an emerging scientific-academic elite at the universities. For example, Andrew Dixon White, the young president of Cornell University, lectured on “The Battle-Fields of Science,” an address which later became the two-volume *A History of the Warfare of Science with Theology in Christendom*.405 A favorite spokesman of the scientific cause was T.H. Huxley, who rallied the intellectual “agnostic” proudly to affirm Comte’s view that the objectivity of positivist science should replace outmoded religious traditionalism as civilization’s single mode for discovering the truth: “the perceived need to cleanse science of left-over religious traces led Huxley to declare that “Warfare has been my business and duty.”406 Notably, Huxley, unlike Gray, found in Darwin no new need for humility in relation to animals, but only confirmation

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406 Id. at 38 (quoting Huxley).
of our exalted view of ourselves.\(^{407}\)

As George Marsden has argued, among the educated elite so-called fundamentalists actually lost their war with "science" before they ever quite realized they were fighting it.\(^{408}\) The triumphant cultural champion of the new secularism was John Dewey, who abandoned his study of religious philosophy and his Calvinist background to become a spokesman for experimental social science. He urged the intrinsic significance of experience and the human capacity to uncover meaning by use of the scientific method, believing that science, freed from outmoded religious suppositions about the supernatural, would progressively increase human harmony and tranquility.\(^{409}\) Properly understood, ethical judgment required, Dewey insisted, not command issued by a transcendent God, but a clear sociological knowledge of consequences, combined with knowledge drawn from psychology as to what it was that humans actually wanted. Morality could thus be verified by experience, through the social sciences.\(^{410}\)

Bruce Kuklick has recently shown that Dewey's claims on behalf of social science cannot be separated from his earlier Calvinism.\(^{411}\) The "common faith" in democratic values and in science that Dewey thought should be promoted through the schools could be "viewed as a secular version of the ideals of the New England standing order."\(^{412}\) If Jonathan Edwards insisted on the possibility of redemption through grace, Dewey too preached the possibility of human redemption, although only through the human and, ostensibly, nonreligious instrumentality of science—science "came to serve, for Dewey, what in the nineteenth century was plainly a divine purpose."\(^{413}\)

Rationalist social scientists, following Dewey, could claim neutrality, but only because they confidently believed in an essentially good and orderly universe—no less than did the "two-tier" thought of the nineteenth century. Unconsciously, they assumed certain

\(^{407}\) See J. Rachels, supra note 403, at 83.
\(^{408}\) Id. at 39, 41.
\(^{409}\) Kuklick, John Dewey, American Theology, and Scientific Politics, in Religion and Twentieth Century American Intellectual Life, supra note 26, at 82.
\(^{410}\) Id. at 85.
\(^{411}\) Id.
\(^{412}\) Marsden, Evangelicals and the Scientific Culture, supra note 382, at 42.
\(^{413}\) Kuklick, supra note 409, at 83.
values, and could not imagine their rejection. Those values in turn became basic to the pragmatic managerial politics of the New Deal period—the politics of professional technicians and efficiency rather than the democratic participation Dewey had urged—and those politics are with us still.

Dewey did not go unchallenged. In fact, the most bracing confrontation between “science” and religion was not the one between Clarence Darrow and William Jennings Bryan, but between John Dewey and Reinhold Niebuhr. Niebuhr, who came from within the ranks of liberal modernist theologians, consistently challenged the myopia and complacency of Dewey’s progressive optimism—insisting that Dewey’s secularized faith in unaided human agency ignored the reality of sin, paradox and tragedy in social life, a reality which theology elucidated far better than did social science. Niebuhr feared that a politics guided only by social science, without religion, would degenerate into mere self-interest. He conceded that religiously motivated politics could become intolerant and absolutist: decent politics required recognition of a God who judged “not only social injustice but the self-righteousness even of those who [fought] against it.” Sin, pride and imperfection were part of all human beings, who remained “creatures as

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414 Id. at 87-88. David Hollinger, similarly, has described the essentially religious vocabulary and assumptions which were used to celebrate ostensibly nonreligious science early in the century. He calls this the “intellectual gospel.” Modern scholars have come to appreciate the complexity of the interplay between scientific and religious thought: now only embittered fundamentalists and, at the other extreme, only “a few die-hard village atheists . . . [fail to] realize how anachronistically Victorian is the vision of a triumphant science eventually replacing religion.” Hollinger, Justification By Verification: The Scientific Challenge to the Moral Authority of Christianity in Modern America, in RELIGION AND TWENTIETH-CENTURY AMERICAN INTELLECTUAL LIFE, supra note 26, at 116. Hollinger points out that in theological terms, the notion of justification by verification, the basic premise of scientific positivism, is a form of Arminianism—in contrast to the doctrine of justification by faith. Id. at 118. In that sense, it was more Methodist than Calvinist. For the importance of Methodist Arminianism, with its optimism about human possibility, in American culture, see G. KELLY, supra note 24, at 84-85.

415 For a perceptive account of that confrontation, see G. WILLS, UNDER GOD, supra note 340, at 97-114 (arguing persuasively that Bryan’s real opponent was not “science,” but the amoral nihilism of those who had misappropriated Darwin, such as H.L. Mencken in his publicizing of Nietzsche).

416 Id. at 104.

well as creators. According to Niebuhr, nothing in Dewey's social science provided access to that reality, a reality no less "true," Niebuhr insisted, than the data of the sciences.

Niebuhr did not, however, challenge the value of science itself, although he tried to discredit its claims to ultimate truth. Indeed his brother, H. Richard Niebuhr, who was more Barthian than Reinhold but a strong influence on Reinhold's thought, actually praised the scientific spirit for its capacity for humility and self-criticism and for its recognition of the unrelenting, objective determinateness of existence. Science, both social and natural, revealed the provisionality of all human knowledge, and the fragile, shifting nature of human perception. That understanding, Niebuhr argued, in fact provided a foundation for recapturing evangelical faith in the sovereignty of God. Science and religion were not at odds, but rather joined in continual, dialectical interplay, having to do with the meaning of ("internal") freedom and ("external") necessity.

B. Protestant Fundamentalism

It is a commonplace of intellectual history that Dewey won the battle. It was a battle between intellectuals known mainly to the intelligensia. Dewey forced intellectuals to choose between the (admittedly imperfect) notions of social science and what Dewey claimed to be a groundless faith in religion; Niebuhr could not convince an emerging academic and managerial class that its own social scientific rationality was also something of a fiction or a metaphor, useful in mobilizing support for the intellectual class, but less able than theology to grapple with the paradoxes of

418 Id. at 107.
419 Id. at 108-09.
420 Moreover, scientific reason, no less than theology, depended on communal "faith" in inquiry, a commitment that could not be verified on purely scientific grounds. Id. at 109. Fox's perceptive essay also explores more fully the differences between Reinhold Niebuhr's thought and that of H. Richard Niebuhr. Reinhold, in his earlier years, was drawn to Marxism, whereas H. Richard was more influenced by Barth. See also Gilkey, Social and Intellectual Sources of Contemporary Protestant Theology, in Religion in America 156-57 (1968) for a brief account of Reinhold Niebuhr's importance. For a more complete account, see R. Fox, Reinhold Niebuhr (1985). For more on Reinhold Niebuhr, see C. Lasch, The True and Only Heaven: Progress and Its Critics 369-93 (1991) [hereinafter C. Lasch, The True and Only Heaven].
421 See Gilkey, supra note 420, at 157.
Increasingly, American divinity schools, once central to the educational enterprise, became marginal to the modern university. The great private universities allowed them to survive, relegated, however, to a backwater, where Christians were free to do their own thing, without credible academic influence. Meanwhile, Dewey's philosophy dominated the American public school system, a fact that is well-known and still a point of controversy among those Christians who resent the takeover of the public schools by Deweyan "secular humanists." 

Parallel controversies were replicated within Protestantism itself. Disputes at Princeton, whose divinity school had traditionally been a major base of American evangelicalism, illustrated the split, not only between religious "liberals" and "conservatives," which is now a commonly held distinction, but also between evangelical-

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422 See Kuklick, supra note 409, at 92.


424 The distinction is made much too flippantly. Today, for example, three in ten Americans count themselves as evangelicals, but many evangelicals are not fundamentalists. Pentecostals, for example, are not, nor are many black Baptists. Many evangelicals are also not political conservatives—probably roughly one in four white evangelicals see themselves as on the "left" of the political spectrum, as do most black evangelicals as well. See Wacker, Uneasy in Zion: Evangelicals in Postmodern Society, in Evangelicalism and Modern America 18 (1984). Indeed, white southern Baptists, the largest evangelical denomination, were largely Democratic in the earlier part of the 20th century; they strongly favored the New Deal programs that attacked poverty, and that commitment to social welfare programs was still strong in the 1940s and 1950s. See K. Wald, supra note 397, at 185. The Democrats began to lose favor among evangelicals only in the 1980s, probably partly in response to Kennedy's Catholicism. Id. Even in the 1980s evangelical support for the Falwell New Right agenda was far more mixed than is commonly supposed, suggesting the inadequacy of labels like "conservative" or "liberal." Pro-family issues are the ones that have gained the most support, but even then support is surprisingly mixed. Careful interviews in 1983 showed majorities among evangelicals supporting school prayer, a pro-Israel policy and tuition tax credits for parochial schools. On the other hand, majorities also, contrary to common perceptions, supported the distribution of birth control information in the schools, favored passage of the Equal Rights Amendment and rejected the view that AIDS was a form of divine retribution. On issues of increased defense spending, the nuclear freeze and abortion, evangelical opinion was split, with no single view prevailing. Notably, Reverend Falwell was less popular among respondents, than the National Organization for Women. See id. at 192-93.

Common groupings within Protestantism, however, are usually made as follows:

Liberal Protestants—Episcopalians, Presbyterians and United Church of Christ (comprised of Congregationalists). These were once the "big three" dominating American culture. They emerged from the fundamentalist controversies with modernists firmly in control, and generally have been "liberal" both in Biblical interpretation and commitment to
ism as rationalist fundamentalism and evangelicalism as personal-ist “experience.” The Princeton disputes affected non-intellectuals

political action. Now this grouping represents slightly less than 10% of the American population, although it remains influential because its members are represented disproportionately among civic and business leaders, despite its waning membership in the population generally.

Moderate Protestants—Methodists, Disciples of Christ, Northern Baptists, Lutherans and Reformed. This grouping accounts for about one-fourth of the religious population, and is the largest Protestant grouping. Traditionally it has not had the same access to power as did the “old-line” group above; it has tended to be middle class in status and outlook; in some senses the Methodists, with their Arminian theology, stressing good works and optimism, along with sound organizational structures and a practical rather than theoretical approach to theology, are the most “American” denomination. Diversity within this grouping is wide in both theology and politics, but cultural influences are strong.

Black Protestants—Black Americans have been primarily Methodist or Baptist in background, but their churches took distinct form, and were not subsumed within the broader denominational structures. Churches were a vital part of the Black American experience, second only to family life as a source of identity, strength and solidarity. Blacks have a high level of religious commitment relative to other groups. When compared with other groups, they tend to be evangelical and “conservative” on family issues, while more politically “lib-eral” in other respects.

Conservative Protestants—The largest denomination is the Southern Baptist; others include Churches of Christ, Church of the Nazarene, the Assemblies of God, Seventh-Day Adventists and many independent fundamentalist, Pentecostal and Holiness groups. The grouping accounts for 16% of the American population. Many are members of the National Association of Evangelicals. Despite a good deal of diversity, most emphasize the conversion experience, Biblical authority and the importance of morality in personal life. They are more inclined than most to see the forces of good and evil, God and the Devil, played out in the world of concrete events.

Taken altogether, Protestants still make up the majority religious faith. Nevertheless, roughly one-fourth of the American population is now Catholic—slightly larger than the “Moderate Protestant” grouping. Like black and conservative Protestants, they have a high level of religious commitment. As Protestantism became more fragmented after the 1960s, Catholicism entered the mainstream. After Vatican II, Catholic churches seemed more Prot-estant and therefore typically more American than they had in the past. Catholics had entered the socio-economic mainstream as well. Importantly, Catholics have been able to articulate a unified and coherent moral position on a number of issues, in a way that Protestants have not.

Jews represent two to three percent of the American population, in three groups, Reform, Conservative and Orthodox. Jews have relatively low rates of attendance at services, and synagogue and temple involvement are weak, but communal ethnic bonds are strong. No other major group has had to struggle so hard with the conflict between commitment to faith and assimilation into the American mainstream.

Other faiths include Mormons, Jehovah’s Witnesses, Christian Scientists, Unitarian-Universalists and Muslims (the latter now approximate Episcopalians in numbers), which have been important in American life despite low percentages of the population. Non-affiliates comprise about seven percent; most are more indifferent to religion than hostile to it. For a succinct summary of these groupings, see generally W. Roof & W. McKinney, supra note 26, at 85-99.
more directly than is commonly the case with elite intellectual controversy; recent events have only served to highlight their importance.\footnote{See Marsden, Evangelicals and the Scientific Culture, supra note 382, at 25-26. Marsden points out that “Princeton theology” has had more influence in the 20th century than in the 19th century.}

For many years Princeton was dominated by the Biblical inerrancy school, which held that the Holy Spirit dictated, or at least suggested, the very words of scripture. Some took this notion more literally than others, but the basic view was that the Bible, as God's word, must be as accurate in its precise accounts of science and history as in its more explicitly theological passages. Missouri Synod Lutherans have probably been the most extreme modern defenders of Biblical inerrancy; they were important both in organizing the Creation Research Society and in promoting the “orders of creation” view of woman's appointed role.

Despite common misconception, Biblical inerrancy, or fundamentalism, does \textit{not} represent a retreat from science to blind irrationalism. When Charles Hodge at (Presbyterian) Princeton defended Biblical inerrancy as against Darwinism in the nineteenth century, he was also defending it against too much emphasis on Edwardian “internal evidences,” or personal religious feeling. The goal of theology was to gain the “assent to the truth, or the persuasion of the mind.”\footnote{See Baird, Schaeffer’s Intellectual Roots, in Reflections on Francis Schaeffer 47 (1986).} J. Gresham Machen, the last great Princeton defender of the “Princeton theology” of inerrancy, explained that the problem with allowing any deviation, even a “limited” or “mediated” view of inerrancy, was that it was “logically untenable”: one could not simultaneously think that the Bible was “the truth” and at the same time think that it contained factual errors. As emphatically as Hodge, he objected to religion as personal feeling or experience. The goal was not blind faith, but theology as a science:

\begin{quote}
Theology . . . is just as much a science as is chemistry . . . the two sciences, it is true, differ widely in their subject matter; they differ widely in the character of the evidence upon which these conclusions are based; in particular they differ widely in the qualifications required of the investigator: but they are both sciences, because they are
both concerned with the acquisition and orderly arrangement of a body of truth.\footnote{Id. at 53.}

By the 1920s, however, the method of higher criticism was gaining ground in mainstream Presbyterianism and Protestantism generally, undercutting the inerrancy position. Karl Barth’s sophisticated hermeneutics managed to affirm the rigorous “truth” of revelation (as against the theological liberals in Germany), while simultaneously rejecting literalism, incorporating critical historical knowledge,\footnote{See E. Jungel, \textit{supra} note 205, at 70-82.} and reminding us that “at the moment” when the “Word of God” has “left its source, it has become the word of man.”\footnote{K. Barth, \textit{The Epistle to the Romans}, \textit{supra} note 223, at 447-48.} The Princetonians were incapable of that prodigious hermeneutic feat, however, and the Presbyterian church of the 1920s was, not atypically, in a state of schism. In 1927 the Presbyterian Assembly effectively repudiated Princeton theology.

Machen and his fellow conservative teachers and students left Princeton in protest and formed the Westminster Seminary in Philadelphia; after quarrels about the Presbyterian Missionary Board, Machen was actually removed from the ministry.\footnote{Baird, \textit{supra} note 426, at 53-55.} In retrospect, that Presbyterian move was dramatically significant for the abortion debate, for Francis Schaeffer, who probably more than any other single person inspired fundamentalists to focus on the abortion issue, became a student of Machen, who continued to teach despite his disaffection. Throughout his life, Schaeffer was a defender of Machen’s Princeton theology and of the rational character of Christian belief.

Fundamentalism’s appeal lies precisely in this offer of a rational basis for Christianity, replicating the “two-tier” nineteenth-century technique of finding in nature itself evidence of scriptural claims, using Baconian induction as the preferred method. Modern “creation science” represents, in effect, an effort to restore the lost harmony between evidence from nature and evidence from scripture. Both sources of truth, scripture and nature, are approached in a spirit of “common sense” (probably a legacy of Scottish philosophical realism) which fundamentalists find lacking in modern scientific theory as well as in modern Biblical interpretation. The
symbolic and the metaphorical are rejected; the goal is to be straightforward and factual. This approach has had considerable appeal for engineers. For example, Henry Morris, a widely read creation scientist writing during the 1960s, was an engineer and claimed to apply engineering methods of common sense and reason to his reading of the Bible: if the Bible states God created the world in six days, then it means exactly what it says, not what some fancy literary scholar claims it "symbolizes."

Young Francis Schaeffer started studying under Machen in 1935. By 1947 he was headed for Europe on an unlikely mission to confront and interpret all of European culture from the fundamentalist perspective. His L'Abri (Switzerland) Fellowship opened in 1955 and, with its loving, communitarian commitment to dialogue, rapidly gained an international following, despite fundamentalism's distinctly American character. Meanwhile, Schaeffer was starting to write the books and, later, to make the films that quickly found their way into church groups and the curricula of evangelical colleges throughout the United States. Schaeffer became a powerful influence (on, for example, both Jerry Falwell and pro-life activist Randall Terry) in part because, true to his Machen heritage, he recognized the central dilemma of modern Christianity: if it were not "true" and "real" in some sense that could be taken as objective, then no amount of talk about values, spirituality, Americanism, love, human needs and feelings would rescue Christian theology.

Barth, like Schaeffer, had also recognized the objective "truth" point, but Schaeffer dismissed Barth and other neo-orthodox European Protestants with the disdain of the practical, common sense American: he accused them of "mental gymnastics" and "black magic in logic," so that "contradictions and changes are accepted with complacency, and paradoxes with joy." Like Machen, Schaeffer continued to affirm the literal inerrancy of the Bible as

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431 See Numbers, The Dilemma of Evangelical Scientists, in Evangelicalism and Modern America 156 (1984); see also Marsden, A Case of the Excluded Middle, in Uncivil Religion 132-56 (1987).
432 Baird, supra note 426, at 61-63.
433 Pinnock, Schaeffer on Modern Theology, in Reflections on Francis Schaeffer 179 (1986).
434 See G. Wills, Under God, supra note 340, at 318-28 (on both Schaeffer and Terry).
435 Baird, supra note 426, at 81.
the only grounding for an objective Christian truth, although under the influence of Reformed Calvinists who taught with Machen, Schaeffer modified Machen’s simplistic Baconianism with a “presuppositionalism” which, as with Barth, understood, in Kuhnian fashion, that nature itself will be viewed differently depending on the presuppositions one brings to its study. (On this important doctrinal point Schaeffer tended to waffle, for fundamentalists prefer to believe in a wooden consistency between the objectivity of natural fact and the objectivity of scripture; serious Calvinists are more skeptical about the ultimate reliability of the “evidences” a fallen natural world can ever present to a fallen reason.)

Schaeffer’s peculiar gift, however, lay not only in reaffirming the “truth” of Christianity but also in realizing its critical potential as against modern secular culture. He understood that a fundamentalism which defensively insulated itself from modern culture, retreating into purist doctrinal squabbling, would simply dig itself into the ground. He thus became “culture reclaiming” rather than “culture denying,” a move which in turn helped induce Falwell’s willingness to enter the public “moral” arena, despite the traditional Baptist aversion to church involvement in political action. Schaeffer’s goal was not to reestablish literal Biblical rules as secular law (although, more recently his son has moved in that direction). Rather, he wanted to show that a culture without Christianity as the central truth of its worldview was doomed to moral floundering—in effect, a crudely simplistic version of MacIntyre. He demonstrated his cultural thesis in part by long descriptions of the history of Western culture (on film as well as print) which were just accurate enough to seem plausible, but were also oddly skewed: untangling the truth from the falsehoods is a mind-numbing task. Nevertheless, he did succeed in bringing European “culture” to the brittle world of fundamentalism. As Gary Wills describes the effect on Randall Terry, “[i]t was a heady experience, to be dealing with the world’s great thinkers in a confident and urbane way, giving grades to Aristotle and Picasso in terms of their Biblical acceptability. At last American evangelicals had their own

\footnote{Id. at 55-58; see also Marsden, Evangelicals and The Scientific Culture, supra note 382, at 23-25 (discussing Kuyper, a presuppositionalist).}

\footnote{See Ruegger, Francis Schaeffer on Philosophy, in Reflections on Francis Schaeffer 107-28 (1986).}

In Whatever Happened to the Human Race, a book and movie about biomedical issues that Schaeffer later co-authored with C. Everett Koop, Schaeffer was to depict abortion as the single most compelling symptom of a modern culture fallen into a non-Christian world view, and he is well-known for the accuracy of his prediction that Christians could be mobilized on the single issue of abortion in order to start reclaiming a culture of decay, one he likened emphatically to the culture of Nazi Germany.\footnote{F.A. Schaeffer & C.E. Koop, Whatever Happened to the Human Race? (1979).} Elsewhere, however, he had also addressed destruction of the environment (actually the first ethical issue he raised specifically), racism and unbridled economic exploitation as symptomatic of the same cultural malaise. However reductionist and simplistic his work may be, with its extravagant slippery-slope claims, Schaeffer was nevertheless starting to rouse conservative Christian ethics away from a preoccupation with sin as personal (usually sexual) immorality (to be remedied as fast as possible by personal conversion) toward a greater understanding of social responsibility and the meaning of culture.\footnote{Hollinger, Schaeffer on Ethics, in Reflections on Francis Schaeffer 245-66 (1986). On the problematic character of making a literal, Biblical case against abortion, to the point where some of the passages relied upon might support reverence for “all life” (i.e., even animal?), see G. Wills, Under God, supra note 340, at 318-20. Wills notes that even St. Augustine could not find a text in Scripture that answered the question of the soul’s origin. Id. at 318.} In so doing he raised difficult questions about church/state relations that he seems never to have comprehended—as a somewhat chastened Jerry Falwell was to learn by the end of the 1980s.

C. Secular Liberalism/Religious Conservatism

The 1960s were a period of both continuity and radical discontinuity for religion in America. Today’s abortion debate represents yet unhealed cleavages in American religion that are traceable to the cultural turbulence of those times. The centrist religion of the 1950s, smugly allied with conventional American culture, lacked the strength to contain fragmentation. Churches had achieved a vague ecumenical unity, but only by losing their strong denomina-
tional and doctrinal identity. Values had largely replaced theology in church life; when those values became contested rather than shared, unity dissolved. Thus, cultural divisions that might once have been contained within denominational structures instead divided the country across denominational boundaries. The center broke, so to speak, as churches lost their capacity to play a unifying cultural role.

For a time, within the zany 1960s youth culture, pluralism ran rampant and religious experimentation ranged from Eastern religions to cults to Satanism to drugs. The lasting cleavage that emerged, however, was between “secular liberalism” on the one hand and “religious conservatism” on the other. However misleading the labels, along with the caricatured images each side has of the other, that particular division has become more important than any doctrinal or denominational issue within American religious life. While this cleavage may be regarded as a specific legacy of the 1960s, its roots were in the past.

Dewey’s victory over Niebuhr in the 1930s had already symbolized the ascendancy of pragmatic, progressive secularism. It also entailed, probably contrary to Dewey’s intent, the political dominance of managerial experts, a development which social scientists (and many legal realists) for the most part hailed: pragmatism in philosophy translated into pragmatic liberalism in politics. Power in the modern world, intellectuals came to believe, should be exercised “dispassionately, impartially, and objectively,” which would occur only if those who exercised authority were trained in a political morality secured not by religious truth, but by rationality and efficiency. As has been commented, “[a] more self-interested theory cannot be imagined,” but it probably reflected naive optimism more than cynical self-interest.

441 For sympathetic accounts, based largely on careful personal observation, see The New Religious Consciousness, supra note 26, which includes descriptions of groups located mainly near Berkeley, including the 3HO, the Hare Krishna, the Human Potential Movement, the Divine Light Mission, the Church of Satan and others.


443 Id. As Kuklick points out, it is by no means clear that Dewey himself advocated government by expertise. Id. His views were sufficiently vague, however, that those who were doing so could take Dewey as a spokesman. Eventually, secular pragmatism simply prevailed, without requiring reference to its intellectual roots.
The growth of an educated, largely secular class of "experts" was closely linked to professionalization and specialization within the universities. Nineteenth-century higher education, largely in clerical hands, sought to preserve sound learning and religious morality. After the 1870s, both expansion and specialization began to occur which made possible a "social faith in merit, competence, discipline, and control that were basic to accepted [American] conceptions of achievement and success." The universities, by "screening, formalizing, and standardizing, and, above all, by certifying with credentials, legitimated and determined competence in American life."

While universities (especially graduate and professional schools) expanded generally after the 1870s, the 1960s saw especially dramatic increases. In 1870 there were only forty-four students enrolled in graduate schools in the United States. By 1930, there were 47,255; by 1972, the number had increased to 908,000. In 1876, forty-four Ph.D.s were conferred; in 1970, this number reached 29,872. Increased government aid to higher education during this period meant vast enlargement, with special emphasis on science and technology. A primary function of this professionalized university system, B.J. Bledstein has argued, was to "render universal scientific standards credible to the public" and also to reduce potentially divisive issues to scientific and even technical terms, thereby containing the controversies. Ideas became the subject matter of academic experts, who managed them with the tools of a universal, scientific reason.

These changes, which intensified dramatically during the 1960s, affected the study of theology itself, especially within Protestantism. Training for the clergy became professionalized and specialized. Study was compartmentalized, with academic expertise required for the mastery of any one of the specialties, in the manner

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46 Id. at 181.
47 Id.
48 Id. (quoting Bledstein).
49 Id.
50 Id.
typical of academic disciplines. As a result, theology became not only marginal to general education and irrelevant to one's basic understanding of the world but also fragmented within its own already isolated sphere. Abandoning its once powerful integrative function, academic theology was also effectively distanced from the laity and was expected to make scant contribution to public discourse. Excellent theologians would continue to write, but the religious voices reaching the public were, increasingly, those of Schaeffer and, later, of television preachers who learned, shrewdly, to manipulate the media instead of surrendering to its secularity.

The dramatic expansion of universities was accompanied by a time of general economic expansion, development of an increasingly important mass media, increased mobility and a growing population of young people; meanwhile, jobs funded directly or indirectly by government provided employment for a larger and larger percentage of the population. In both universities and government bureaucracies, the basic assumptions of (Deweyan) secular pragmatism prevailed and became what has been called, not without caricature, a "new class" ideology of the educated elite—an elite that spoke authoritatively on behalf of the public interest in schools, government agencies and the media. Their ideology of knowledge and expertise served not only to validate their own credentials, but also carried with it a new emphasis on lifestyle choices—with toleration for sexual freedom and divorce—not just among 1960s rebels, but also among "two-career households in the technological fast lane," whose jobs increasingly depended on government spending.

By the early 1970s, surveys showed that education and professional employment clearly corresponded with tolerance for abortion, homosexuality and gender equality; it also corresponded with support for government spending in education, space, medicine,
environment and urban improvement.\textsuperscript{464} In turn, these attitude changes, avowedly secular, also corresponded with a decline in religious involvement. Contributions and membership began to decline in the 1960s for the first time in a century and a half.\textsuperscript{465} When feminism was given full media attention in the 1970s, its appeal seemed strongest to those among whom religious commitment was weak. Feminism became associated, fairly or unfairly, with the “new class” ideology of secularism and permissive lifestyle freedom.\textsuperscript{466} This was so despite the fact that women’s ordination had begun to take hold in churches by the 1970s; in fact, as noted earlier, by 1980 the proportion of professional women in the clergy was actually higher than in either law or medicine.\textsuperscript{467}

For a time, in the early 1960s, the divisive and dispiriting effects of those changes were not apparent. For many intellectuals who remained religious, the period seemed to usher in a time of religious hope and possibility, not division. One source of possibility was the civil rights movement. In his famous letter from the Birmingham, Alabama, jailhouse, first published in its entirety in a Christian newsletter, Martin Luther King, Jr. had issued a challenge to white churches. King wrote that white churches had too often “remained silent and secure behind stained glass windows”\textsuperscript{468} in the midst of racial injustice. If the church did not “recapture the sacrificial spirit of the early church, it [would] lose its authenticity, . . . and be dismissed as an irrelevant social club with no meaning for the twentieth century.”\textsuperscript{469}

This was a challenge, not just to complacency, but to an assumption that had been basic to American churches in the 1950s—the presumed relation between good personal values and social justice. Churches had assumed that by shaping sound individual values within the church congregation, they could insure that decency

\textsuperscript{464} Government employees, in fact, manifested these “new class” lifestyle attitudes even irrespective of educational level. Harvey, \textit{supra} note 444, at 186.

\textsuperscript{465} In 1955, approximately $4.50 was donated to religion for every dollar given to education; by 1970, the ratio declined to $2.90 for religion for every dollar given to education. Id. at 159.

\textsuperscript{466} Id. at 226-27.

\textsuperscript{467} Id. at 227-28.

\textsuperscript{468} A.J. \textsc{Rechley}, \textit{supra} note 26, at 242.

would prevail in social life. The problem of race highlighted the extent to which social evil was structural, not merely personal—a point Reinhold Niebuhr had made in response to Dewey’s social optimism.\footnote{See Fox, supra note 417, at 100.}

Many within the clergy were finally willing to recognize that, with respect to racism, the good values churches supposedly had been teaching were leading neither to good behavior nor to a just society. Therefore, they concluded, on the question of civil rights, they needed to put their values on the line in their own behavior through direct political action. Merely preaching values was no longer sufficient.\footnote{See R. Wuthnow, supra note 21, at 145-47.}

By then, Bonhoeffer’s \textit{Letters and Papers from Prison}\footnote{D. Bonhoeffer, \textit{LETTERS AND PAPERS FROM PRISON} (1953); see also supra note 210.} were being widely read, and the connection seemed obvious: Bonhoeffer put his life on the line in opposition to Hitler; opposition to American racism formed a seemingly unambiguous parallel.\footnote{For the importance of this book during the period, see Fackenheim, \textit{On the Self-Exposure of Faith}, in \textit{RELIGION IN AMERICA} 205 (1968). On the connection made to civil rights, see W. Stringfellow, \textit{Dissenter in a Great Society: A Christian View of America in Crisis} 94-95 (1966). For Bonhoeffer’s own direct understanding of American racism’s challenge to American religion, see Shriver, \textit{Faith, Politics, and Secular Society: The Legacy of Bonhoeffer for Americans}, in \textit{Ethical Responsibility: Bonhoeffer’s Legacy to the Churches}, supra note 210, at 205; see also E. Bethge, supra note 210, at 109-10. The racial issue was, in fact, the one American social issue with which Bonhoeffer allowed himself to become involved during his stay in New York in 1930-1931. \textit{Id.} His subsequent description of the American race problem to his brother, Karl-Friedrich, in Germany, was so powerful as to elicit the following in reply:}

\begin{quote}
I am delighted you have the opportunity of studying the Negro question so thoroughly. I had the impression when I was over there that it is really the problem, at any rate for people with a conscience and, when I was offered an appointment at Harvard, it was a quite basic reason for my disinclination to go to America for good, because I did not want either to enter upon that heritage myself or to hand it on to my hypothetical children. It seems impossible to see the right way to tackle the problem. \textit{Id.} at 110 (quoting a letter from Karl-Friedrich to Dietrich Bonhoeffer (Jan. 24, 1931)). Moreover, according to Bethge, “[n]ot suspecting the heritage he would have to enter upon in his own country, Karl-Friedrich continued: ‘At all events, our Jewish question is a joke in comparison; there cannot be many people left [in 1931] who maintain they are oppressed here. At any rate, not in Frankfurt . . . .’”\textit{Id.}
\end{quote}
letter stated clearly and forcefully:

In the midst of a mighty struggle to rid our nation of racial and economic injustice I have heard many ministers say, “Those are social issues with which the gospel has no real concern,” and I have watched many churches commit themselves to a completely other worldly religion which makes a strange, unbiblical distinction between body and soul, between the sacred and the secular.464

That sharp distinction between the sacred and secular spheres, which is stronger in Christian than Jewish theology, had not been made traditionally by black churches in America, given their history of struggle and community building.465 It had also been largely rejected by the social gospel movement earlier in the century,466 which influenced King;467 and it has also, more recently, been challenged by liberation theologians.468 In the context of the 1960s struggle against the unambiguous evil of racism, quibbles over the precise “boundary” between the “sacred” and “secular” seemed excessively and inappropriately legalistic.

Given their 1950s record of complacent conventionality, American churches responded impressively to King’s direct challenge. Many clergy became involved in civil rights demonstrations.469 Moreover, finally galvanized to take action, the National Council of Churches (NCC) dropped its earlier ban of activity on behalf of specific legislation and formed a Commission on Religion and Race

464 Findlay, supra note 459, at 69.
466 For a recent sympathetic reanalysis of the social gospel movement, see King, An Enthusiasm for Humanity: The Social Emphasis in Religion and Its Accommodation in Protestant Theology, in Religion and Twentieth-Century American Intellectual Life, supra note 26, at 49.
467 King sought a middle ground between the excessive optimism of social gospel and evangelical liberalism and what he perceived as the despair implicit in Barth’s neo-orthodoxy, given its emphasis on “the intractable nature of sin and evil and the relative futility of utopian aspirations.” Cook, supra note 465, at 1028. For a discussion of King’s theology, see id. at 1012-44.
468 On the importance of Latin American liberation theology in American religious thought, including feminist thought, during the 1970s, see A.J. Reichley, supra note 26, at 256-67.
469 In California in 1968, for example, one-quarter of the Protestant clergy took active part in civil rights demonstrations. R. Wuthnow, supra note 21, at 146.
(NCC-CORR), which led an ecumenical drive to enact civil rights legislation. Jewish and Catholic leaders gave full support, but encouraged the (Protestant) NCC to take the lead, a leadership role that was recognized by President Kennedy.\textsuperscript{470} The NCC-CORR quickly organized church participation in the March on Washington and then directed extensive lobbying and grass-roots letter-writing campaigns.\textsuperscript{471}

Working with the NAACP and the Leadership Conference on Civil Rights, both more experienced lobbyists, the NCC drew on church organizations across the country and used its access to the structures of political and economic power to insure enactment of the 1964 Civil Rights Act. Examples: B'\textsuperscript{nai} B'rith gathered all its lawyer members in Iowa to pressure Senator Bourke Hickenlooper; Quaker professors from Earlham College lobbied the senators from Indiana; James Hamilton, a leader of the NCC, contacted a businessman in Omaha to ask a Methodist minister to encourage the president of the largest state bank to apply pressure on a reluctant Nebraska senator.\textsuperscript{472} Meanwhile, church groups, joined even by conservative congregations such as the Missouri Synod (which was not even an NCC member), orchestrated campaigns that flooded Congress with letters supporting the Civil Rights Act.\textsuperscript{473}

Such sophisticated politicking was probably not necessary once President Kennedy was killed, but prior to his assassination passage of the Act was by no means certain, underscoring the significance of those efforts. The same church leaders then went on to press for enactment of the Voting Rights Act, and the NCC shortly thereafter became involved in organizing and distributing funds to the Head-Start Program.\textsuperscript{474}

Suddenly, American religion, once the bastion of 1950s conventionality, found itself on the cutting edge of political action and social change. Then, in 1965, only one year after passage of the

\textsuperscript{470} Findlay, \textit{supra} note 459, at 71.

\textsuperscript{471} \textit{Id.} at 71-73. Quickly appointed to the staff was Dr. Anna Hedgeman, a savvy and shrewd African-American woman who knew how to do effective political organizing. \textit{Id.}

\textsuperscript{472} \textit{Id.} at 78-79.

\textsuperscript{473} \textit{Id.} at 84-85. An executive from that group wrote: "The God of the Gospel is also the God of justice, and holds society and government responsible for equality under the law." \textit{Id.} at 85.

\textsuperscript{474} G. WILLS, \textit{BARE RUINED CHOIRS}, \textit{supra} note 340, at 148-149. Wills is critical of the extent to which the church became embroiled in the details of political pressure and funding.
Civil Rights Act, Harvey Cox published *The Secular City,* which defended the social relevance of religion symbolized by the Civil Rights Act. Drawing specifically on Bonhoeffer's expression, "man's coming of age," and on his questions, "[h]ow do we speak of God without religion [and] . . . [h]ow do we speak in a secular fashion of God," Cox suggested that the secularization process in American life was a positive one, and that a secular world view could in fact be traced to Biblical origins. The Exodus from Egypt represented release from a cosmology of nature and place, and also from the idolatry that linked any given political ruler with an overarching sacral order.

Cox argued that modern Christians should not regret the depersonalization and alienated mobility of the modern, bureaucratic, secularized world. Much time was wasted, he said, longing for a lost period that was more religious, while the real freedom of the Judeo-Christian message lay in freedom from religion, and in the consequent possibility of human action in a truly "profane" world. This meant a release from ontology to pragmatism, and from a closed (natural law) view of what the world was to an open examination of how the world functions. That shift allowed for new possibilities of action in the world.

Similarly, Cox insisted that the Gospel was not concerned with objective truth, but rather with doing. This meant frankly acknowledging that "truth" and "value" were socially constructed, human creations. People are not limited by the natural order, but create, in fact, the meaning of nature itself—a point which the Bible symbolizes with Adam's naming of the animals. People are thus invited to be partners in God's creative work in a secular world. The gospel is the summoning to seize the forever new possibilities of the world. We are, Cox said, always in a "catalytic gap"—that point where the new is suddenly revealed within the

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470 H. Cox, *The Secular City,* supra note 400.
471 Id. at 241 (quoting Bonhoeffer).
472 Id. at 15-26.
473 Id. at 58.
474 Id. at 64.
475 Id. at 65.
476 Id. at 64.
477 Id. at 73-74.
478 Id. at 83.
old—and are free to act responsibly in the world if we can only wake up to our responsibilities.484

For his models of men "come of age" Cox chose both Camus and Kennedy—the latter, of course, had just been killed, a fact which seemed not to dampen Cox's optimism.485 Cox's description of Kennedy is revealing. He was the "technopolitan man" as pragmatist, which means he "discipline[d] himself to give up certain things."486 In particular, he wasted little time thinking about "ultimate" or "religious" questions. Instead, he was satisfied with "highly provisional solutions," which were arrived at by "bringing to bear the knowledge of different specialists."487

He sees the world not so much as an awesome enigma, evoking a sense of hushed reverence, as a series of complex and interrelated projects requiring the application of competence. He does not ask religious questions because he fully believes he can handle this world without them.488

Some of Cox's phrases were unnecessarily flippant. He enthusiastically borrowed, for example, the description of God's work in the world as a "floating crap game," so that the Christian's obligation is to "know where the [catalytic] action is" and "dig it."489 Nevertheless, despite such excess, Cox's book was a serious effort to explain the link between the Judeo-Christian tradition and the capacity to think in secular terms. It also captured the heady optimism of the early 1960s when all the world's problems seemed solvable by unaided human agency, drawing solely on its own professional competence. If Dewey's secular pragmatism, in its triumph, threatened the relevance of theology, the answer, Cox suggested, for theology, was to claim secular pragmatism as its own—as the true spirit of both Jewish and Christian scripture. In using the vocabulary of Dewey, theology was really speaking its own language after all.

Cox's book was widely read; Cox and discussions of The Secular
City became a mainstay on the lecture circuits and in the media. Meanwhile, Cox's basic theological optimism was shared by many Catholics as well. In a different sense, they, too, had "come of age" in modern American culture. No longer a defensive immigrant enclave in an alien society, they were now in the mainstream of social, economic and academic life. For many, Kennedy's presidency represented the full-fledged Americanization of Catholicism.

The background had been laid in the 1950s by the Jesuit theologian John Courtney Murray, who had argued that Catholicism was in fact consistent with the long American tradition of church/state separation. He elaborated, in the manner of classical legal thought, a magnificent series of further compartmentalizations: state/society, natural law/revealed law, temporal/spiritual and others. Within that structure, Catholics had a duty to participate in political life and could do so in a manner that was both conscientiously Catholic and utterly secular. Vatican II later incorporated Murray's formulation and Kennedy drew on it for his famous Houston statement.

There were, of course, differences between the Cox and the Murray approaches, despite the fact that both so fully embraced the pragmatic Kennedy approach to governance. Murray was a natural law theologian, whereas Cox rejected arguments based on ontology. Murray was a careful compartmentalizer, especially of the sacred and secular, whereas Cox was eager to label the secular as the only "true" (gospel) interpretation of the sacred. Cox embraced pluralism, while Murray accommodated himself to it.

Despite those differences, Vatican II and the new secular direction of Protestantism were similar phenomena. Both represented a self-conscious shift from the sacral to the secular. As Murray stated with extraordinary candor, "The notion of the sacral society is dismissed into history, beyond recall. The free society of today is recognized to be secular." Similarly, Robert Cushman, a delegate-observer to the Council, stated that, "[i]n principle, the era of Constantine—sixteen hundred years of it—passed away."

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490 See Mensch, The History of Mainstream Legal Thought, supra note 24, at 18-21.
492 A.J. REICHLEY, supra note 26, at 288.
493 Id.
this did not change the Church's claim to be the one true church, it did signify a new openness to the pluralist, secular world.\textsuperscript{404} The two main focuses of Vatican II, Sister Marie Augusta Neal wrote, were "openness to the world and . . . recognition of the laity as a partner,"\textsuperscript{405} in marked contrast to the view of the church as a spiritual oasis in a sinful world, with the religious life clearly superior to life in the world.

Sister Neal even saw Vatican II as embracing an American, Deweyan pragmatism as well as an American separation of church and state. Norms were to be established, not just by a bishop's pronouncement, but rather by experience and common sense judgment, in a joint effort in which "pursuit of science and the development of political and economic institutions for the enrichment of mankind are good."\textsuperscript{406} Natural law would no longer be the sole basis for moral theology; instead, new emphasis would be given to people as viewed from the perspective of the social sciences.\textsuperscript{407} Harvey Cox was cited as "the first American theologian [thus] to emphasize the spiritual potential of the secular city."\textsuperscript{408} Actual Council documents, of course, not only treated the question of religious liberty (Murray's chief concern) but also opened an entire range of Catholic subjects to reappraisal, including creed, liturgy, Canon Law, cult, education, institutional hierarchy, laity, role of women (who were given more responsibility and personal choice) and the like.\textsuperscript{409}

Not surprisingly, therefore, during this hopeful time, when all

\textsuperscript{404} The state was relinquished to the merely human and provisional, and social pluralism was acknowledged, but only as a fact of a fallen world. See id.
\textsuperscript{405} Neal, Catholicism in America, in RELIGION IN AMERICA 326 (1968).
\textsuperscript{406} Id. at 323-24.
\textsuperscript{407} Id. at 324.
\textsuperscript{408} Id. Catholic theologians were, in fact, writing on similar themes. For example, Johannes Metz wrote "to Christianize the world means in its basic sense to make the world more worldly, to bring it to its own. . . . [Grace] calls and guides the world into its perfect secularism." Cox, Afterword, in THE SECULAR CITY DEBATE 191-92 (1966) [hereinafter Cox, Afterword] (quoting Metz, A Believer's Look at the World: A Christian Standpoint in the Secularized World, in THE CHRISTIAN AND THE WORLD 93 (1965)). Similarly, the Jesuit theologian Karl Rahner wrote: "If the world of the future is a world of rational planning, a demythologized world, a world secularized by the creature in order that it may serve as the raw material for man's activity, then this whole modern attitude . . . is basically a Christian one." Id. at 192 (quoting Rahner, Christianity and New Man, in THE CHRISTIAN AND THE WORLD, supra, at 228).
\textsuperscript{409} Neal, supra note 495, at 313.
things seemed possible and all change was for the better, liberal, educated Catholics embraced Cox's secular city—symbolized by Washington, still in the afterglow of its young, pragmatic Catholic President—as eagerly as did liberal, educated Protestants. Cox appeared on the lecture circuits with Sister Corita, the artist-nun who celebrated *The Secular City* by composing advertisements for big corporations in a happy "Warholism of the supermarket"; her "hymn to the Virgin (as the juiciest tomato of them all)" was superimposed on a soup can design.\(^{500}\) Meanwhile, Cox's work was printed in the Catholic press, used in Catholic schools and endlessly quoted.\(^{501}\) Bonhoeffer, meanwhile, became nothing short of faddish, subject of a photo essay in *Life* and an article in *Time*.\(^{503}\) He was so popularized that serious divinity school professors assigned his work almost sheepishly. As one theologian said, "[w]e have to continue studying Bonhoeffer even though he is a fad."\(^{503}\)

But what did "studying Bonhoeffer" mean? Some seemed too ready to adopt startling phrases like "religionless Christianity" while also forgetting the more somber ones, such as the "cost of discipleship." Those who found in Bonhoeffer some relief from the heavy learning and complex paradoxes of Barth's many-volumed *Church Dogmatics* too quickly forgot that Bonhoeffer viewed himself as in that same tradition.\(^{604}\) Moreover, as Cox was later to point out, with more care than was evident in *The Secular City*, Bonhoeffer was writing within a very particular context—\(^{605}\) a long tradition of "two sphere" Lutheranism which so separated the church from the world, the sacred from the secular, that it was immobilized even in the face of extraordinary evil. It was this "world-despising" aspect of Lutheranism which required a hearty new dose of maturity. That did not mean, however, that Bonhoeffer believed one could suddenly step forth to confront a God who somehow, magically, had nothing to do with the religious tradition that had been interpreting God's word for centuries.

\(^{500}\) G. Wills, *Bare Ruined Choirs*, *supra* note 340, at 90-91.

\(^{501}\) Id. at 90.


\(^{503}\) Cox, *Beyond Bonhoeffer*, *supra* note 502, at 206.

\(^{504}\) See Novak, *supra* note 502, at 385.

\(^{505}\) See Cox, *Beyond Bonhoeffer*, *supra* note 502, at 207.
For that reason, Barth’s multivolume *Church Dogmatics* is in large part an extended conversation with precisely that tradition. As Barth and Bonhoeffer both knew, there is an idolatry that says one can capture and contain God within any single (human) tradition, yet there is also an idolatry that claims any single moment of history, any particular modern insight, to be the new truth taking us to an Archimedean point that transcends history, including the history of religious tradition. Who was the “God” we confronted anew and religiously in Cox’s *The Secular City*, except the God of Jewish and Christian religions? Put in Christian terms, even the gospel does not remove us from history, but rather sets in motion the dialectic Barth described in paradoxical phrases like “nothing new, but the oldest . . . not an old acquaintance, but a new one.”

Like the Enlightenment (including enlightenment legalism) in relation to religion, and also like many Protestants in relation to Catholics (and many Christians in relation to Jews), those who were part of the Bonhoeffer fad in the 1960s forgot the first part of the paradox. Cox, however, reflecting on his own work, made the point persuasively, both about Bonhoeffer and also about an American theology that was prone to adopt the latest novelties of the secular culture at the expense of theology itself:

Bonhoeffer’s vaunted radicalism grew out of a tradition which was so much a part of him he rarely felt the need to affirm it. His genius was that he could deal with frontier issues, but was able to do so in the light of a theological heritage which he loved and cherished. This is why our American theological enterprise, which often tends to be ahistorical as well as anarchic, can still learn much from him. Too often our traditionalists have no interest in emerging issues and our pioneers feel they must exude a lusty disrespect for anything that happened before 1961. This is why so many new movements in theology end up in old blind alleys. Bonhoeffer knew the revolutionary power of a tradition understood and applied.

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506 See *supra* note 225 and accompanying text.
507 Cox, *Beyond Bonhoeffer?*, supra note 502, at 207-08. Cox noted Bonhoeffer’s dismay when he visited the United States and found students at Union Seminary laughing out loud at passages from Luther on sin and forgiveness. *Id.* at 207.

On the other hand, this does not mean, of course, that there is no point in trying to rid
Meanwhile, however, other faddish “secular” theologies were gaining as much publicity as Cox, chiefly by asserting, as the new gospel message, that “God is dead.” This was taken, ironically, not as a rejection of Barthian neo-orthodoxy, but rather as the culmination of both Hegelian and Barthian dialectics, and as the real meaning of Bonhoeffer. In The Gospel of Christian Atheism, for example, Thomas Altizer “literally affirms and indeed wills the death of the Biblical God.”

No less than a new “third testament” is required:

The Old Testament knew only the alien, transcendent, externally commanding Father. He became the Son, incarnate and immanent, in the New Testament. It will be left for the third testament to come dialectically to deny the Son’s resurrection to transcendence, and along with it the Father who makes this resurrection possible.

Thus would the final stage of the dialectic be achieved, revealing the “full and actual presence of the Christ who is a totally incarnate love.”

Akin to Altizer was Anglican bishop John A.T. Robinson. In Honest to God, which sold over 500,000 copies in the United States, he announced that Christianity was formulated at a time when mythology still dominated human consciousness. On the basis of Bonhoeffer and others, he argued that theologians should give up such relics of the past as transcendence.

And Paul Van Buren, in The Secular Meaning of the Gospel, argued on the theology of dead myths and excessive dependence on philosophical modes of thought. Callahan, from the Catholic perspective, wrote that God “reveals Himself in history rather than in the philosopher’s study, [and] . . . speaks through the language of events rather than that of timeless essences.” Callahan, Toward a Theology of Secularity, in The Secular City Debate 85 (1966) [hereinafter Callahan, Toward a Theology of Secularity] (pointing out that few Catholic theologians would dissent).


Fackenheim, supra note 463, at 217 (quoting T. ALTIZER & W. HAMILTON, RADICAL THEOLOGY AND THE DEATH OF GOD 157 (1965)). Fackenheim argues that Altizer was untrue to Hegel, whom Barth had understood more accurately than modern death-of-God Hegelians. Fackenheim, supra note 463, at 228 n.41.

J. ROBINSON, HONEST TO GOD 51-54 (1963). See also Callahan, The Quest for Social Relevance, in RELIGION IN AMERICA 339-40 (1968) [hereinafter Callahan, The Quest for Social Relevance].

basis of linguistic philosophy that the language used to describe
God is empirically meaningless; the gospel, to be made meaningful,
must be translated into empirical terms—the terms of science and
technology. Van Buren took “faith language” to be merely emo-
tive, as opposed to the objectively “true” world of empirical sci-
ence—thereby ignoring the very Kuhnian insight of both Barth
and the presuppositionalists, that “validity” itself depended on
one’s initial presuppositions.

The “God-is-dead” theologians were, of course, featured in the
media—how could journalists resist so catching a phrase? The
dawn of the new secular era was heralded as if the end of history
had arrived. As Wills described it:

If the world were to be truly secular, God must die to it,
release his claim on it. The God-is-dead theologians even
congratulated God on his sacrifice, on his death traded
for secularity’s life. We should rejoice, not be sad, at his
demise, said Thomas Altizer: “All things will dance when
we greet them with affirmation.”

Jesus could still be praised as a moral example, but such emphasis
on Jesus operated as a kind of “theological chaser, making it all go

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512 Id. at 81-106. See also Callahan, The Quest for Social Relevance, supra note 510, at
340.

513 See supra note 436 and accompanying text; see also Fackenheim, supra note 463, at
214-16. Fackenheim describes two different standpoints—the one within and the one
outside the circle of faith. Empiricism accepts as objective data only what is accessible to
one outside the circle; “thus the objective realm is confined to ‘the world,’ which in turn is
empirical data and the hypotheses needed to explain them.” Id. at 215. With that stance
taken as one’s basic presupposition, then faith does reduce itself to attitude. From the van-
tage point of faith, however, in its own self-understanding,

faith is a committed confrontation of the world . . . and in this confrontation of
the world . . . it takes itself as receptive of an objective truth accessible only in
the believing attitude and inaccessible otherwise. Linguistic empiricism poses
as a refutation of faith; in fact, it merely takes its stand outside the circle of
faith, in a circle of its own in which the world of God is not heard and only
“data” are given.

Id.

In the face of the various God-is-dead celebrators of secularism, Fackenheim argued that
the Jewish response should be wary. Traditionally, Jews had found in secular liberalism
freedom from the oppression of a Christianizing culture—Fackenheim is urging reappraisal
of that Jewish position. Id. at 220, 223.

514 G. WILLS, BARE RUINED CHORSES, supra note 340, at 91.
down easier.”

Cox, despite the optimism of The Secular City, was never quite part of the exuberant pride that dared to proclaim the final stage of the dialectic. Slightly chastened even by the mid-1960s, he acknowledged the limitations of his own book. His enthusiastic emphasis on human possibility, on people as God’s pragmatic “partners,” had threatened to overwhelm his own (avowedly Barthian) understanding both of God’s transcendence and of human sin.

According to Daniel Callahan, Cox’s pragmatic insistence on context rather than false universals sought to have it both ways. Could the pragmatic Christian be “unreservedly contextual” in both ethics and evangelism, yet still employ categories like “biblical perspective” or “Kingdom of God,” which, after all, “cut across time and through history?” Such categories “illuminate the contextual without themselves being wholly contextual.”

For many people, moreover, the most pressing context is not the context of enhanced possibility in a sophisticated urban environment, but of death, a fact Cox acknowledged ignoring in the secular city reality. As Callahan stated:

Some people are going to die tomorrow. That is their context, and they want to know why. This is a very personal question, not something that [Deweyan] history or sociology or politics can throw much light on. A question like this is wretchedly ultimate, direct and noncontextual. It just will not go away.

Neither would other “contextual” realities. The Holocaust, which had taken place only twenty years earlier, was for Cox only an atavistic resurgence of pre-modern tribalism. Yet its grim efficiency depended on the modern, rational technology so admired by Cox. Hence:

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517 Callahan, Toward a Theology of Secularity, supra note 507, at 98. Hence, the inner contradiction in Cox, which Wills points to. If one truly embraces secularization, then why refer to Biblical categories at all? See G. Wills, Bare Ruined Choirs, supra note 340, at 92.
518 Callahan, Toward a Theology of Secularity, supra note 507, at 99.
520 Rubenstein, Cox’s Vision of the Secular City, in The Secular City Debate 132, 142-
Cox sees the action of the God of history in technopolis. If there is such a God, He has also manifested himself in Auschwitz. . . .

. . . Our problem is not how we shall think of God in a secular way. It is how men can best share the decisive crises of life, given the cold, unfeeling, indifferent cosmos that surrounds us and given the fact that God the Holy Nothingness offers us only dissolution and death as the way out of the dilemmas of earthly existence.621

Of course, the particular urban context of enhanced possibility Cox celebrated was more available to some than others: "The Playboy bachelor can make the most of urban anonymity; not everyone else can. Mobility is grand if one has brains and a future; not everyone does. And so on. The urban-secular coin has two sides and so does man."622 This meant a reality more complex than the linear one Cox had described. In fact, as some argued, the world Cox both described and represented was the intellectual one of a university trained elite. In the actual cities of America, according to Andrew Greeley, ethnic and religious traditionalism were more the rule than the outmoded exception. As Greeley stated,

My problem is not whether religion can live with secular man, but whether he exists; and I will contend that save in senior faculty positions in some universities and in certain places in the communications industry, secular man is not common in the United States and does not seem to be growing more common. On the contrary, secular man

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43 (1966).
621 Id. at 142-43.
622 Callahan, Toward a Theology of Secularity, supra note 507, at 99. Similarly, from Richard Rubenstein:

There is something very success-oriented about his theology. He approves the mobility and anonymity of the city, but says hardly enough about the hideous price the poor have had to pay in rootlessness, disorientation and suffering as a result of these phenomena. Anonymity and mobility can be enormously helpful to successful, highly educated young men who are part of what Life magazine recently called the "take-over" generation. They constitute an impossible burden for the millions of Americans who lack the personal, social or psychological resources with which to take advantage of the new freedom.

Rubenstein, supra note 474, at 139.
is a theologian's romanticized version of mass man—and he doesn't exist either.\footnote{Greeley, An Exchange of Views, in \textit{The Secular City Debate} 101 (1966).}

As a matter of sociological fact, Greeley's observations were accurate. The particular world view of \textit{The Secular City} and the God-is-dead theologians \textit{was} just that—a very particular world view, one possibility among many, and one most easily embraced, as Rabbi Rubenstein pointed out, by successful young men (and soon, women) who could delight in their own competence.\footnote{Rubenstein, supra note 520, at 140.} It was also, as Rubenstein noted, for the most part peculiarly Protestant, despite Vatican II, and most represented those very traditional WASP enclaves of "tribal" power, the corporation and the university—precisely those arenas within the modern secular city which Cox praised for having progressed beyond tradition and tribalism into the new era of secular pragmatism.\footnote{Id. at 138.}

Rubenstein, in other words, quite brilliantly made the point we now associate with Geertzian anthropological relativism. In effect, we are all "natives" now, even including sophisticated, proudly secular and pragmatic WASP Harvard professors like Cox:

> I fail to understand why one man's religious life must be regarded as tribal while Cox, Protestant to his very core, can insist that his theology has transcended the tribalisms and traditionalisms of the "earlier," "immature" religious postures . . . . I can only ask that he refrain from turning men of other religions into primitive anticipations of what he has become.\footnote{Id. at 137. Cox, who did not quite agree with Greeley as a matter of sociology, acknowledged Rubenstein's critique fully. See Cox, Afterword, supra note 498, at 181. He admitted it was not the mark of the mature person to flippantly jettison the past. He has also spent years, since then, studying other religious traditions at a very particular level. \textit{Sec H. Cox, Many Mansions} (1989).}

The criticism was not only prophetic, but had already been realized in emerging cultural divisions. Even in the early 1960s, when there was relative religious unanimity supporting civil rights, there was increasing disharmony in response to Supreme Court decisions banning school prayer and school Bible reading. In 1962, the Court...
in *Engel v. Vitale* held that reciting a nondenominational prayer ("Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country") composed for school use by the New York Board of Regents, violated the Establishment Clause despite provisions allowing nonparticipants to remain silent or leave the room. The prayer was not saved by the excuse provisions, the Court held, because unlike the Free Exercise Clause, under the Establishment Clause neither compulsion nor coercion is the basis of the violation. Rather, it is the mere fact of public (governmental) religious expression that triggers the ban. Only Justice Stewart dissented, chiding the Court for its indifference to the "history of the religious traditions of our people," and citing the frequent instances of religious expression in American public life, such as the "under God" in the Pledge of Allegiance.

A year later, in *School District of Abington v. Schempp*, the Court extended the doctrine to prohibit reading of the Bible (without commentary) as part of daily opening exercises in schools, even if student readers could choose the passages to be read. Justice Stewart again dissented, viewing the decision "not as the realization of state neutrality, but rather as the establishment of a religion of secularism, or at the least as government support for the beliefs of those who think that religious exercises should be conducted only in private." While Stewart was the lone dissenter, the view that the Court was imposing a "religion of secularism" on the country was widespread. After those decisions were announced, condemnation came in waves, from both Catholics and Protestants. Billy Graham, as just one example, said *Engel* was "another step towards the secularization of the United States." Consistently, roughly seventy-five percent of the American public has favored

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528 Id. at 446, 449 (Stewart, J., dissenting). Gary Wills suggests that a singular failure of the Dukakis presidential campaign was its failure to understand that the Pledge of Allegiance issue worked so well for George Bush because the pledge is the only remaining instance where the words "under God" may be invoked ceremonially in a public school. G. WILLS, UNDER GOD supra note 340, at 80-82.
530 Id. at 313 (Stewart, J., dissenting).
531 A.J. REICHLEY, supra note 26, at 147. In contrast, Graham did support civil rights on religious grounds. See R. WUTHNOW, supra note 21, at 188.
voluntary organized prayer in the schools. In many areas, of course, the Court decisions are simply ignored. A 1966 study of Tennessee showed that in all but one school district, Bible reading was continued despite Schempp. Polls indicate that no other Court rulings have elicited so much criticism.

Americans already outraged over Engel and Schempp were hardly pleased to learn from the media that their supposedly most sophisticated theologians were preaching “God-is-dead” theology while praising the delights of secularism. Increasingly, the image of the “new class” liberal secularists emerged: an educated elite that was contemptuous of the religious beliefs of the majority and was able to use access to the government and to the media to impose a secularist culture on American society. When many “old line” Protestant churches (mainly Episcopalian, Presbyterian and Congregationalist), along with liberal Catholics, seemed to side with the secularists, they too were viewed as having abandoned the faith.

This divisiveness was compounded when the moral/political issues of the late 1960s failed to arouse the relative unanimity that had marked the campaign for the 1964 Civil Rights Act. In fact, moral consensus in the country as a whole broke down. In the late 1960s, unlike the brief Camelot period, the correct course of action for churches in the world became unclear. In the face of that uncertainty, the shallowness of the liberal presumption that all tradition could be discarded had its most corrosive effect.

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532 A.J. Reichley, supra note 26, at 149.
533 K. Wald, supra note 397, at 129. In 1984, Reagan supported an amendment to permit prayer in public institutions, including schools. It was supported by 56 senators, but not by the 67 needed for passage. Id. at 130.
534 Id. at 132.
535 Wald points out that survey results are not unambiguous, however. Id. Given widespread political support for allowing prayer and Bible reading, it is surprising that political action has not led to results. That may be due to de facto tolerance for the practice in areas where feelings run especially strong, combined with the fact that support is stronger among the less educated and, therefore, less powerful voters.
536 Cox had favored neutrality but distinguished that from an “intolerant religion of secularism.” H. Cox, THE SECULAR CITY, supra note 400, at 100. He opposed prayer in the schools, but praised the California State Board of Education for stating that a “point of view denying God” would be as inappropriate as to “promote a particular religious sect.” Id. Whether those distinctions are workable is highly debatable, but central to the American church/state dilemma.
537 See infra notes 680-789.
It was, after all, the pragmatic experts in Washington, so celebrated by Cox, who started the Vietnam War, revealing the potentially tragic dimension of action in the world. Sorting out the ethical meaning of Vietnam required more than the categories of Deweyan pragmatism—when action is taken by the powerful, Langdon Gilkey commented, one begins to find relevant "some of the older theological categories descriptive of sin and guilt within all active social involvement, categories expressing the need for communal repentance, forgiveness, reconciliation, and meaning beyond the ambiguity that is consequent to everything that man does." Even the apparently unambiguous morality of racial justice was revealing its own fateful ambiguity with struggles over the legitimacy of violence rather than nonviolence and black power and separatism rather than integration.

Similar breakdowns were occurring within Catholicism. Murray's carefully formulated categories seemed to collapse in the absence of consensus. Under Vatican II, the church was not supposed to have a particular political agenda, but it did have a responsibility to help shape society's moral consensus. As American bishops, following the Vatican II mandate, have explained, public policy decisions necessarily involve moral judgments, and the church must share (indeed, cannot avoid sharing) in the development of a public moral consensus on the basis of which such decisions can be made. In theory, since the church premises its positions on human rights, to which both the church and the American polity are committed, the Church cannot be said to violate the Constitution when addressing specific moral issues.

In that spirit, American bishops in the 1970s issued statements critically evaluating the morality of the Vietnam War (1971) and the American economy (1975). More recently, they issued their dramatic pastoral letter condemning nuclear weapons (1983), in which they explicitly appealed to that natural law which is "written on the human heart by God" and from which "reason draws moral norms." Joseph Cardinal Bernardin has insisted on a consistent pro-life philosophy, a "seamless garment" encompassing the church's position on nuclear armaments, abortion and the death penalty. The goal has been to help define a set of principles that

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538 Gilkey, supra note 420, at 163-64.
539 Id. at 163.
would structure public debate and policy but not to enter into detailed disputes over, for example, specific weapons proposals.440

That Vatican II goal remained uncontroversial only so long as there was some public consensus on the meaning of human rights (and natural law). By the mid-1960s, consensus over basic American values had dissolved. Was the Vietnam War a "just war" or a violation of natural law? Was the right to economic well-being a fundamental human right, as Vatican II proclaimed, or did it run counter to the priority American constitutionalism gave to "negative," libertarian rights? In other words, as the church tried to play a responsible role in the public debate, it found itself unable simply to stake out a high ground of moral guidance; instead, it was taking a stand on issues that aroused resentment even within the church itself.541

The breakdown of moral consensus raised hard questions about the proper role of the Catholic Church, questions which were just coming to the fore as the abortion debate began. Conservatives were generally urging the church to draw back from the expansiveness of Vatican II and to retreat into its sacramental role—to facilitate personal salvation, not set the terms for public debate. At the other extreme were the Berrigans, who, in their radical opposition to the war, exemplified an activist ministry of gospel-oriented Christian witness. The Berrigans were part of the long, morally compelling church tradition of prophetic witness, which some now think is the proper role of the church in an increasingly secular world, but that tradition was bound to run counter to the church's institutional goal of broad-based inclusiveness and accommodation to state power.542 Many, however, continued to strive for the Vatican II ideal of a church that could play a responsible, but not divisive, role in public life without surrendering its special Christian mission and becoming just another player in the secular field.

Those efforts were undercut in 1968 when Pope Paul issued

440 See O'Brien, Catholic Contentiousness, supra note 491, at 158-59 (analyzing various public statements of American Catholic bishops); see also G. Wills, Under God, supra note 340, at 324-25.


542 See G. Wills, Bare Ruined Choirs, supra note 340, at 241-50.
Humanae Vitae,⁴⁴³ the encyclical that announced his decision to continue condemning "artificial" contraception. The Pope had assembled a commission to study the question of birth control, and a majority of the commission had actually decided that the church should change its position. Noonan, who was a member of that commission and a determined advocate of reform, carefully showed, as in his Natural Law Forum article, that the church could both adhere to its natural law methodology and change its position on a particular rule. By tracing the subtle dialectic of continuity and change in church teaching on both usury and birth control, Noonan demonstrated that such a reversal was not a surrender to relativism but was in the best tradition of Catholic ethical thought.⁴⁴⁴

The issue of birth control was a charged one, however, and the extremists on both sides of the debate ignored Noonan's careful approach. People on the left and on the right insisted that the whole tradition somehow depended on this weakest link in the Catholic moral chain. If the Pope admitted "error" on this point, conservatives argued, then how could the church continue to hold that its natural law teachings were authoritative? Moreover, despite the peculiar inconsistencies that had developed in the church's prior arguments, the distinction between "artificial" and "natural" means still held powerful appeal.

Secular liberals, in turn, mockingly adopted the conservative line—if the church pragmatically changed its mind on this point, that just showed the emptiness of its claims to moral authority and, implicitly, the absurdity of the whole Aristotelian, natural law tradition on which the birth control teachings had been based.⁴⁴⁵ The Pope's decision to maintain tradition then convinced skeptics that the church had rejected the spirit of Vatican II, retreating instead into rigid moral absolutism and inordinate preoccupation with channeling sexuality. The church's opposition to abortion would later be dismissed by many outside the church as simply an extension of the Catholic stand on birth control.

In fact, however, by the end of the 1960s, one's position with

⁴⁴⁴ Noonan, Tokos and Atokion, supra note 295.
⁴⁴⁵ See G. Wills, Bare Ruined Chords, supra note 340, at 176-87.
respect to tradition itself became the principal measure of one's location in the American religious landscape. Familiar denominational squabbles (even Protestant against Catholic) became displaced, as the recurring and insistent dividing line for American religion became "Old" (Traditionalist) versus "New" (Secularist). To be sure, denominational difference did not disappear, but the Old/New line became the sharpest one—and on no issue was that line so starkly evident as with abortion.\footnote{See Noll, Catholics and Protestants Since Vatican II, in UNCIVIL RELIGION 99-101 (1987).}

There was considerable caricature in the conservative image of the "new" secularist Christians: morally loose, compromised by secular humanism, hung up on faddish social issues with a shallow knowledge about what religion is really about, a shallow knowledge about the Bible, and having an "anything goes" attitude, with "marshmallow" convictions.\footnote{See R. WUTHNOW, supra note 21, at 132-33. These stereotypes were based on a 1984 Gallup survey and a report of a church official. This is, of course, matched by an equally caricatured version of traditionalists—intolerant, morally rigid, fanatical, unsophisticated, close-minded, simplistic, smug, self-righteous, having a loveless, dogmatic faith, etc. Id.} Nevertheless, institutional realities exacerbated the tension and fed suspicions produced by the 1960s. After the dramatic success of the effort on behalf of the Civil Rights Act, many national church-affiliated groups began to descend on Washington (and New York City), perfecting the techniques of expertise that seemed to be required for effective deployment of power in the modern secular state.\footnote{This is not, of course, to say that religious groups did not, in the past, try to influence legislation, and succeed. Those that proliferated after the 1960s were those that were specifically concerned with dealing with government. See R. WUTHNOW, supra note 21, at 115-16. The number of specific purpose religious groups—those representing workers within ecclesiastical institutions (managers, secretaries, etc.) as well as those representing various women's concerns (both pro- and anti-feminist) also increased significantly. Id. at 107-12.}

Prior to 1960, some denominations had already located themselves in Washington. As early as 1946 Baptists had appointed a lobbyist to "watch the Catholics." See A.J. REICHEL, supra note 26, at 244. A 1951 study by Ray Ebersole found 16 church offices located in Washington. Id. at 245. Even the NCC's Washington office, however, was originally directed "not to engage in efforts to influence legislation," a prohibition dropped specifically for the purpose of the Civil Rights Act of 1964. Id. For an account of church activity on behalf of the Act, see id. at 246-50. Catholics were less inclined to use direct lobbying and more inclined to work through parish constituents, but that difference was not considered divisive—only complementary. Id. at 248.
involved with civil rights, some arose in response to specific governmental rulings and some were advocates on behalf of groups about whose welfare there was special concern—children, the hungry, gays, women, handicapped, single parents and others.

These church groups have dealt with Congress, government agencies and sometimes involved themselves with litigation. They are typically labeled the "National" or the "American," rather than by reference to denomination or to religion at all. This is perhaps a symbol of the extent to which they draw on the modern, secular techniques of politicking rather than on distinct religious heritages.\textsuperscript{649} Most have professional staffs and complex budgets; they hire specialists, consultants, researchers and news writers. Intricate bureaucratic chains link groups to each other and to church institutional structures.\textsuperscript{650}

This "move to Washington,"\textsuperscript{5} which occurred in the 1960s chiefly among denominations who were members of the active NCC, was also accompanied by organizational restructuring within the denominations themselves. With the accumulated resources of the 1950s, churches already had extensive bureaucracies, but a newer tendency was for those who were more secular in outlook to exert a more powerful influence. One Presbyterian minister described the process as follows: "[P]erhaps because they are by inclination more alert to the new, open to the secular world, and inclined to respect science in any form—[they] have become the skilled process managers, strategy planners, and agents of change."\textsuperscript{5} Denominational representative bodies increasingly fell into the hands of the church bureaucracies: the new managers, those who understood pragmatic politics, knew how to control agendas, control the sources of expert opinion and ultimately to control denominational decisions.\textsuperscript{5} Later, of course, conservative Christians, especially evangelicals, would try to reseize the terrain—with marked success in Washington, under the manipulative

\textsuperscript{649} R. Wuthnow, supra note 21, at 123-24.
\textsuperscript{650} Id. at 125-30.
\textsuperscript{5} See A.J. Reichley, supra note 26, at 244 ("The Churches Come to Washington"). For a serious Catholic justification of the impact churches could have on social reform, see Callahan, The Quest for Social Relevance, supra note 510, at 358-63.
\textsuperscript{5} A.J. Reichley, supra note 26, at 277.
\textsuperscript{5} Id. at 277-78.
The "new breed" clergy of the 1960s elicited resentment, less for the specific causes they advanced than for their almost contemptuous failure to relate those causes to the denominational traditions they were representing. Cox had set the tone by dismissing most churches as so stifling and conventional that they usually failed to represent the "real church," which is, he said, the reconciling act of God in the world, wherever it may be occurring. That "real" work was more likely to occur, it was often claimed, during a civil rights march than during an ordinary church service.

Notably, the freedom of the new-breed clergy to involve themselves in direct social action overtly aimed at challenging existing social structures—which they did in growing numbers during the 1960s and 1970s—arose from their ability to separate themselves, institutionally, from the laity. The so-called managerial revolution in church organization produced a number of well-educated specialist clergy, trained in universities as well as major divinity schools and serving, not as pastors, but rather as staff persons in church social action bureaucracies or university ministries. Studies showed that the clergy who were most likely to be involved with direct social action were precisely those who were not working as pastor to a congregation and were not directly subject to lay control.

Social action by the clergy became more visible and radical as public consensus broke down. Often, lay resentment was directed specifically at the highly visible new-breed "tactics," and did not represent, for example, pure racist opposition to advancing civil rights for African-Americans. Yet, from the vantage point of those involved in direct action, if the problem were structural, only tactics directed at the structure could be effective.

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554 Id. at 314-27.
555 H. Cox, THE SECULAR CITY, supra note 400, at 225-26. The church is the "eventful moment" in which barriers are being struck down, and a radically new community beyond the divisiveness of inherited labels and stereotypes is emerging. Id. at 226.
557 R. WUTHNOW, supra note 21, at 145-46; see also K. WALD, supra note 397, at 246; Cox, The "New Breed", supra note 556, at 374-75.
558 R. WUTHNOW, supra note 21, at 146-49.
took visible part in civil rights and anti-war demonstrations, but also led rent strikes, organized pickets, served in community action projects, financed low-cost housing projects and organized welfare recipient unions. Some were so determined to break with the church tradition of “charity,” as opposed to real empowerment of the poor, that they advocated noncooperation even with the war on poverty, unless real provisions were made for power and participation of the poor. Thus, the Presbyterian Division of Church Strategy and Development warned:

There are serious dangers in the way current community action programs are being structured. Lines of control are being drawn tightly to a central bureaucracy. Vital dynamic elements in the city are in danger of being smothered by the kinds of control of the local citizens which are built into . . . the poverty operation.

The point was, of course, accurate in its depiction of government bureaucracy. The irony was the extent to which the same defects characterized the new breed themselves, in relation to their own “communities,” the churches. Disdainful of their own frumpy denominational traditions and communities, and not able (or willing) to awaken those communities by reference to theology, they offered no explanation for their actions except by reference to an increasingly secular political vocabulary. Resentment grew, and counter-groups formed, even within the mainline churches, to oppose the most activist stances of the clergy, even as the most conservative evangelical churches grew in numbers.

Saul Alinsky, the 1960s political activist, described the special

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659 K. WALD, supra note 397, at 242; Cox, The “New Breed”, supra note 556, at 371-72. Saul Alinsky said that the churches were “now taking the leadership in social change.” Id. at 371.

660 Cox, The “New Breed,” supra note 556, at 381.

661 There is some surprise in this, given the importance of Paul Lehmann’s work, a sophisticated examination of philosophy which stressed the importance of “koinonia,” or Christian community, as the basis of ethics. P. LEHMANN, supra note 270. For a time koinonia was a trendy term, until, it was said, the churches had “koinonitis,” but too little attention was devoted to sustained communities over time, as part of an historic religious tradition. See Sweet, supra note 338, at 42-43. Sweet’s work is an excellent summary of the 1960s. Churches tried to meet the needs of congregations but not bring them into an historic tradition, which is part of the task of theology.

662 See, e.g., R. WUTHNOW, supra note 21, at 186.
contribution new breed clergy were making to radical politics. He had never before seen, he said, the "pure flame of passion for justice you find in these young ministers today." As Cox pointed out, there was good theological basis for that passion in the special gospel status assigned to the poor and also in the notion of the "blessed community," of equal participants. Yet, there was also theological reason for caution. Karl Barth, with his own leanings toward socialism, nevertheless warned of the dangers of a too arrogant (and too idolatrous) commitment to political opposition. "The revolutionary Titan," Barth wrote, "is far more godless, far more dangerous, than his reactionary counterpart—because he is so much nearer to the truth." As Barth explains, the Biblical message does, indeed, expose the injustice and the arrogance of all worldly authority:

Rulers! What are rulers but men? What are they but men hypocritically engaged in setting things in order, in order that they may—cowards that they are—ensure themselves securely against the riddle of their own existence? . . . That men should, as a matter of course, claim to possess a higher right over their fellow men, . . . this whole pseudo-transcendence of an altogether immanent order is the wound that is inflicted by every existing government—even by the best—upon those who are most delicately conscious of what is good and right. . . . Men have no right to possess objective right against other men. And so, the more they surround themselves with objectivity, the greater is the wrong they inflict upon others. . . . Is there anywhere legality which is not fundamentally illegal? Is there anywhere authority which is not ultimately based upon tyranny? There is a certain imperfection in the existing ordinances by which we are enabled to detect that their existence is, as such, evil. . . . There is a certain strange and penetrating perception which sees through the fiction that lies behind our

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564 Id. at 375-76.
565 K. Barth, The Epistle to the Romans (1933).
566 Id. at 478.
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The critical impulse is thus born of gospel truth, and of accurate perception—a perception that sees through the “fiction” of ideology, rightly detecting the “imperfection in the existing ordinances.” (Hence, for example, critical legal studies). Too easily, however, the revolutionary, as well, falls into idolatry, forgetting that he is not the One, that he is not the subject of the freedom which he so earnestly desires, that, for all the strange brightness of his eyes, he is not the Christ who stands before the Grand Inquisitor, but is, contrarivise, the Grand Inquisitor encountered by the Christ. He too is claiming what no man can claim. He too is making of the right a thing. He too confronts other men with his supposed right. He too usurps a position which is not due to him, a legality which is fundamentally illegal, an authority which . . . soon displays its essential tyranny.

What man has the right to propound and represent the New, whether it be a new age, or a new world, or even a new spirit? Is not every new thing, insofar as it can be schemed by men, born of what already exists? The moment it becomes a human proposition, must it not be numbered among the things that are? What man is there who, having proposed a novelty, has not proposed an evil thing? Far more than the conservative, the revolutionary is overcome of evil, because with his “No” he stands so strangely near to God.668

The popular disaffection from the “liberal” political action direction of mainstream churches in the 1960s and 1970s can be overstated. Sometimes it is assumed that people left those churches in droves and switched to evangelical churches instead. The story is more complex. Even in what came to be called the liberal denominations,669 ministers tended to be less politically liberal than staff, although more liberal than their congregations. Moreover, they continued to perform their pastoral functions, concerning themselves with issues like death, where the ordinary and the ultimate

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667 Id. at 478-80.
668 Id. at 480.
669 See supra note 424.
intersect to place our temporal concerns in appropriate perspective. In churches where the education level was highest, the gap between the laity and “new breed” church leadership was narrowest, as in, especially, Episcopalian churches, which became among the most liberal. And in many ways those denominations at the forefront of social action were successful, both in bringing American religion out of the complacency of the 1950s and in providing social services whose value few have seriously questioned. During the 1980s, when there was too little American concern, in Washington or elsewhere, about the ethical dimension of social responsibility, liberal mainline churches kept that concern alive. Those churches still represent a vital tradition in American life, which may regain some of its lost force.

Yet, the mainline churches did dramatically decline in membership numbers, losing members for the most part to the “nonaffiliates.” Most affected by the decline were the “old line” denominations, once the mainstay of American religion—Episcopalian, Presbyterian and Congregational. Those denominations, which had always been comprised of the best-educated, saw their youth, especially, defecting to the secular culture, losing interest in religion altogether. The increasingly secular vocabulary of clergy, while not necessarily offensive, hardly differentiated itself from that same secular culture. Meanwhile, the birth rate among the old line membership declined, and the population shift away from the northeast also drew members away from the old line churches whose base had been there.

Traditionally, the Presbyterians and Episcopalians had gained members from the upwardly mobile, who “switched” as they achieved higher social status. If one began life as a poor evangelical Baptist, wealth might eventually lead one to become Episcopalian. Such switching did not disappear, but its rate declined as evangelicals entered the mainstream in terms of education and social status. More significantly, evangelicals (whether “conserva-

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570 On the continuing need for ministers to concern themselves with such matters, see Clebsch, American Religion and the Cure of Souls, in Religion in America 249-68 (1968).
571 R. Wuthnow, supra note 21, at 161-62.
572 One of the most important changes is that religious participation used to increase with education; by the end of the 1960s that was no longer true. See id.
573 On changing patterns generally, see W. Roof & W. McKinney, supra note 26, at 161-79.
tive” or not) were able to keep their younger members committed to their churches—and those members had larger families. By 1976, one-third of Americans said they were “born again.”

With the possible exception of school prayer, no aspect of “new breed” secularized theology alienated traditionalists so much as its failure to offer any basis for personal, moral decisionmaking. Even as it stood resolute on morally grounded social issues, like racism, the new theology failed to address basic questions of personal and family responsibility. One could conclude that theology, in becoming secularized, had simply surrendered to the “do your own thing” lifestyle culture of the 1960s. No theologian fulfilled this characterization as much as Joseph Fletcher, an Episcopalian theologian from Cambridge, Massachusetts, whose well-publicized Situation Ethics: The New Morality was published in 1966 and taken to represent the erosion of all traditional, external sources of moral authority.

Fletcher emphatically rejected all legalism, all appeal to scriptural law. Nothing remained, he said, but love; he rejected the complex Barthian dialectic of law and moral freedom. On the other hand, he also rejected love as antinomian intuitionalism or pietistic sentimentality. Love, he said, represents concern for the other, which can basically be reduced to a utilitarian calculus of consequences. Nothing was wrong “in itself” but only if it led to greater harm than benefit. Ends did, therefore, justify means. He urged a de-emphasis on sexual morality, and a more utilitarian concern with responsible (pragmatic) decisionmaking. Absolutist abortion restriction was one of his examples of an outmoded moral authoritarianism.

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674 R. Wuthnow, supra note 21, at 192.
675 Cox is an exception. His critique of consumerist sexuality—the idols of the Playboy and the American Girl of Miss America—is one of the most insightful parts of The Secular City. See H. Cox, The Secular City, supra note 400, at 192-216.
676 J. Fletcher, Situation Ethics: The New Morality (1966) [hereinafter J. Fletcher, Situation Ethics].
677 See W. Roof and W. McKinney, supra note 25, at 62.
678 See, e.g., J. Fletcher, Situation Ethics, supra note 576, at 64-67, 77.
679 Id. at 18-21.
680 Id. at 91.
681 Id. at 189.
682 Id. at 133.
683 Id. at 139.
684 Id. at 33, 37, 62. Fletcher criticizes Barth’s disapproving attitude.
Fletcher's offensiveness lay in openly and wholeheartedly embracing what others recognized as a danger—the reduction of Protestant ethics to mere act utilitarianism, distinctively Christian only in that its underlying motivation was a vaguely conceived "love." Fletcher was controversial in part because, to avoid the Protestant danger of ungrounded intuitionism, he made the utilitarian calculus so explicit, even quantifiable, while fetishizing technology. Writing at some length about medical ethics, he actually stated, for example, the precise number one should score on an I.Q. test before sensibly being treated as "human" for medical policy purposes. Schaeffer's outraged "absolutism" on the question of medical ethics, including abortion (as in the movie and book co-authored by Koop), was in part a response to that "situational" approach to the subject.

Fletcher even tried to appropriate both Barth and Bonhoeffer as complete situationalists, in each instance through oversimplification. He regarded abortion as just another means of fertility control, perhaps the least desirable one, but nevertheless "good if the good to be gained is great enough to justify the means." He dismissed the "natural-law ethic" as "self-contradictory, problematical, and dead as Queen Anne." On euthanasia, Fletcher suggested that in "this day of existential outlook," we might "think twice on Nietzsche's observation, 'In certain cases it is indecent to go on living.'" Ironically, in view of subsequent history, and probably because Fletcher thought he had history on his side, he proclaimed that "Without a consensus, a democratic agreement about what is immoral, there can be no true civil law." In fact, sounding much like his liberal legal counterparts, Fletcher offered his situationist baseline that, "In the end there is nothing but

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585 For critical responses to Fletcher in this regard, see R. McCormick, How Brave a New World?: Dilemmas in Bioethics 45-46, 334-35 (1981); P. Ramsey, Ethics at the Edges of Life: Medical and Legal Intersections 204 (1978) ("Fletcher is simply a sign of our times"); see also J. Gustafson, Protestant and Roman Catholic Ethics 38-40 (1978).
587 P.A. Schaeffer & C.E. Koop, supra note 439.
588 See J. Fletcher, Situation Ethics, supra note 576, at 33.
590 Id.
591 Id. at 145.
592 Id. at 124.
To his credit, Fletcher forced modern Christians to face a technological world in which they could not avoid ethical responsibility for calculating life and death decisions. Everyday social decision-making involves choosing death—Noonan's own traffic speed example or the introduction of factory procedures which pose "acceptable" risks to workers—as well as the less prosaic examples of going to war or ending a patient's life. We are all purveyors of death. As Fletcher insisted, that reality does not disappear because we refuse to acknowledge it, and pretend to an absolutism we cannot carry off. Utilitarianism forces us to acknowledge the reality of cost in a world of scarcity, and to recognize that calculations must be made.

Inevitably, however, Fletcher fell into the standard utilitarian version of the fact/value dilemma: he made value judgments about facts and then used the facts to substantiate the value judgments. A calculus of consequences can never be value-free; nor can it ever be a true calculus, for many consequences are elusive, intangible and unpredictable.

IV. THE MORAL STATUS OF THE ABORTION ISSUE: A TALE OF TWO CONFERENCES

A. Abortion as Morally Debatable

Despite the sterility of late 1960s mainstream religion, some holdouts, even in the face of the seeming triumph of secularism and fully aware of proceeding against the current, sought to continue to address the abortion issue as one of debatable public morality, in both its general and particular aspects. Appeals to theological sources were regarded as central to the ethical debate. That debate included both the morality of abortion and the separate issue of the legitimacy of state intervention into the decisionmaking process. A striking example of such debate was a conference held in Washington, D.C., in September 1967, sponsored by both the Joseph P. Kennedy, Jr. Foundation and the Harvard Divinity School.

An outcome of that conference was the publication of The Mo-

rality of Abortion: Legal and Historical Perspectives, edited and introduced by John T. Noonan, Jr.694 Based on the published vol-


The same conference produced an earlier volume published as The Terrible Choice: The Abortion Dilemma (1968) [hereinafter The Terrible Choice], edited and written with the help of Robert Cooke, M.D., Andre E. Hellegers, M.D., Robert G. Hoyt, and Herbert W. Richardson, Ph.D. The book contains: a foreword by Pearl Buck; a list of participants (seventy-two in all); five "case studies" presented dramatically at the conference as occasions for discussion; transcripts of some of that discussion following each presentation; and summary chapters, first on the then-current law with respect to abortion, followed by chapters dealing, respectively, with the perspectives offered by social scientists, physicians, ethicists and lawyers.

The brief epilogue leads off with the observation that "[i]f there is anything that is clear about the issue of abortion, it is that it is complicated, delicate, and difficult," because "people who come at it with honest, humane convictions have differences which are not easily composed." Id. at 105. The authors/editors expect that public policy decisions with respect to abortion "will continue to be made in the social-political process." Id. at 106. They conclude with the observation that "[t]he International Conference on Abortion was held, and this book was written, in the hope that as the decisions are made there will be responsible public debate, based on the facts and issues as we understand them, and regard for our values of compassion, freedom, and reverence for life." Id.

From the perspective of the current abortion debate, The Terrible Choice is an unusual book. Contemporary pro-choice advocates would probably view it as a pro-life tract, since it recognizes "reverence" for fetal life as an issue for public policy decisionmaking, id., while their pro-life counterparts today would probably regard the book as a sellout, since abortion is presented as morally ambiguous and not necessarily to be regulated or criminalized even if regarded as morally wrong. What is particularly striking is that theologians, speaking from within their diverse moral traditions, are taken seriously as having an important role in the debate.

Of the 72 participants, 15 are listed under "Medical," 12 under "Social Sciences," 15 under "Ethics," 15 under "Law" and 15 under "Representatives-at-Large." Twenty-three of the participants (not even including Noonan) are identifiable as religiously affiliated, members of the clergy, teachers of religion or in divinity schools, or representatives of religious organizations. Eight of the participants are women (identifiable by name). With respect to race, one can identify both Dorothy Height, then-president of the National Council of Negro Women, and Whitney Young, then-executive director of the Urban League. The group also included three college presidents (Mary Bunting, Arthur Flemming and Rev. Theodore Hesburg), two Supreme Court Justices (Abe Fortas and Potter Stewart) and a United States Senator (Mark Hatfield). Id. at xiii-xvi.

Preceding the title page of The Terrible Choice is a statement of the "Purpose and Origin of the First International Conference on Abortion," which offers an accurate overview of what follows in the published volume:

The first International Conference on Abortion that was interdisciplinary in nature was convened in Washington, D.C., in the fall of 1967 under sponsorship of the Harvard Divinity School and the Joseph P. Kennedy, Jr. Foundation.
ume, the participants were all wary of accelerating reform, yet not necessarily resolute in opposition, and hardly spoke with one voice. Of the seven essays, five are explicitly theological, one is ostensibly rooted in a secular natural law tradition ("the universal respect for the value of human life"), and the last essay is a legal brief in the nature of an attempted preemptive strike against the yet-to-be-decided *Roe v. Wade."

Noonan's introduction, while unsurprisingly strident, grudgingly acknowledges a changing social reality. Noonan saw three forces combining to change the rules with respect to abortion: first, professional autonomy in the name of science and expertise; second, the urgency of world population control; and third, an agenda of reproductive freedom, which, for Noonan, meant the combination of sexual freedom and rational control of consequences. The third force he perceived as a subset of a larger, across-the-board resistance to the intrusion of traditional moralities into lifestyle issues.

Conference planners for both organizations agreed:

— that abortion is a moral, social and cultural matter, as well as a medical and legal problem; and that it should not be decided for all society by doctors or lawyers acting alone;

— that abortion is not an issue which divides Catholics, Jews and Protestants along denominational lines, for some leading religious authorities from all groups oppose abortion while others justify it, albeit in limited cases;

— that abortion is an issue of vital importance to all, for it involves delicate questions that are basic to concepts of life, responsibility for retarded or otherwise disadvantaged children, and morality;

... and finally, both groups agreed it was time to substitute thoughtful discussion among responsible experts for the emotional publicity given to those abortion cases involving rape, mental retardation, incest or physical defects of the fetus like those caused by thalidomide poisoning, all of which taken together account for much less than five per cent of all abortions.

*Id.* at unnumbered introductory page.


699 See *id.* at xv-xvii. Lawrence Friedman's recent *The Republic of Choice* may be seen as
The actual theological essays, three Protestant and two Catholic, share the assumption that abortion is an issue of public morality, to be discussed as such. The collection offers a variety of positions, from categorical moral absolutism to post-Vatican II Catholic pragmatic flexibility and even a version of Protestant contextual ethics. Few of the essays offer easy answers; the common thread is treating the issue as a hard one, and calling for the application of ethical insight derived from theological tradition.

The essay by James Gustafson, *A Protestant Ethical Approach*, illustrated the potential for a Protestant ethical ap-


E.g., Noonan, *An Almost Absolute Value in History*, in *The Morality of Abortion, supra* note 594, at 1 (Catholic); Ramsey, *Reference Points in Deciding About Abortion*, in *The Morality of Abortion, supra* note 594, at 60 (Protestant). Ramsey's position is a bit more complicated, however. Ramsey is quoted in *The Terrible Choice* as distinguishing abortion as a moral issue from its legal status:

[T]he churches and anyone else concerned with the moral ethos of this civilization ought to know that even now it is the morality of acts of abortion with which they should be chiefly concerned—not with proposed public policies that would use abortion law as an interim solution. I suggest . . . that those among us who believe that morally abortion is, or sometimes is, a species of the sin of murder might be able to distinguish this from any conclusion to the question whether such abortion ought to be defined as a crime in the penal code. *The Terrible Choice, supra* note 594, at 92 (quoting Ramsey, *Reference Points in Deciding about Abortion, supra* note 594, at 63).

Moreover, there is basis in Ramsey's own essay for differential, more relaxed treatment of early abortion. On the other hand, Ramsey reacted to sweeping cultural change by becoming much more extreme in his opposition to abortion, even before *Roe v. Wade*. See Ramsey, *The Morality of Abortion*, in *The Ethics of Abortion, supra* note 13, at 61 (this Ramsey essay was a reprint of one originally published in 1971).


Gustafson, *supra* note 602. Gustafson is a leading Protestant theologian, currently teaching at the University of Chicago Divinity School, who has written extensively and
proach to abortion that neither surrendered to secular liberal individualism nor sought refuge in simplistic fundamentalism. Gustafson begins by rejecting the perspective from which the "traditional Catholic arguments about abortion" are made. He sees that perspective as formal, deductive, abstract and physical (life viewed as "biological" fact, without encompassing "concern for the emotional and spiritual well-being of the mother or the infant") and too indifferent to social and historical reality ("this particular mother, her particular relationships, and her past spiritual as well as physical history").

While Gustafson rejects what he sees as the excessively categori- cal rationalism of the natural law tradition as applied to the issue of abortion, he does not claim that one can abandon principle altogether. He rejects only the rationalism that serves "to reduce spiritual and personal individuality to abstract cases." With such an approach, "[t]he sense of human compassion for suffering and the profound tragedy which is built into any situation in which the taking of life is morally plausible are gone." On the other hand, Gustafson makes clear that the "alternative" to overly abstracted rationalism is "not to wallow in feeling and visceral responses."

To illustrate his approach, Gustafson offers a hypothetical case of a woman who became pregnant after being raped by her former husband and three other men in an act he characterizes as one of "sadistic vengeance." A careful and deliberate analysis leads Gustafson to conclude that, as a moral counselor (he was a pastor and a preacher before he became an academic theologian), he would affirm the moral propriety of an abortion for this particular woman. Despite his choice of that extreme hypothetical (probably thoughtfully about ethics. See, e.g., J. Gustafson, Protestant and Roman Catholic Ethics (1978); J. Gustafson, 1 Ethics from a Theocentric Perspective: Theology and Ethics (1981) [hereinafter J. Gustafson, 1 Ethics from a Theocentric Perspective]; J. Gustafson, 2 Ethics from a Theocentric Perspective: Ethics and Theology (1984) [hereinafter J. Gustafson, 2 Ethics from a Theocentric Perspective]. For a brief sociological and personal portrait of Gustafson (written by his brother), see P. Gustafson, A Sociological and Fraternal Perspective on James M. Gustafson's Ethics, in Religious Sociology: Interfaces and Boundaries 57 (W. Swatos ed. 1987).

604 See Gustafson, supra note 602, at 101-06.
605 Id. at 104.
606 Id. at 105.
607 Id.
608 Id.
609 Id. at 107.
chosen because the standard Catholic position would be no abortion), he also notes that his approach could be made applicable to other cases, such as "unwed girls, or older married women with large families, etc."\footnote{Id. at 117 & n.4.} He is less certain, but not closed-minded, about situations where "the social and emotional conditions do not appear to be beneficial for the well-being of the mother and the child."\footnote{Id. at 116.}

On the other hand, Gustafson is clear about his "moral biases: life is to be preserved, the weak and the helpless are to be cared for especially, the moral requisite of trust, hope, love, freedom, justice, and others are to be met so that human life can be meaningful."\footnote{Id. at 114.} His approach to the particular problem affirms that "[l]ife is to be preserved rather than destroyed," that "[t]hose who cannot assert their own rights to life are especially to be protected," but that "[t]here are exceptions to these rules."\footnote{Id. at 116.} At the core of Gustafson's theological world view are both the "sense of a powerful Other," understood as the "sovereignty of God," and the "centrality of piety," an "attitude of reverence, awe, and respect which implies a sense of devotion and of duties and responsibilities as well."\footnote{Id. at 163-78.}

\footnote{For a fuller account of his theological world view, see J. Gustafson, I Ethics from a Theocentric Perspective, supra note 603, at 163-78. In 1984, Gustafson briefly summarized his views on abortion:}

\begin{quote}
The choice is always a morally serious one because fetal life has the possibility of developing into a unique human being with capacities for self-fulfillment and for contributions to the human community. There are circumstances in which it is morally justifiable, though it is always a tragic choice. Among those circumstances might be a familial situation in which the birth of another child and the resources needed for its care would severely jeopardize the survival and well-being of the family and its other members. Other courses of action for relieving such dire straits, however, ought to be taken by the family and by the community of which it is a part.
\end{quote}

J. Gustafson, 2 Ethics from a Theocentric Perspective, supra note 603, at 245-46.

Consider the views of Paul Lehmann, another important Protestant contextual ethicist, who was a student of Barth and a close friend of Bonhoeffer. The following was reported to us in a letter from Milner Ball:

\begin{quote}
[I]t was reported to me that, in the question-answer period following a public lecture of his, Paul Lehmann was asked what he thought about abortion. He gave a long, complicated answer that mystified the audience. Frustrated, the questioner asked: "Dr. Lehmann, are you against abortion—yes or no?"
\end{quote}
Gustafson’s approach surely offered a basis for rethinking the abortion issue in a moral/theological context that might have supported significant liberalization of restrictive laws. This is not to suggest that Gustafson represented the “correct” Protestant line; the point is more that serious debate was possible. Dramatically opposed to Gustafson in the same volume, for example, stood Paul Ramsey, a Protestant theologian who had for years been battling “ethical relativism,” favoring a deontological approach more akin to the Catholic natural law tradition. Ramsey’s absolute opposition to abortion resembles that of the Catholic traditionalists, although his detailed reflections on embryonic and fetal development seem to concede a potential moral basis for differential treatment of first trimester abortions. Ramsey deploy...
Ramsey enlists Barth's support by quickly eliding Barth's actual treatment of the abortion issue and turning instead to Barth's adamant opposition to euthanasia. The latter was hardly surprising, given Barth's experience with Nazi Germany. Barth does not offer much support for the sort of liberal situation ethics that would support abortion on demand; neither does he, when closely read, provide much help for moral absolutists. If one takes into account that he was writing on the subject more than forty years ago, Barth seems to provide a solid basis, in Protestant tradition, for the contextual and deliberate approach of Gustafson.

To be sure, Barth's context is "respect for life," which means "astonishment, humility, awe, modesty, circumspection and carefulness . . . What matters is that everyone should treat his existence and that of every other human being with respect. For it belongs to God. It is His loan and blessing."618 Indeed, for Barth this "respect for life" extended to non-humans as well. In the "Freedom for Life" section of Church Dogmatics, he devoted as many pages to the taking of animal life as he did to abortion, insisting that killing an animal is very like "homicide." If there is freedom to take animal life, it is a freedom we exercise only in relation to the "prior command to desist," and that carries with it an enhanced responsibility of stewardship.619

When it comes to the difficult subject of abortion (and capital punishment as well), his position is far from absolute. He chal-

618 III K. Barth, Church Dogmatics, supra note 220, pt. 4, at 340.
619 Compare id. at 348-56 (animals) with id. at 415-23 (abortion). With respect to animals, as is usually the case with Barth, the moral responsibility is a grave one:
And the nearness of the animal to man irrevocably means that when man kills a beast he does something which is at least very similar to homicide. We must be very clear about this if we maintain that the lordship of man over animals carries with it the freedom to slaughter them. Those who do not hear the prior command to desist have certainly no right to affirm this freedom or cross the frontier disclosed at this point.
Id. at 352-53. Thus, for Barth,
If there is a freedom of man to kill animals, this signifies in any case the adoption of a qualified and in some sense enhanced responsibility . . . . The slaying of animals is really possible only as an appeal to God's reconciling grace, as its representation and proclamation. It undoubtedly means making use of the offering of an alien and innocent victim and claiming its life for ours. Man must have good reasons for seriously making such a claim.
Id. at 354-55. See also J. Gustafson, supra note 585, at 35-36 (discussing Barth's treatment of relationship between God, man and nature).
lenges the Catholic tradition of absolutism, calling it “horribly respectable” and “[n]ever sparing in its extreme demands on women.” According to Barth, “even Roman Catholic nuns raped when the Russians invaded Germany in 1945 were not allowed to free themselves from the consequences” with abortions. Yet Barth insists on noting “the wicked violation of the sanctity of human life which is always seriously at issue in abortion, and which is always present when it is carried out thoughtlessly and callously.”

But he is convinced that the Roman Catholic “abstract prohibition . . . is far too forbidding and sterile to promise any effective help.”

For Barth, the ultimate answer must be a “wholly new and radical feeling of awe at the mystery of all human life.” Barth has little faith in the efficacy of legal prohibition, sees abortion to be as much a social as an individual problem, and recognizes that “[h]uman life, and therefore the life of the unborn child, is not an absolute.” While God’s commandment with respect to abortion is, for Barth, a resolute “No,” it is a “No” to be engaged dialectically by human freedom and conscience. He reminds us that “there is a forgiveness which can be appropriated even for this sin” and refuses to spell out categorical exceptions to the “No,” leaving us with the typically paradoxical message that with respect to a decision to have an abortion, “[t]here is always required the most

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621 Id.
622 Id. at 417-18.
623 Id. at 417.
624 Id. at 418.
625 Id. at 420. See also J. GUSTAFSON, supra note 585, at 30-31.
626 See III K. BARTH, CHURCH DOGMATICS, supra note 220, pt. 4, at 417-21. On the dialectic of freedom and obedience in Barth’s theological ethics, see R. LOVIN, supra note 210, at 18-44.

As to the particular freedom of women, Barth approved of feminist impatience with “typologies” of gender role that defined for women their special “nature.” Barth ridiculed the way in which “contingent, schematic, conventional, literary and half-true indicatives” are turned into false “imperatives.” Both men and women “will justifiably refuse to be addressed in this way.” III K. BARTH, CHURCH DOGMATICS, supra note 220, pt. 4, at 153. To that extent he fully agreed with Simone de Beauvoir, although he rejected the view that one could transcend sexual difference altogether, id. at 162, asserting that the difference was a constant question, and riddle; male and female should always be learning from one another. Id. at 167. He insisted on retaining a sequential ordering of male before female, but not as male “privilege or advantage” or “any kind of self-glorification,” but as a special male obligation to, in humility, create conditions of freedom. Id. at 170.
scrupulous calculation and yet also a resolute venture with a conscience which is bound and therefore free."\(^{627}\)

For Bonhoeffer as well, the question of abortion was more complex than the simple categorical prohibition. What little he wrote on the subject appears in his *Ethics*,\(^{628}\) a posthumous work based on fragments he wrote in Berlin from 1940 through 1943. On the blunt side, he offers no relief from the conclusion that an abortion means that a "nascent human being has been deliberately deprived of his life," which is "nothing but murder."\(^{629}\) Yet the question of guilt is not so quickly resolved: "A great many different motives may lead to an action of this kind; indeed in cases where it is an act of despair, performed in circumstances of extreme human or economic destitution and misery, the guilt may often lie rather with the community than with the individual."\(^{630}\) He also notes that under legal prohibition, the poor who transgress, however reluctantly, will be more likely to be held accountable, than the wealthy, for "money may conceal many a wanton deed."\(^{631}\) Despite the "fact of murder," for Bonhoeffer, these other considerations "must no doubt have a quite decisive influence on our personal and pastoral attitude towards the person concerned."\(^{632}\)

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\(^{627}\) III K. Barth, Church Dogmatics, *supra* note 220, pt. 4, at 419, 422-23.

\(^{628}\) D. Bonhoeffer, *Ethics* (1955). Central to Bonhoeffer's ethics was his simultaneous rejection of (Kantian) rational moral absolutism and what he saw as its "existential" counterpart, radical individual subjectivized atomism:

> The ethical, in this sense of the formal, the universally valid and the rational, contained no element of concretion, and it therefore inevitably ended in the total atomization of human society and of the life of the individual, in unlimited subjectivism and individualism. When the ethical is conceived without reference to any local or temporal relation, without reference to the question of its warrant or authority, without reference to the concrete, then life falls apart into an infinite number of unconnected atoms of time, and human society resolves itself into individual atoms of reason. It makes no practical difference whether one interprets the ethical as a purely formal universally valid principle or whether one refers it to the "existential" decision which the individual takes completely anew at every separate "moment." The underlying factor is always that the ethical is destroyed by its being detached from its concrete relations.

\(^{630}\) Id. at 272. On Bonhoeffer's notion of "responsibility," see R. Lovin, *supra* note 210, at 139-47.


\(^{632}\) Id.
This is hardly to suggest that had Bonhoeffer shown up in the 1960s he would have joined the pro-choice movement. One cannot extrapolate with much certainty from his content, especially given his particular historical situation. The more significant point is that the Protestant tradition of contextual theological ethics, represented at the 1967 conference by Gustafson and rooted in the legacy of Barth and Bonhoeffer, offers an alternative to the stark and uncompromising contemporary approach now taken by both sides on this issue. That such a voice became more and more unheard is a testament not only to the ostensible triumph of secular liberalism as the only legitimate basis of public moral discussion but also to the self-destruction of mainstream American churches as an independent mediating structure for the serious theological consideration of moral issues.

Not only Protestants but Catholics as well, though perhaps more tentatively, were willing to engage in moral and theological debate about the abortion issue in the late 1960s. Such debate might be

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Reviewing the 1967 conference, the authors of *The Terrible Choice* concluded that, The official Catholic position is not so simple, so rigid, or so monolithic as is commonly thought. Cultural relativism was accepted as morally relevant to the abortion question by at least one Catholic theologian. One ought not to suggest that the Catholic Church’s teaching is about to change in a substantive way; it is clear, however, that the teaching is susceptible of gradual development through a process of refinement. In discussion of a case history presented at the Conference, Father Johann [Rev. Robert J. Johann, S.J., Fordham University (Philosophy)] remarked in passing: “The question I pose very seriously for the Catholic moralist is that we consider and... try to understand at least what is behind the perception of so many people... where dealing in particular with the fetus is felt, experienced, perceived as being something different from dealing with an infant.” Father Johann was here calling for theological reflection on the social facts.

*The Terrible Choice*, *supra* note 594, at 87-88. Some at the conference, such as Noonan and his colleague, David Louisell, took the extreme pro-life position with which we are today familiar. Other Catholics, however, took a variety of positions. Reverend Robert Drinan of Boston College Law School advocated that “criminal law withdraw entirely from abortion control,” yet he also expressed his fear that legalization of abortion would lead us to “institutionalize abortion as the contraception of the poor.” *Id.* at 102. “If abortion were given on request, would this not in effect lead to the proposition that the poor can have the number of their children limited by the wishes of a white suburban affluent society?” *Id.* at 24. Father Richard McCormick, a noted Catholic medical ethicist, reminded the participants that there was a “‘tenable and respectable theory’ preferred by a notable number of [Catholic] philosophers and theologians which holds that the soul is not infused at conception but rather at some later point, perhaps when the body develops recognizably human characteristics.” *Id.* at 86. On this notion of “delayed ensoulment,” see *infra* text accompanying note 694.
attributed to acknowledgment of the inevitable reality of pressure for abortion reform, combined with the ecumenical spirit associated with the years immediately following Vatican II. Yet the content of the discussion again reveals possibilities not apparent in the contemporary setting.

The eminent Catholic theologian Bernard Häring contributed to the Noonan volume an essay called *A Theological Evaluation.* Häring, a self-styled “Catholic of the post-Vatican II era,” observed that “the characteristic note in Catholic theology today is one of critical searching,” and while reaffirming the Church’s adherence to its traditional teaching on abortion, Häring nevertheless pointed out that there are “those who think that the teaching of the Catholic Church might be ‘susceptible to gradual development though a process of refinement.’” The remainder of the essay seeks to explore such possible “refinements.”

More striking than the careful and tentative content of Häring’s essay is its tone. He noted, for example, that the position of Gustafson is “at least not very far from the position of Catholic thinkers of the past which we have reviewed.” Häring’s ecumenical mission is clear:

The official position of the Catholic Church, which in most respects is well grounded, will be weakened in the eyes of Protestants and of many critical Catholics unless we give a clear account of the different degrees of certainty of our general presuppositions, and acknowledge the intellectual difficulties regarding some hard cases which are now falling under the official condemnation of the Church, although they were freely discussed in earlier centuries.

Implicitly critical of the Church’s intransigence with respect to

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It has even been suggested that Catholic tradition itself offers a contextual ethics which might serve a quest for compromise with respect to the abortion issue. That tradition is the legal one of casuistry. See A. Jonsen & S. Toulmin, *The Abuse of Casuistry: A History of Moral Reasoning* 333-38 (1988).

634 Häring, *A Theological Evaluation,* supra note 601, at 123.
635 *Id.* at 123-24.
636 *Id.* at 124-45.
637 *Id.* at 131-32.
638 *Id.* at 132.
contraception, Häring chided his Church: "[t]he Church's condemnation of abortion is only fully credible if at the same time all possible effort is made to eliminate the chief causes of abortion." His suggested "refinements" include reconsideration of "mechanical" lines, such as that between "direct" (impermissible) and "indirect" (allowable) abortion.

Showing his solidarity with Gustafson, Häring reminded the reader that there is a distinction between the level of moral theology and that of pastoral counseling. On the second level, of counseling, "a Catholic moralist might come to almost the same conclusion and even to almost the same way of friendly discourse as Gustafson. Pastoral prudence looks not only to the general principles but also to the art of the possible." While Häring conceded that he would not actually recommend the course of abortion, he also affirms that he might well "refrain from all rigid judgment."

While the movement within Catholic theology was incremental at best, within the more general Catholic culture of the post-Vatican II era, there was ferment in progress. In 1970, the same year the Noonan volume was published, Daniel Callahan wrote Abortion: Law, Choice and Morality, which is perhaps still the best single book on the subject. Callahan, who had been an editor at Commonweal magazine, conceded that he set out to defend the traditional Catholic position and changed his view in the course of the project, which took him four years.

Callahan, while affirming the basic principle of the "sanctity of

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639 Id. at 135.
640 Id. at 124, 135-38.
641 See id. at 139-42.
642 See id. at 140. It must be conceded that Häring's spirit of exploration and "refinement" is not entirely welcome today. Archbishop Rembert G. Weakland of Milwaukee was recently disciplined by the Vatican (mandatory withdrawal of an honorary degree) for having criticized the tactics of anti-abortion activists and for suggesting, not unlike Häring, that moral principles could not be a matter of law unless they enjoyed a "consensus of the population." Steinfeld, Vatican Bars Swiss University from Honoring Archbishop of Milwaukee," N.Y. Times, Nov. 11, 1990, §1, at 20. Similarly, on the difficulties facing contemporary dissenters within the Church on the abortion issue, see B. Ferraro, P. Hussey & J. O'Reilly, No Turning Back: Two Nuns' Battle with the Vatican over Women's Right to Choose (1990).
643 Häring, supra note 601, at 142.
644 D. Callahan, supra note 13.
life,\textsuperscript{645} nevertheless calls for the repeal of prohibitory abortion laws in favor of permissive regulatory ones.\textsuperscript{646} He does not favor complete repeal of legislation, nor does he favor an absolute right to abortion on demand; he believes that a public moral debate should be sustained.\textsuperscript{647} His firm conviction that abortion does raise serious moral issues leads him to reject the extremes we are accustomed to today:

The Catholic position says that the only moral question of importance is when human life begins. Once that has been determined (or believed determined), then all other possible questions and considerations become irrelevant. The “woman’s right” position proceeds in the same way, the difference being that it locates the critical moral factor in the desire of the woman. Thus in neither position is room left for an integration of other possibly relevant data or for a balancing of rights.\textsuperscript{648}

Callahan’s position might best be characterized as “constrained choice.” He believes there are serious “social” interests in pursuing such goals as “[a] desire to limit an excessively large number of repeated abortions to forestall a primary reliance on abortion for birth-control purposes rather than contraception,” “to lead women to consider abortion a serious and not a trivial choice,” and also a “desire to maximize female freedom.”\textsuperscript{649} He does not accept a version of personal autonomy that leads to the rampant subjectivity of all value, with the consequent abandonment of public moral discourse: “Abortion does not seem to me the kind of moral issue which is just ‘solved’ once and for all; it can only be coped with.”\textsuperscript{650}

Even though Callahan’s position placed him in sharp disagreement with traditional Catholics, his book was nevertheless a valid entry in the debate that marked out a boundary of legitimate discourse. In the early 1970s, Stanley Hauerwas, a Protestant theologian who taught theology at Notre Dame, and who now teaches at Duke, wrote a pair of review essays, covering Callahan’s book, his

\textsuperscript{645} Id. at 308.
\textsuperscript{646} See id. at 307-48, 448-83.
\textsuperscript{647} Id. at 448-83.
\textsuperscript{648} Id. at 467.
\textsuperscript{649} Id. at 477-78.
\textsuperscript{650} Id. at 486.
traditionalist counterpart Germain Grisez and the essays in the Noonan volume. While his own position is closer to the traditional Catholic one than to Callahan’s, Hauerwas finds serious flaws in the arguments at both extremes. And despite his own affinity for the more traditional view, Hauerwas is sensitive to the dangers of rhetorical excess that we have come to know so well:

I wish to make clear I do not agree with those who argue that once possible exceptions to the taking of life are admitted in connection with abortion then Auschwitz is somehow right around the corner. There is clearly no logical relation between these, nor is it clear that there is even a psychological relation. I must admit I have always found rather unconvincing the argument that suggests that the granting of possible exceptions for certain kinds of abortion would be to undermine the value of “sanctity of life” in the face of our nation’s military spending alone, not to mention the degradation of life we are willing to tolerate in our ghettos. If what we have now is sanctity of life, then perhaps it could stand to be undermined.

Along with debate over the substantive morality of abortion, a somewhat independent issue of church-state relations was being discussed. Not every religiously rooted moral position translates, even from a theological perspective, into a demand for secular enforcement through legislation. On the other hand, the mere fact

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652 S. HAUERWAS, Abortion: The Agent's Perspective, in VISION AND VIRTUE, supra note 651, at 155-56. While seemingly not agreeing with Callahan’s moderate pro-choice position, Hauerwas sees no easy answer:

It may be that issues such as abortion are finally not susceptible to intellectual “solution.” I do not mean to suggest that we cease trying to formulate the problem in the most responsible manner possible, but rather that our best recourse may be to watch how good men and women handle the tragic alternatives we often confront in abortion situations. . . . For no amount of ethical reflection will ever change the basic fact that tragedy is a reality of our lives. A point is reached where we must have the wisdom to cease ethical reflection and affirm that certain issues indicate a reality more profound than the ethical.

S. HAUERWAS, Abortion and Normative Ethics, in VISION AND VIRTUE, supra note 651, at 146.
that a moral position is deeply rooted in religious belief does not preclude the assertion of that position in the secular public realm, as many liberals would assert later.

The role of religion in public life is a serious moral and political issue. Häring, for example, acknowledges the constraints of pluralism, even as he affirms that "in a pluralistic society one of the most urgent duties of the churches and of humanist ethicists is to contribute to the formation of a mature conscience." Häring recommends that the Church reduce its "undue emphasis on [the] battle for penal legislation" and that it remember that it is only within the Church that the mere existence of a teaching is an argument for its validity; for others, real dialogue will be necessary. And Häring recognizes that "it cannot be the task of a pluralistic state to protect the religious teaching of a church where this does not coincide with the common good of the respective society." If it is going to participate in the public debate, the Church must provide "reasons and motives that could be convincing to sincere and intelligent people who are not under Church authority."

Häring's seemingly prudential analysis of the church-state issues with respect to the looming abortion debate is best understood as firmly rooted in the Catholic tradition of debate about the relationship between religious and secular morality. At stake in this debate is the theological position on the respective roles of spiritual and temporal authority. For American Catholics in particular, the issue was heightened by its appearance in a concededly pluralistic society.

The tradition of John Courtney Murray, who died before the onset of the public abortion debate, cautioned against imposing particularistic religious faith on the secular political process—although Murray's commitment to secularism was

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653 Häring, A Theological Evaluation, supra note 601, at 143. One need not believe in pluralism to accept it as a reality constraint. As A. James Reichley reports with respect to the great American Catholic theologian, John Courtney Murray: "Murray doubted no more than Cardinal Ottaviani or Monsignor Ryan that 'religious pluralism is against the will of God.' But pluralism, he had decided, 'is the human condition; it is written into the script of history.'" A.J. REICHLey, supra note 26, at 287.
654 Häring, A Theological Evaluation, supra note 601, at 143.
655 Id. at 144.
656 Id.
657 See, e.g., Murray, Religious Freedom, in FREEDOM AND MAN 131 (1965); Murray, The Declaration of Religious Freedom: A Moment in Its Legislative History, in RELIGIOUS LIB-
problematic because he simultaneously attempted to find traditional Catholic moral positions on freedom and dignity already realized in a shared American secular morality. As Häring implies, Catholics had traditionally distinguished between particular religious doctrines (compliance with which was demanded of the faithful only) and generalized appeals to the “common good” (the moral baselines to be insisted upon in any just society).658

The abortion debate, like others emerging from the chaos of the 1960s—the Vietnam War, nuclear weapons and capital punishment are examples—served to unhinge Murray’s fragile solution. Instead of the facile equivalence of common good and Catholic tradition as realized by American shared secular morality, the reality was a fragmented American public morality, with a dominant secularism standing in opposition to religious moral traditionalism,659 not serving as its realization.

There were many legislative options facing would-be abortion reformers in the late 1960s, ranging from liberalization of criminal laws, to decriminalization in favor of a substantive “indications” policy, with or without procedural delegation, to total repeal of restrictive legislation. In the context of that debate, many responsive options not necessarily amounting to an all-out campaign to retain harsh penal laws were available to the Catholic Church and its theologians. At one extreme the Church might simply have served the privatized role of “bearing witness,” or trying to instruct and guide the faithful to serve as an exemplary moral community on the issue. Further options included general appeals to the common good rather than the pursuit of specific legislative goals (for example, Cardinal Joseph Bernardin’s consistent ethic of life)660 or a

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658 See Häring, A Theological Evaluation, supra note 601, at 144-45.
659 See supra text accompanying note 577.
660 See Cardinal Bernardin’s Call for a Consistent Ethic of Life, 13 ORIGINS 491-94.
secular morality that insisted on something less than the most extreme Catholic position. Father Drinan represents another available role, that of moral advocate in the public realm without insistence on legal implementation of that position for those in disagreement.661 Common to all these positions was the assumption that the Church has a role in the formation of a public moral position on the question of abortion, as should other religious communities whose traditions have also spoken to that issue.

Protestant tradition in America offers a diversity of roles for the church in relation to the legal order. Baptists, for example, at one time disavowed all church involvement with the coercive powers of the state.662 Roger Williams was singularly extreme on this point, drawing a line between state and church not out of love for democracy and civil liberty, but to maintain the purity of the church. For Williams, to link the state to religion would make the church a

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661 Drinan apparently changed his mind on this issue sometime between 1965 and 1967, when, at the 1967 conference, he took the position that the state should withdraw from abortion control through criminal law. Compare Drinan, The Inviolability of the Right To Be Born, in ABORTION AND THE LAW 107 (D. Smith ed. 1967) (papers originally solicited for a law review symposium in 1965-66), with THE TERRIBLE CHOICE, supra note 594, at 102.

662 See, e.g., J. BUTLER, AWASH IN A SEA OF FAITH: CHRISTIANIZING THE AMERICAN PEOPLE 257-62 (1990); M. MARTY, supra note 26, at 150-54. For an excellent and sensitive anthropological account of a contemporary Baptist community, focusing specifically on its relation to law and dispute resolution, see C. GREENHOUSE, PRAYING FOR JUSTICE: FAITH, ORDER, AND COMMUNITY IN AN AMERICAN TOWN (1986).

For a reprint of a "liberal" Baptist sermon endorsing the pro-choice position on abortion, on theological grounds, see Paynter, Life in the Tragic Dimension: A Sermon on Abortion, in THE ETHICS OF ABORTION, supra note 13, at 143-50.
"filthy dunghill and whorehouse of rotten and stinking whores and hypocrites."\textsuperscript{66a} Luther and Calvin had been less purist, but separation of spheres was basic to Reformation thought, deemed crucial to protect religious freedom and liberty of conscience.\textsuperscript{66b} Episcopalians, with their history rooted in England's established Anglican church, have probably been more open to a close church/state connection than other American denominations, but even for

\textsuperscript{66a} Quoted in M. Marty, supra note 26, at 78. On Williams as the unlikely sponsor of religious toleration, see id. at 75-78; G. Wills, Under God, supra note 340, at 341-53.

\textsuperscript{66b} For a good overview, see Collinson, The Late Medieval Church and its Reformation: 1400-1600, in The Oxford Illustrated History of Christianity 257-63 (J. McManners ed. 1990). On the challenge to the legitimacy of law posed by Reformation thought, see generally D. Little, Religion, Order and Law (1959); see also Mensch, Religion, Revival, and the Ruling Class: A Critical History of Trinity Church, 36 Buffalo L. Rev. 427, 456-57 (1988).

If God saves through grace, not good works, then of what value are the external forms of order, whether in church or state? As St. Paul himself had asked, "Do we then overthrow the law by this faith?" Romans 3:31. If the true community could be founded only on the free assent of the redeemed, was not law an empty shell, to be rightly discarded?

Nevertheless, most Protestants believed that the true voluntarism of the moment of redemption—to be protected at all costs from state authority—must be distinguished from "mad men acting according to their frantic passions, who should be restrained with chains, when they can not be restrained otherwise." See P. Miller, The New England Mind: The Seventeenth Century 392 (1967). In a fallen world, the state, unlike the churches, must preserve order through law's coercive power, rather than abandon the world to its own "Satanic devices." See Berman, Conscience and Law: The Lutheran Reformation and the Western Legal Tradition, 5 J.L. & Religion 177, 190 (1987).

In that sense, law was not illegitimate, and the way was open for the Christian prince to do much good in the world. Nevertheless, the church order of pure voluntarism, where the sword should not be wielded, was inevitably a "better" order than that enforced by law. Moreover, while neither Luther nor Calvin wholly rejected the notion of natural law, the sharp distinction between noncoercive church order and the legal order of the state rendered problematic the older, all-embracing scholastic identification of civil order with a divinely ordained natural harmony. In that sense, political order could be more utilitarian and positivist, although not necessarily un-Christian. See generally id.

On law as serving a subordinate, "functional" rather than "ethical" role, of exposing "crucial danger spots" or "boundary" situations, and thereby becoming "instrumental to the divine activity," see P. Lehman, Ethics in a Christian Context 146-47 (1963). For the complexity of Calvin's approach to civil law, see Potter, The "Whole Office of the Law" in the Theology of John Calvin, 3 J.L. & Religion 117 (1985). For Barth's reformulation of the relation between law and gospel, see E. Jungel, supra note 203, at 105-26. On the problematic character of law in Lutheran theology, see M. Luther, Of the Double Use of the Law, in Martin Luther: Selections from His Writings 139-45 (J. Dillenberger ed. 1961); M. Luther, Secular Authority: To What Extent It Should Be Obeyed, in id. at 363-402.

For Milner Ball's effort, drawing on the theology of Calvin, Barth and Bonhoeffer, to reformulate the metaphor of law as "medium" instead of the traditionally dominant one of "bulwark" against "chaos," see M. Ball, Lying Down Together: Law, Metaphor, and Theology 113-36 (1986).
Episcopalian the right relation is not easily defined.\footnote{See generally Mensch, Religion, Revival, and the Ruling Class: A Cultural History of Trinity Church, 36 BUFF. L. REV. 427 (1987).}

It is increasingly clear that there is no neat, categorical answer to the “right” relation between religion and secular law. Ironically, the question is answered best only when it does not arise. When churches function vigorously, providing the community with moral guidance, penal law will be required only as a last resort, to which, ideally, one need have recourse only rarely. In such a setting it may be a matter of indifference whether or not, for example, law addresses an issue like abortion, since one could trust to churches to uphold, in diverse ways, an underlying spirit of respect for life, even while, in pastoral counseling, providing necessary contextual judgments along with a community of support for those in need of help. That, of course, would be the model of the church as an ideally functioning “mediating structure,” which not only lessens the need for a state-coerced morality, but also insures that the minimal morality embodied in the law will be widely shared and therefore relatively uncontroversial.

Conversely, as churches fall short of that ideal, secular law becomes more necessary to the social order, as the main expression of the culture’s moral norms; yet, at the same time, the norms reflected in the law become more controversial and arguably sectarian, for there is no shared moral culture to draw upon. In the face of the resulting controversy, it is tempting to leap to the supposed neutrality of the “secular” solution—that is, to cleanse law of all vestiges of sectarian religious traditionalism, and appeal instead to the authority of, for example, the Constitution.

In so doing one forgets the coercive character of such “cleansing,” that it is a nonneutral substitution of one morality for another,\footnote{For the complexity of the relationship between government action and religion, showing that politics cannot be “inconsequential” to religion, even when calling itself “neutral,” see R. WUTHNOW, supra note 21, at 319.} which will (as it did in the case of both school prayer and abortion) lead to further conflict in the form of fresh efforts to contest the moral arena through law. In turn, those efforts may be destructive to the very religious groups who undertake them. It has often been noted that the United States has remained so religious precisely because it lacks a history of official establishment. While
it is always tempting to seek aid from the coercive arm of the state, the effect on religious life is disspiriting.687

The correct relation between religion and American law, in other words, does not lend itself to easy categorical boundary definition, but instead is one of subtle, nuanced dialectic. In the 1830s, Tocqueville observed a close "affinity"688 between American religion and American democracy. In the face of death, he said, religion is a form of "hope." Unbelief he termed an "accident," and faith "the only permanent state of mankind."689 If that faith becomes too troubled, it resolves itself in bursts of anarchy or, especially, servility.690 Indeed, said Tocqueville, "I am inclined to think that if faith be wanting [in a person], he must be subject; and if he be free, he

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The central, and somewhat paradoxical, argument of Gary Wills' recent Under God is that American religion owes its continuing vitality and visible presence in public life to the American tradition of insistent church/state separation. G. Wills, Under God, supra note 340.

688 See G. Kelly, Politics and Religious Consciousness in America 42 (1984). Kelly's book is, in effect, an extended and complex meditation on the meaning of the "affinity" Tocqueville pointed to, as well as one of the most sophisticated analyses of American church/state relations in the literature.

Tocqueville also termed religion "first" among American political institutions; even though there was no direct connection between church and state, religion was of primary importance to American political freedom. Id. at 46. To the extent Tocqueville overemphasized New England Calvinism as the model of American religion, his observations have been challenged. See generally, J. Butler, supra note 662 (contending that the historical reality was one of lively variousness and great sectarian diversity).

On the importance of religion to those historic Americans, there is agreement. Of great contemporary significance is the debate over whether there was, is or should be an American "civic" religion, derived more or less from Protestant tradition, and supplying Americans with a shared public basis for moral understanding. For an introduction to this debate, see R. Bellah, The Broken Covenant; American Civil Religion in Time of Trial (1975); R. Bellah & P. Hammond, Varieties of Civil Religion (1980); R. Bellah, R. Madsen, W. Sullivan, A. Swidler & S. Tipton, Habits of the Heart: Individualism and Commitment in American Life 219-96 (1985); Uncivil Religion: Interreligious Hostility in America (R. Bellah & F. Greenblatt eds. 1987); M. Hughey, Civil Religion and Moral Order: Theoretical and Historical Dimensions (1983); M. Marty, The Public Church: Mainline-Evangelical-Catholic (1981); R. Neuhaus, The Naked Public Square: Religion and Democracy in America (1984); NOMOS XXX: Religion, Morality, and the Law (J. Pennock & J. Chapman eds. 1988); see also, Lovin, Perry, Naturalism, and Religion in Public 63 Tul. L. Rev. 1517 (1989).

689 G. Kelly, supra note 668, at 41.

690 Id. at 41.
must believe."\textsuperscript{871}

In part, religion promotes civil liberty simply by promoting the moral self-governance that makes coercive political regulations unnecessary. Freedom does not become unbridled selfishness, but self-interest "rightly understood."\textsuperscript{872} Tocqueville's point, however, was not simply that churches provide a valuable civic function by training people to conform to conventional morality. An established church does that much, without having a special "affinity" for democracy. Nor did he mean that religion provides ideological legitimation for the social/political order, although American churches have all too often played that bland and servient role.

Instead, as George Kelly has argued, Tocqueville was describing a religious spirit which he quite specifically associated with Calvinist Protestantism—one which insisted on clear separation of church and state, but at the same time fostered a "structured politics of involvement"\textsuperscript{873} in which religious conviction and political organization reinforced each other. As Kelly explains, Tocqueville argued that religion provided people with both "hope \textit{and} pause,"\textsuperscript{874} for it is an "unknown providence" that "liberates them for cooperative satisfactions in the \textit{res publica}."\textsuperscript{875} Religion provides a reference point, the "unknown providence" which provides both an incentive to act responsibly in the world and that "pause" which makes complete allegiance to any political order impossible. This is why religion provides a counter-force to totalizing secular ideologies, whether of the right or left—so long, that is, as churches resist the temptation to identify themselves with the state.

Peter Berger, insightful sociologist of religion, writes:

Death radically challenges \textit{all} socially objectified definitions of reality—of the world, of others and the self. Death radically puts in question the taken-for-granted, "business-as-usual" attitude in which one exists in every-

\begin{thebibliography}{9}
\bibitem{871} Id. at 24.
\bibitem{872} Id. at 48. On the inverse relation between religious and political control, see \textit{id.} at 25-26 (quoting Montesquieu): "He who has no religion at all is that terrible animal who can only feel his freedom when he is destroying or devouring." \textit{Id.} at 26.
\bibitem{873} Id. at 27.
\bibitem{874} Id. at 43 (emphasis added).
\bibitem{875} Id.
\end{thebibliography}
day life. ... Insofar as the knowledge of death cannot be avoided in any society, legitimations of the reality of the social world in the face of death are decisive requirements in any society. The importance of religion in such legitimation is obvious.776

Death may be the one "essential" reality of the natural world, a reality that is simultaneously mundane and ultimate, a profane occurrence that forces us to confront the possibility of the sacred. Nazis, identifying themselves with nature and rejecting the sacred altogether, became, not surprisingly, purveyors of death. If it is difficult to legitimate our reality at all in the face of death, then it is all the more difficult to acknowledge in uncompromising terms our pervasive social responsibility for death. That abortion is such a case can neither be deemed not so by semantics nor successfully hidden from view by secularizing and "privatizing" it.

The traditional role of religion has been to facilitate the contact between the sacred and the profane. It would thereby provide, Tocqueville said, the "hope" in the face of death that would make possible a politics of responsible freedom. Yet that "hope," no less than death itself, "radically challenges" our socially objectified definitions of reality. In the face of death, Barth wrote, "[w]e are in captivity to be sure. . . . Here is the kingdom of death, the brutal tyranny of fate which became the fate of nature."777 Yet, a "person should not lie in the chains of the cosmos. . . . The Kingdom of God is a kingdom of the freed and the free . . . ."778

It is precisely this freedom, this "hope" in the face of death, which makes total allegiance to any human political order at best

776 Id. at 12 (quoting Berger). As Berger also writes, Human life has always had a day-side and a night-side, and, inevitably, because of the practical requirements of man's being in the world, it has always been the day-side that has received the strongest "accent of reality." But the night-side, even if exorcised, was rarely denied. One of the most astonishing consequences of secularization has been just this denial. Modern society has banished the night from consciousness, as far as this is possible. The treatment of death in modern society, especially in America, is the sharpest manifestation of this. P. BERGER, A RUMOR OF ANGELS 93 (1969). Meanwhile, ultimate questions of life and death are not only suppressed in practice, but are "theoretically liquidated by relegating them to meaninglessness" in modern philosophy. Id.

777 E. JUNGEL, supra note 203, at 98 (quoting Barth).

778 Id. at 99.
provisional. Christians "freely" fulfill their civic duties, in utmost, earnest responsibility, precisely because they alienate themselves from any existing political order: if the state were "someday to recognize the threat posed by this revolutionary method, then there will be sufficient time to prove ourselves as martyrs."\textsuperscript{670}

The relation between religion and politics is, in other words, a dialectic of freedom and responsibility in which the relation of church and state is linked to the meaning of life and death itself. Religion cannot dictate civil law; and justice is not Christian love. It is not the business of coercive state power to achieve a Schaefferite moral reclamation. Yet, Tocqueville warned us, without an independent religious culture to shape the political and legal culture, there was only the coercive power of the state, and abject servility before it.

Legal decisionmaking thus calls for a delicately nuanced sensitivity to that complexity of church/state relations, one that appreciates not only the importance of the state's freedom \textit{from} religion, but also the importance of religion's contribution \textit{to} freedom. But in relation to the abortion issue, genuine debate and sensitivity to nuance were not to prevail. By way of recapturing a lost moment, consider the cautionary words of Alan Guttmacher, then-President of Planned Parenthood-World Population and active advocate of abortion reform:

\begin{quote}
I am opposed to [abortion on demand] for the U.S. in 1967. I believe that social progress is better made by evolution than revolution. Today, complete abortion license would do great violence to the beliefs and senti-
\end{quote}

\textsuperscript{670} Id. at 101. For Barth's own essentially Augustinian formulation of church/state relations, see G. Kelly, \textit{supra} note 24, at 174-75. Kelly views Barth's formulation as similar to the practice adopted by the New England Calvinists.

Notably, in a rerun of the Milgram experiment, see \textit{supra} note 104, those with either a high or low degree of religious commitment were significantly less likely to be obedient than those with a "moderate" commitment. The researchers explained:

\begin{quote}
In the Judeo-Christian tradition, a high value is placed on a strong, well-defined response to "the will of God." In fact, a decisive response even if negative is to be preferred over neutrality. The Biblical position is that the man who is undecided about basic religious issues is unable to be decisive when confronted by an ethical dilemma. His tendency is to forfeit his choice to any impinging power. On the other hand, having taken a definite religious stance, one is in a position to act in accord with conscience.
\end{quote}

ments of most Americans. Therefore I doubt that the U.S. is as yet ready to legalize abortion on demand, and I am therefore reluctant to advocate it in the face of all the bitter dissension such a proposal would create.\textsuperscript{680}

B. The Seeming Triumph of Secularism

Neither Guttmacher himself, nor his fellow reformers, would heed his 1967 warning. Indeed, by 1968, reformers would be calling for medicalization, secularization and legalization of abortion. The impetus for that movement came in part from an unlikely source—the United States Supreme Court. The Court, despite its traditionally conservative role, was reaching in the late 1960s its all-time historical peak of activism on behalf of equality and personal liberty interests. In 1965, in fact, it had initiated the move that would, within less than a decade, lift the abortion debate out of the legislative arena. In a problematic and puzzling six-two decision containing six opinions, the Court in \textit{Griswold v. Connecticut} struck down Connecticut's archaic law forbidding the use of contraception.\textsuperscript{681} It did so by explicitly announcing the existence of a


\textsuperscript{681} 381 U.S. 479 (1965). Given the dependence of \textit{Roe v. Wade} on \textit{Griswold} for its privacy rationale, it is important to recall just how problematic a decision \textit{Griswold} was. Every Justice but one (Tom Clark) wrote separately. Clark and three others (Goldberg, Warren and Brennan) also jointly wrote a concurring opinion. Harlan and White wrote separate opinions, concurring with Douglas' majority only in the judgment. \textit{Id.} at 499 (Harlan, J., concurring); \textit{Griswold}, 381 U.S. at 502 (White, J., concurring). Black and Stewart wrote separate dissents.

Douglas was so desperate to avoid the charge of "substantive" due process that he engaged in some amazing verbal legerdemain to prove that "privacy" was actually protected by the Bill of Rights, as incorporated through the fourteenth amendment, and therefore consistent with post-New Deal judicial review theory. \textit{Griswold}, 381 U.S. at 481-85. Thus, privacy as physical security (fourth amendment) and privacy as confidentiality (fifth amendment) became privacy as privacy, which therefore protected something new, privacy as autonomy. \textit{See id.} at 484-85. There was also the play on the word "association," which took a first amendment doctrine that protected membership confidentiality and transposed it through sheer formalism to protect marital "association." \textit{See id.} at 482-84. And of course there was the frightening imagery of alien intruders in the marital bedroom, \textit{id.} at 483-86, (remember how poor Bork got roasted on that one), which had nothing to do with the case, since the sanctity of the marital bedroom as a place was neither at issue nor secured by the decision. For an excellent and insightful critique of the Douglas opinion, drawing on linguistic philosophy, that was unfortunately lost in the liberal euphoria of the times, see Gross, \textit{The Concept of Privacy}, 42 N.Y.U. L. Rev. 34 (1967). For a summary of the judicial review
constitutional right to "privacy."

By that time, few outside the Catholic Church supported such restrictions, but officially the Church still advocated their enforcement, thereby deeply associating itself with what many took to be an oppressive intrusiveness. The Church's historic tendency to focus on personal sexual behavior as the single most important moral issue—a peculiar obsession many American Protestants shared—only intensified the public perception that an increasingly secular society should be protected from an authoritarian and outdated church-based moralism. Whereas Noonan was genuinely advancing an ethic grounded on loving regard for human life, many

dilemma, see Mensch, supra note 24, at 29.

Even more problematic was the concurring opinion of Justices Goldberg, Warren and Brennan, which relied explicitly on the ninth amendment's reservation of "rights . . . retained by the people." *Griswold*, 381 U.S. at 487-88 (Goldberg, J., concurring). Just how problematic is evident if one looks at the major interpretive secondary source cited by the concurring justices, id. at 490 n.6 (citing B. Patterson, *supra* note 121). As Justice Black realized, the Patterson book is an explicit call for a "revival of natural law" through the medium of the ninth amendment. *Griswold*, 381 U.S. at 518 n.12 (Black, J., dissenting). And the natural law sought by Patterson is one that is firmly rooted in theology. See *supra* note 121.

The other four opinions, two of which were dissents, all agreed that this was a substantive due process case, inasmuch as the Court was defining the content of the word "liberty" in the fourteenth amendment. Justice Harlan, while concurring, was cautionary:

> Judicial self-restraint . . . will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.

*Griswold*, 381 U.S. at 501 (Harlan, J., concurring).

None of this is to say that *Griswold* was wrongly decided. But when the Court ventures to define the meaning of "liberty" as it did in *Griswold*, it is doing the same thing it did in the infamous *Lochner v. New York*, 198 U.S. 45 (1905), offering the public a particularized version of natural law and freedom. On the normative implications of judicial review, including a brief discussion of *Griswold*, see Hiers, *Normative Analysis in Judicial Determination of Public Policy*, 3 J.L. & RELIGION 77 (1985) (on *Griswold*, in particular, see *id.* at 99-102).

Whether *Griswold*'s particular vision accords with consensus, with publicly shared values, is an inescapable element in the constitutional calculus. *Griswold* was easy in that regard, since Connecticut stood alone in 1965 in banning the use of contraceptives by married people.

In other areas of modern substantive due process, the Court has been careful not to stray too far from values rooted in consensus. Compare, e.g., *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (groups of more than two unrelated persons not constitutionally entitled to live together), with *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (right of "extended family" to live together protected by substantive due process).

*Griswold*, 381 U.S. at 485.
took the Church simply to be insisting on one strict, unrealistic prohibition after another. That liberals saw only negativity in the Church's position resulted in part from the Church's own past mistakes, and also, of course, from the "lifestyle" emphasis of the 1960s.

By the late 1960s some "liberal" theologians were ready to discard entirely any theological concern with the issue of abortion, in favor of rational secular individualism. The striking contrast between these "liberal" theologians and their more "conservative" and troubled colleagues becomes evident by comparing the treatment of abortion as an ethical issue in the Noonan volume, *The Morality of Abortion,* with the treatment of the same issue at a conference held one year later. In a manner reminiscent of the Carnegie Foundation's support of Gunnar Myrdal's *An American Dilemma,* which helped retool liberal consciousness to support civil rights reform, the 1968 abortion conference represents an establishment-backed call for liberalization and eventual repeal of restrictive abortion laws in furtherance of medical professionalism, population control and the rationalization and secularization of ethics in the name of freedom. The sponsor of the conference

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683 *The Morality of Abortion,* supra note 594.
686 The 1968 conference was held at Hot Springs, Virginia, from November 17-20, 1968. It resulted in a two-volume publication, ABORTION IN A CHANGING WORLD (R. Hall ed. 1970) [hereinafter ABORTION IN A CHANGING WORLD]. For a list of conference participants see 2 ABORTION IN A CHANGING WORLD, *supra*, at 213-18.

Of the 93 participants, more than half (56) are identifiable as physicians or health professionals, as compared with 15 out of 72 at the 1967 conference. On the other hand, only 11 of the 93 are religiously affiliated, as compared with 23 out of 72 for the 1967 conference. Eleven of the participants were women, virtually the same percentage as the 1967 conference with 2 female physician/medical school teachers (Sophia Kleegman and Natalie Shainess) being the only two participants listed for both conferences (which certainly amounts to a tiny overlap for two conferences ostensibly on the same subject held in the same area of the same country within a year of one another). Id.

Racially identifiable as nonwhite is Percy Sutton, then-Borough President of Manhattan. The 1968 conference was, however, much more genuinely international in representation than the prior one. Whereas the 1967 conference listed participants from Canada and Western Europe (England, France, Netherlands, Sweden), the 1968 Conference drew participants not only from Western Europe (England, Sweden, Belgium, Greece) but also from Eastern Europe (Czechoslovakia, Hungary, East Germany, Yugoslavia, USSR), Africa (Nigeria), Asia (India, Taiwan, Korea, Japan), the Middle East (Turkey, Israel) and South America (Brazil, Chile). Id.
was the Association For the Study of Abortion. Its president, Robert Hall of the Columbia University Medical School, believed that “[c]ountries with stringent abortion laws have buried their heads in the sands of time.”

The introduction to the conference, entitled “Abortion Law Reform—The Moral Basis” was a clarion call issued by none other than John D. Rockefeller III. His talk evidenced genuine concern for the fate of children born into adverse circumstances:

The New York Times recently reported that cases of child abuse are steadily increasing in the United States. Child abandonment and infanticide are serious problems in some countries. All over the world, unwanted children are being permanently harmed both physically and psychologically through hunger, neglect, and abuse. Is this not a moral issue of the first order?

Nor did he fail to mention, albeit briefly, that liberalized abortion laws should be combined with concern for the “most fundamental rights of children—to be wanted, loved, and given a reasonable start in this world.” Nevertheless, there was a disquieting tone to the proposed solution—put crudely, to eliminate the unborn children rather than the conditions that would make their childhood so bleak. His conclusion was to call first for liberalization of abortion laws, leading as soon as possible to repeal, leaving the decision “with the conscience and need of the patient and the professional experience and guidance of the physician.”

He also advocated promotion of family planning and contraception, for he did

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Noonan’s account of the 1968 conference is characteristically sarcastic but not inaccurate:

The conference was under the auspices of the Association for the Study of Abortion, that imperfectly disguised committee for the promotion of the abortion liberty. It was organized by Alan Guttmacher, Louis Hellman, and Planned Parenthood’s chief lawyer, Harriet Pilpel. Announced as a meeting to “discuss” abortion, the conference had the kind of ratio of proponents to opponents not uncharacteristic of pro-choice symposia—twenty of the pro-choice side to one of the other.

J. Noonan, A PRIVATE CHOICE, supra note 9, at 44 (footnotes omitted).


Rockefeller, Abortion Law Reform—The Moral Basis, in 1 ABORTION IN A CHANGING WORLD, supra note 686.

Id. at xv, xvii.

Id. at xviii.

Id. at xix.
not "favor liberalizing abortion laws for the purpose of fostering abortion as a method of birth control."\textsuperscript{692}

\textsuperscript{692} Id. at xx. Whitney Young, at the 1967 conference, had expressed some ambivalence, arguing vigorously, on the one hand, that if "abortions are a fact of life in this country and "are engaged in substantially by people who can afford them," then the poor should have equal access, yet conceding that he was "a little suspicious when the first intervention, first concern as regards the Negro is around liberalizing sterilization laws and abortion laws, but the real concern is less with the human being involved and there is much more concern about increased Aid to Dependent Children and welfare caseloads." The Terrible Choice, supra note 594, at 64.

Dorothy Height, then-President of the National Council of Negro Women, felt that "[i]f we had the courage to deal" with problems like "poverty," "deprivation," and "racial discrimination," "it would allow these children to come into life really wanted." Id. at 19-20. And Dr. Eric Lincoln of Union Theological Seminary reported that

[t]here is a very broad suspicion on the part of many Negroes that what appears to be a sudden concern with contraception and with abortion is thought by many to be a part of a very heinous plot to eliminate, or further control, not only the black minority in this country, but dark minorities everywhere.

Id. at 24.

At the 1968 Conference, Percy Sutton (then Borough President of Manhattan, and black), whose role in the panel on Abortion and Poverty was to "speak about abortion in the Negro ghetto," 2 Abortion in a Changing World, supra note 686, at 31, spoke only about the (real) problem of access and availability of abortions for poor women. See id. at 32-35.

Recent data reveals that while nonwhites have often, when surveyed, reported more opposition to abortion than whites, (see, e.g., W. Roof & W. McKinney, supra note 26, at 209-13 (Black Protestants)), abortion rates among nonwhites are dramatically higher than their white counterparts:

In 1981, based on reported data from thirty-four states, black (and other) women had approximately 240,000 abortions and white women approximately 580,000. The abortion ratio (number of legal abortions per 1000 live births) was 549 for black women and 329 for white women.

The Abortion Question, supra note 13, at 153. A more recently published study reports that "[i]n the mid-1980s, there were about 64 abortions per 100 live black births and 30 abortions per 100 white births in a 13-state reporting area." Children and Families, in A Common Destiny: Blacks and American Society 509, 513 (G. Jaynes & R. Williams, Jr. eds. 1989) (citation omitted).

The authors of The Abortion Question conclude from such data that "black women are currently exercising more reproductive control." The Abortion Question, supra note 13, at 153.

Perhaps the issue is more complicated and places in question the experiential meaning of "choice." Consider the following statement from a black mother, as reported by Robert Coles:

They say no, no—no more kids; the welfare worker she tells you you're "overpopulating" the world, and something has to be done. But right now one of the few times I feel good is when I'm pregnant, and I can feel I'm getting somewhere, at least then I am—because I'm making something grow, and not seeing everything die around me, like all it does in the street, I'll tell you. They want to give me the pill and stop the kids, and I'm willing for the most part; but I wish I could take care of all the kids I could have, and then I'd want...
The first plenary session of invited participants at the conference, entitled "The Ethical Aspects of Abortion," seems to have been structured to neutralize any lingering theological concern. The first two presenters were an embryologist whose conclusion amounted to a refutation of ensoulment at conception, and an historian with a careful, critical review of Noonan’s account of church doctrine. For the “Protestant position” the convenors brought Joseph Fletcher himself, the author of Situation Ethics, to celebrate those Protestants who advocated a “free and responsible ethics of abortion”—especially Unitarians, who had decided in 1968 in favor of leaving the abortion decision in the hands of “duly licensed physicians and their patients.” In a telling case of clouded crystal ball, Fletcher, seemingly unaware of conservative evangelicalism, observed that “[t]he majority of Protestant churches have remained silent and will probably stay that way until the question is resolved for them in the social-cultural debate. They will not give much leadership, even if their opposition to medically responsible abortion is not as plainspoken and theologically sophisticated as Catholicism’s.” He conceded that some Protestants had actually taken “the Catholic position,” oddly naming Karl Barth and Dietrich Bonhoeffer. Nevertheless, in Fletcher’s “modern world of scientific biology and medicine” we could rely on “an ethics of responsible decision rather than submission to inflexible moral laws.” In such a world, he said, plenty of them. Or maybe I wouldn’t. I wouldn’t have to be pregnant to feel hope about things. I don’t know, you can look at it both ways, I guess.

D. CALLAHAN, supra note 13, at 506.

693 Id. at 25-26.
694 J. FLETCHER, SITUATION ETHICS, supra note 576.
695 Fletcher, A Protestant Minister’s View, in 1 ABORTION IN A CHANGING WORLD, supra note 686, at 16.
696 Fletcher, A Protestant Minister’s View, in 1 ABORTION IN A CHANGING WORLD, supra note 686, at 25.
697 Means, A Historian’s View, in 1 ABORTION IN A CHANGING WORLD, supra note 686, at 3.
698 Comer, An Embryologist’s View, in 1 ABORTION IN A CHANGING WORLD, supra note 686, at 3.
699 On Barth and Bonhoeffer in this regard, see supra text accompanying notes 617-32.
“traditional church positions become more and more archaic.”\textsuperscript{701} Indeed, the entire history of both legislative and theological restriction of abortion he reduced to a “motivation” of “conscious and unconscious male chauvinism.”\textsuperscript{702} A sentiment like “a life is a life” is, for Fletcher, just “tautolog[y],” a case of mere “feeling,” “sublogical,” “an attitude only.”\textsuperscript{703} For him, the “task is to reeducate people on a deeper level than logic,” to “the level of empirical fact and a situational versatility which fits the realities of modern life.”\textsuperscript{704} Fletcher, going even further than Rockefeller’s opening address, concluded that abortion was the “best method of birth control.”\textsuperscript{705}

For a Jewish counterpart to Fletcher, the convenors found Reform Rabbi Israel Margolies, who wanted nothing to do with “holier-than-thou religionists” overly preoccupied with “sin,” deeming

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\textsuperscript{701} Id., at 26.
\textsuperscript{702} Id.
\textsuperscript{703} Id.
\textsuperscript{704} Id. Fletcher elaborated on his views during the subsequent panel discussions. At the panel entitled “Abortion and Animation” (ensoulment), Fletcher proclaimed:

[T]his whole discussion is like the argument about the death of God—pointless because we cannot establish whether God was ever alive to begin with.

All of the positions taken by people about animation are a matter of faith rather than empirical reasoning; therefore, the debate provides no foundation for social policy with respect to abortion.

\ldots Desirability—that is, a bill of goods and evils in any concrete situation realistically assessed in terms of human needs and social welfare—should decide whether we terminate a life \textit{in utero} or postnatally just as we would in any case of self-defense or common defense.

\textsuperscript{2} ABORTION IN A CHANGING WORLD, \textit{supra} note 684, at 5.

Fletcher went even further at the panel entitled “Abortion and Morality: The Relationship between Available Abortion and Sexual Freedom” (all seven of the panelists were men). Fletcher made clear that his goal was sex without consequences, that his moral position was maximization of human satisfaction. To that end, he announced that early abortion was “the best method of fertility control because it would entail, if present research succeeds, the least discomfort and the least risk of failure due to emotion or carelessness and the least hazard of ineffectiveness.” \textit{Id.} at 93.

Fletcher summed up his moral outlook:

\ldots I say, let’s be done with all objective morality, that is to say, any notion in terms of scriptural law or natural law, that right and wrong and good and evil are intrinsic values, and take instead the view that all values are quite extrinsic, dependent upon the varieties of circumstances.

\textit{Id.}

\textsuperscript{705} Fletcher, \textit{A Protestant Minister's View}, in \textit{1 ABORTION IN A CHANGING WORLD, supra} note 686, at 28.
such behavior “spineless and irrational subservience to the dogma-
tism of theologians . . . unbecoming to the rational and largely
moral society of a great nation.” He therefore called upon us to
“disavow the old taboos” and “assert proudly and honestly that, as
creative partners of God, we reserve the right to build our families
purposefully and joyfully, not accidentally and reluctantly.”

Nevertheless, a more poignant dimension to Rabbi Margolies’
participation in the ethics panel emerged in the follow-up discus-
sion. Margolies listened to three successive testaments to the secu-
lar/rational character of the abortion issue, followed by a con-
cerned question about potential life from Daniel Callahan.
Callahan’s question was dismissed by Fletcher, whose only baseline
was the utilitarian one, what will “augment our sense of well-be-
ing.” At that point Margolies suddenly shed his complacent ve-
ner of secularism, reverting to the very theology he had dismissed
as so “unmodern”:

I also believe that there is something very special about
what we call the soul, the spiritual nature of man. If you
deny this and lean entirely on the rational you are in
danger of falling into the kind of trap that occurred in
Nazi Germany, which was by all objective judgment a
highly rational society. We used to refer in German to
the Luftmensch—“people who live on air.” This was a
people of philosophers, musicians, and scientists, and yet
it was out of this company that the kind of philosophy
was able to come which, having no consideration for the
spiritual nature of man, was able to condemn a certain
segment of the population to extinction in the interest of
its own point of view.

. . . I think this is why the religious emphasis at the
beginning of this conference certainly has a place.

However begrudgingly, the convenors gave the penultimate slot
on the ethics panel to Thomas J. O’Donnell, a “traditional Catho-
lic,” who stated the prevailing Catholic opposition to abortion. O’Donnell was followed immediately by what was touted as a “liberal Catholic view.” Its advocate, Joseph Donceel, dissented from the theory of “immediate animation” (ensoulment at conception) in favor of “mediate” or “delayed” animation, but he did so by rejecting the basic dualistic premises of Western Enlightenment rationalism and by locating theological error in the deference of Catholic thinkers to Cartesian scientific rationalism. Citing Aquinas, Donceel argued for the notion of hylomorphism, under which both body and soul proceed together from conception through vegetative and animal states, toward true hominization: “Hylomorphism holds that the human soul is to the body somewhat as the shape of a statue is to the actual statue. The shape of a statue cannot exist before the statue exists. The human soul can exist only in a real human body.” For Donceel this theory was more consistent not only with the dynamics of fetal development but also with the most advanced epistemological philosophy of the time—the existential phenomenology of Merleau-Ponty. The upshot of Donceel’s position was that “a prehuman embryo cannot demand from us the absolute respect which we owe to the human person”; however, “it deserves a very great consideration” and “only very serious reasons should allow us to terminate its existence.” The panel conversation was lurching dangerously out of control.

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710 O’Donnell, A Traditional Catholic’s View, in 1 Abortion in a Changing World, supra note 686, at 34.
711 See Donceel, A Liberal Catholic’s View, in 1 Abortion in a Changing World, supra note 686, at 39-45 (italics omitted).
712 Id. at 39-40.
713 Id. at 44.
714 Id. at 45. Curiously, the delayed animation notion has recently gained some scientific support as a way to solve the abortion dilemma. By defining the beginning of life to achieve symmetry with our standard for its termination, brain wave activity, Hans-Martin Sass of the Kennedy Institute of Ethics at Georgetown University, has proposed that we “set the beginning of life at about 70 days after conception, when he says the brain has started to function and connections between nerve cells are rapidly forming.” His model abortion law, fashioned accordingly, would legalize abortions only in the first 10 weeks of pregnancy, except, perhaps, for medical indications. See Beck, Let’s Use Scientific Basis to Fix Beginning of Life and Settle Abortion Issue, Buffalo News, Nov. 25, 1990, at G-7, col. 3; see also E.H. Kluge, The Practice of Death 88-100 (1975); Steinfels, Catholic Scholars, Citing New Data, Widen Debate on When Life Begins, N.Y. Times, Jan. 13, 1991, § 4 (The Week in Review), at 5.
Participants who had been assembled to give polite, deferential religious sanction to the requirements of enlightened secularism found themselves in an arcane discussion of ensoulment theory which was, at the same time, a sophisticated modern epistemological challenge to the whole tradition of Enlightenment dualistic rationality. Ralph Gampell of Stanford Law School expressed the view that this whole debate should be kept away from courts and legislatures:

When you are dealing with the courts and legislatures I think that the matter of ensoulment is not irrelevant, for if you tell them that we are dealing with a choice between two lives in being, they will move away from you in holy horror. I think that such a proposition does have Nazi overtones that society would recognize. If you are going to persuade legislatures, you have to say that there is maternal, but not fetal life in being.\(^\text{115}\)

Gampell hoped that he could trap O'Donnell by asking why spontaneous abortions were not given the rites of the church. O'Donnell informed him that rites \textit{were} given, in the form of conditional baptisms, although he conceded that it was not "one of our clerical duties . . . to watch over every missed menstruation."\(^\text{116}\) He then pointed out that the Church's primary concern was not "about the soul surviving or not"—on that question the church had no lack of confidence—but rather about the moral state of American society.\(^\text{117}\) Finally George Corner, speaking as a medical biologist and philosopher, concluded the unraveling discussion by stating that "many great problems of our responsibility to each other—abortion, moral restraint, penal law—can never be settled by delimiting fixed stages of development of body or soul."\(^\text{118}\)

\(^{115}\) Discussion, supra note 708, at 54.

\(^{116}\) Id. at 54-55.

\(^{117}\) Id. at 55-56.

\(^{118}\) Id. at 56-57. While there was no feminist presence as such at the 1968 conference, which was hardly atypical for the early abortion reform movement, one of the 10 subsequent panels was devoted, almost in the manner of a traditional "ladies' auxiliary," to "Abortion and Womankind: Abortion as an Inherent Right, an Occasional Prerogative, or a Special Privilege." 2 ABDORTION IN A CHANGING WORLD, supra note 27, at 191. The group consisted of 8 of the 11 women listed as conference participants—four physicians, a psychologist, a social scientist, a lawyer and Vera Houghton, "Chairman, Abortion Law Reform Association, London, England." (See the alphabetical entries of participants in id. at 213-18).
Gampell's own solution lay with the medical profession. A practi-

Mary Calderone, M.D., Executive Director of the Sex Information and Education Council of the U.S., and moderator of the panel opened the session by reminding the group that "Dr. Robert Hall deliberately made this a panel of women so that we would approach the question as women." Id. at 193. The first third of the session consisted of reports and discussion with respect to incidence of abortion and surveys of attitudes toward abortion, especially in England where a reform law had recently been enacted. Id. at 193-201.

Then Sophia Kleegman, M.D., Professor of Obstetrics and Gynecology at New York University Medical Center, spoke from her 44 years of medical practice, focusing on serious problems of poverty and illegal abortion, concluding that we should "have all legal restrictions removed entirely to allow physicians to take care of their patients within the framework of sound medical judgment and practice." Id. at 201-03, 215. Ruth Lidz, M.D., Associate Clinical Professor of Psychiatry at Yale, reported on her work in the "unwed mother" project at Yale, where she gave therapeutic counseling to women seeking abortions and then advocated for those she believed deserved the abortions (40 of 42 she regarded as deserved). Id. at 204-06, 216. Her conclusion was somewhat cautious:

[While I would like very much to have all restrictive abortion laws removed, I would like to caution that this is not going to settle all of our problems. It is two different things, to be pregnant and to have the child, and many women are very much mortified by becoming pregnant, but not by having a child.]

Id. at 205.

Then Ruth Roemer, a lawyer and Associate Researcher in Health Law at U.C.L.A., spoke in what we have come to regard as "rights terms": "[W]omen, particularly in the developed countries, are coming to regard abortion as a fundamental human right. . . . It is a right so fundamental, so personal to women, that its denial nullifies the right to freedom and to security of their person and of their families." Id. at 207. Roemer then called for the panel to "address itself to political action designed to make abortion freely available to women who want it." Id. at 208.

Interpreting the call as a motion, Calderone replied that she "would like to include in it the motion that with every right go certain obligations." Id. Then things got a little heated:

ROEMER: We are carrying out our obligations.
CALDERONE: Not with repeated unwanted pregnancies. The rights and obligations should balance.
R. LIDZ: Yes. I think that I am also for removing the law. I am very much for that, but I do not think that will solve our problems.

Id. at 208.

Dr. Kleegman then offered her view:

- I do not believe in abortion on demand. I feel very strongly that if a woman asks for an abortion, it is a medical problem, and I do not think physicians should be chaplains. When a woman requests an abortion, then I think it is important that she be given the opportunity to be seen by someone who is trained.

Id. at 209. And Calderone would not let the moral issue go:

The point I want to make is that we have a picture of many young people marrying today because they know if things do not work out properly, they can get a divorce all too quickly. And to have young people growing up and saying, "Well, we can always get an abortion"—this is what I was driving at. This has already happened in Japan, where multiple abortions are carried out on the same woman. It is too easy.

Id. at 209.
ticing physician with a law degree from Stanford who co-taught with Herbert Packer a law and medicine course at Stanford, Gampell had co-authored a law review article with Packer in 1959 calling for the decriminalization of "therapeutic abortions" in favor of procedural delegation to committees of doctors, who would gain plenary control over the process. Consistent with Packer's approach to criminal law in other problematic areas, the authors called for the repeal of dysfunctional criminal law, seeing the problem of therapeutic abortion as one calling for the deliberate application of informed medical judgment; their solution would both privatize the issue and transfer authority over it to the realm of medical expertise.

By 1968, however, when the Gampell and Packer article was reprinted in Guttmacher's The Case for Legalized Abortion Now, the cutting edge of advocacy with respect to abortion reform had become the privacy right enunciated by the Supreme Court in Griswold. Particularly influential was the nearly fifty-page article, Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes, published in 1968 by Roy Lucas, who would go on to be an important legal activist for abortion rights. Eschewing the incrementalism of legislative reform, Lucas called for the constitutionalization of choice. Given the legal rhetoric to which we have become accustomed since Roe v. Wade, it is difficult to recall how startling it was for Lucas to assert in 1968 that "[a]lthough interests at stake in the abortion controversy are diverse, subtle, novel, and sensitive, the case appears ultimately to fit within the classical framework of governmental interference with important interests of individual liberty

By way of testament to the diversity of viewpoints, Natalie Shainess, M.D., Lecturer in Psychiatry at Columbia University College of Physicians and Surgery, id. at 217, gave the last long statement of the session, seeing "the abortion problem [as] one manifestation of the power struggle between the sexes, with man fearful of and reluctant to surrender power, as is every group which is in command," and citing Simone de Beauvoir regarding male-female relations. Id. at 210-11.


E.g., H. Packer, The Limits of the Criminal Sanction (1968).

The Case for Legalized Abortion Now 147 (A. Guttmacher ed. 1967).

and to be capable of resolution in traditional constitutional terms." He concluded that

[a] right to abortion by consent performed by a licensed physician can be strongly asserted in at least three related forms within the Bill of Rights and fourteenth amendment framework—first, as a fundamental right of marital privacy, human dignity, and personal autonomy reserved to the pregnant woman acting on the advice of a licensed physician; second, as a penumbral right emanating from values embodied in the express provisions of the Bill of Rights themselves; or, third, as a necessary and altogether reasonable application of precedent, namely, Griswold v. Connecticut.

While Lucas' law review article displayed the understandable self-assurance of advocacy, it was far from certain in 1967 and 1968 that litigation would lead to abortion as constitutionally protected privacy. Another early abortion rights activist, Harriet Pilpel, noted at the 1968 conference in the panel entitled "Abortion and Constitutionality: The Means of Assessing and Testing the Constitutionality of Abortion Law in the United States," that even losing test cases could have a valuable educational effect: "So whether or not we are eventually successful in declaring clauses unconstitutional in this area, the fact that attacks are mounted and the public is educated as to the infirmities in the laws will become, I think, extremely useful."

Accompanying the zeal for solving the abortion problem through constitutional litigation was a striking contempt, even distaste, for sectarian religion, religiously rooted morality or even the notion that abortion might raise a serious question of morality from a theological perspective. It was routinely assumed that Protestants and Jews overwhelmingly favored extreme liberalization, and even repeal, of abortion laws, supporting the characterization of "the sole major organized body opposing all abortion reform—officials of the Roman Catholic Church." According to Lucas, "[t]o make the

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723 Lucas, supra note 722, at 738.
724 Id. at 756-57 (footnotes omitted).
725 2 Abortion in a Changing World, supra note 686, at 137.
726 Lucas, supra note 722, at 737. Interestingly, Milner Ball, who was a Protestant parish minister in the 1960s and who had not yet gone to law school, recalls the perception among
decision that a fetus ought to be considered a human being is a subjective belief of religious character,” and “[t]here is no valid state interest in implementation of religious belief sufficient to serve as a basis for legislation.”

The distinction between “developing fetal tissue,” on the one hand, and “fully established human life,” on the other, becomes the only appropriate one in the secular realm of legislation and, accordingly, the secular moral value of choice itself becomes the only allowable position. To allow otherwise would contradict “the ethical value of not forcing the subjective moral assumptions of one group upon all other groups.”

We are told by Lucas that, according to H.L.A. Hart, “the unimpeded exercise by individuals of free choice may be held a value in itself with which it is prima facie wrong to interfere.” Thus, a somewhat bizarre claim of libertarianism becomes the only acceptable constitutional norm.

Lucas, curiously, having been requested to offer an establishment clause perspective on the abortion issue at the conference, took a position in the panel on Abortion and Constitutionality seemingly at odds with his law review article:

Now, I will try to summarize the separation of church and state position. This is perhaps the final argument which can be raised, that the laws regulating abortion are laws respecting an establishment of religion. The quickest way to sum this up is to show that the abortion restrictions arise out of a metaphysical theory that the fertilized ovum is a human being entitled to the protection of ultimate birth and life. But in the same sense, all of the statements in the Decalogue can be said both to be religious and to represent some state interest.

The chief obstacle to knocking out the abortion laws on the establishment of religion point, even though you can prove that maintenance of the laws is religiously mo-

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his fellow theologians that the Griswold decision was basically a statement to the Roman Catholic Church that it should not enact its doctrine into law. The Catholic Church was presumed by Ball and his colleagues to exercise legislative power in Connecticut. Letter from Milner Ball to Elizabeth Mensch and Alan Freeman (October 1990).

127 Lucas, supra note 722, at 760.

128 Id. at 751.

129 Id. at 751-52 (quoting H.L.A. HART, LAW, LIBERTY, AND MORALITY 21 (1963)).
tivated, is the argument of the other side that there is a state interest in protecting the sanctity of life. This is an argument not easily dismissed.\textsuperscript{730}

Despite such concessions, the basic constitutional argument ruled out of order any sectarian claim about preserving the sanctity of life, gradually turning the legal abortion debate into an all-or-nothing affair obsessively focused on who does or does not have "rights." The opponents of reform took up the challenge. The 1970 Noonan volume, for example, contains one entry that was written in 1970, after the California Supreme Court had invalidated its state abortion law on constitutional grounds,\textsuperscript{731} which, unlike the other essays that had come from the 1967 conference reflects the stark and uncompromising posturing of contemporary pro-life legalists.\textsuperscript{732}

If the abortion rights strategy was to load the constitutional argument on the mechanical category of "liberty" (or privacy), then the equally mechanical pro-life response was to load everything on the category of "person" by definitionally including the fetus for all purposes. Just as creationists took on their evolutionist adversaries by appropriating through "creation-science" the status of secular positivism,\textsuperscript{733} abortion opponents, heeding the warnings of those like Lucas, reprocessed their own position as firmly rooted in secular constitutional legalism. The particular essay written by Noonan and his colleague David Louisell displays for the most part (to the shame of legal realists everywhere) a facile, manipulative conceptualism with an unrelenting insistence on deduction based on the all-or-nothing category of "human being."\textsuperscript{734} In fact, it is exactly the sort of legalism that has become standard fare in pro-

\textsuperscript{730} 2 Abortion in a Changing World, supra note 686, at 160.
\textsuperscript{732} Louisell & Noonan, Constitutional Balance, in The Morality of Abortion, supra note 594, at 220.
\textsuperscript{733} See our discussion of this in Mensch & Freeman, Religion as Science/Science as Religion: Constitutional Law and the Fundamentalist Challenge, Tikun, Nov.-Dec. 1987, at 64.
\textsuperscript{734} See Louisell & Noonan, supra note 732, at 220-30, 244-58. They are on more solid ground when they argue that the precedential route from Griswold to abortion is far from obvious. See id. at 233-34.
life tracts and is strikingly at odds with the sensitivity and deliberation of the theological essays in the same volume.

Then came Roe v. Wade, ensuring that the defenders of choice would be situated in a context that was almost exclusively legalistic and rights-based. Like all legalisms, it invited interminable legalist debate. The pro-choice legal arguments rested upon the secular morality that was being developed to shore up the liberal activism of the Supreme Court. So starkly secular did the pro-choice position become that a leading liberal theorist could argue that successful theological opposition to the pro-choice position would amount to an unconstitutional establishment of religion—which crudely oversimplified what was nonetheless a subtle and difficult question of church-state relations, from the perspective of both theology and law.\(^7\)

Although Roe secularized the abortion issue through the insulating effect of the privacy right, a growing opposition to Roe became ever more resolutely absolutist in theologically defending the pro-life position. Triggered in part by reaction to Roe itself, Catholics and fundamentalists formed an alliance (hitherto unheard of) in opposition to abortion, with some fundamentalists quite self-consciously seizing upon abortion as a vehicle for reasserting religion in what seemed to be an increasingly secular world.\(^7\)


Reichley describes the lay Catholic reaction to Roe v. Wade:

The sweeping nature of the Court's decision practically guaranteed that opponents of abortion would fight back in a similarly draconian spirit. Many lay Catholics who had stopped listening to their bishops over contraception and had been prepared to accept some modification of absolutist laws against abortion were startled and outraged by the Court's contention that for the first six months of gestation, unborn life has no rights whatever. They agreed with the bishops that the Court's ruling violated the fundamental value attached to individual human life not only by Catholicism but by the entire Judeo-Christian tradition, and indeed by most forms of Western humanism. Catholic opponents
As a result of that historical sequence, the public debate on abortion, as it later developed, seemed almost to concede to the pro-life position the moral high ground, however over-absolutist it was perceived to be, while the pro-choice rhetoric seemed to defend one's legal right to do moral wrong—and even to assert that morality was an inappropriate, virtually impermissible concern. At the most insidious political level the moral high ground of the pro-life position was used to cover a multitude of real evils: the Christian rhetoric of authentic pro-life advocates was exploited by a manipulative Republican right wing.\footnote{For an account of just how manipulative and successful this effort was, see A.J. Reichley, supra note 26, at 319-27.}

... were psychologically prepared to accept defeat in those states which enacted abortion reform, though they clearly did not relish the prospect. But “deciding this question in the courts... was steadfastly opposed by the anti-abortion forces because it undermined the process of negotiation and compromise and denied effective representation to the unborn.” A.J. REICHLEY, supra note 26, at 292. Reichley’s observation confirms the impression of our Catholic colleague, Tom Disare, who recalled family discussions of the abortion issue during the period just prior to Roe v. Wade. Disare recalls that while there was much debate about the particulars of concededly inevitable reform, Roe itself was perceived as an outrageous and enormous shock, to be opposed by all. He also observed that he thought that for many Catholics who had refused to comply with the Church’s teaching on contraception, the abortion issue, in its clear moral purity, offered an opportunity to reaffirm commitment to the Church’s ethical tradition.

Although diehard apologists for Roe v. Wade, like Tribe, discount and minimize the pre-Roe legislative process (for instance stating that, “it is instructive in this regard that between 1971 and 1973 not one additional state moved to repeal its criminal prohibition on abortion early in pregnancy,” L. Tribe, ABORTION: THE CLASH OF ABSOLUTES, supra note 734, at 51, there is reason to believe that the legislative process might well have done a better, if not perfect from the pro-choice or pro-life side, job of resolving this issue through compromise. Barone is less pessimistic in retrospect: “Rockefeller and (much to his later regret) Reagan signed liberalized abortion laws which were among the most sweeping of the sixteen such laws passed, in states with 41% of the nation’s population, in the five years preceding January 1973.” M. BARONE, supra, at 460. Or, further:

[B]y the time the Roe v. Wade decision was issued, about 70% of the nation’s population lived within 100 miles—an easy two hours’ drive—of a state with a legalized abortion law. And just as the Supreme Court was speaking, legislatures in almost all of the states were going into session; many would probably have liberalized their abortion laws if the court had not acted.

Id. at 756 n.14.

This is not to suggest that the legislative path would have been a neat, linear one leading to total repeal, since, if nothing else, it would have given voice to the widespread and deeply felt, religiously rooted concern about abortion. The close-out move in Roe is, in this regard, another instance of what Gary Wills described as the unfortunate mindset of liberal elite intellectuals as far as their attitudes and assumptions about religion in America. See G. WILLS, UNDER GOD, supra note 340, at 89.
Nevertheless, the anomaly continues: in the current debate as publicly perceived, the pro-life position is defended as a religious/moral position, while the pro-choice position is defended as if it were purely secular. Yet, despite the liberal secularist presumption that appeals to morality, and certainly to the "supernatural," are wholly out of order in public life, deeply felt theological appeals to conscience are more compelling than claims rooted in analytic philosophy. Moreover, the claims rooted in analytic philosophy are ultimately rooted either in consensus (which does not exist on this issue) or on a natural law that is surreptitiously hidden from view.\footnote{738 See supra note 681 and accompanying text.}

In fact, when either side in the debate resorts to pure, secular legalism, its position becomes foolish and self-contradictory. The labels, selectively deployed by pro-lifers, like "judicial usurpation," "judicial legislation" or "anti-democracy" simply do not work.\footnote{739 These labels are just another way of saying that Roe is, somehow, clearly and objectively unconstitutional, a conclusion at odds with any realistic perception of judicial interpretation. Thus, we can agree with Tribe that Roe is "not unconstitutional," yet remain unpersuaded by his defense of the decision in L. Tribe, Abortion: The Clash of Absolutes, supra note 8, at 77-112.}

We think that, in retrospect, Roe v. Wade may be fairly characterized as a mistake for three combined reasons; it was legally problematic at best, sociologically inaccurate and politically disastrous. As to the first, the precedential line from Griswold to Roe was far from clear. For a recent elaboration of this point, see Van Alstyne, Closing the Circle of Constitutional Review from Griswold v. Connecticut to Roe v. Wade: An Outline of a Decision Merely Overruling Roe, 1989 Duke L.J. 1677. While substantive due process may be a constitutional fact of life, it is also the case that as the Court moves in particular decisions from clearer realms of text and tradition to more open-ended interventions, circumspection and prudence become a necessary part of the constitutional calculus. For example, the Court in Roe might have overturned the Texas law on the ground that criminalization of all abortion exceeded the bounds of the due process clause, while merely remanding, or even summarily sustaining, the statute in the companion case of Doe v. Bolton, 410 U.S. 179 (1973), which, after all, involved a version of the reform statute promulgated in the 1962 American Law Institute's Model Penal Code, id. at 182.

Conservatives have consistently applauded a robust interpretive activism to protect property rights from democracy, in a tradition running all the way from John Marshall\textsuperscript{40} to Antonin Scalia,\textsuperscript{41} culminating in a perverse distortion of egalitarianism to overturn a democratically adopted and modest affirmative action plan in \textit{City of Richmond v. J.A. Croson Company}.\textsuperscript{42}

For their part, liberals traditionally have celebrated democracy and judicial restraint in the context of economic regulation but then applauded judicial "activism" for the sake of protecting rights of personal autonomy.\textsuperscript{43} This inconsistency is heightened by the correspondence between the rhetoric of privacy and that of property. The claim of privacy as autonomy is one of self as owner, as having dominion. One can easily imagine (and may see) the Republican pro-choice candidate who can use the same rhetoric to defend both abortion rights and unregulated plant closings. Similarly, the president can use the language of free economic "choice" to justify the veto of mandatory family care leave legislation, yet be against choice on the abortion issue.

Our point is not just the political manipulability of the rhetoric but the extent to which the rhetoric of autonomy at the secular level is bound up with a celebration of "self" as the ultimate concern, the final arbiter, the trump to all moral claim. In that context, by immunizing abortion from the legislative process, \textit{Roe} could be read as inviting, or even encouraging, routine use of abor-

\textsuperscript{40} E.g., \textit{Fletcher v. Peck}, 10 U.S. 87 (1810) (employing expansive interpretation of Contract Clause to protect property rights).
\textsuperscript{42} \textit{488 U.S. 469} (1989).
tion for the instrumental realization of self-interest. This criticism, of course, has nothing to do with the moral character of pro-choice activists, who are often selfless in their service to other women; nor does it even reflect their attitude toward abortion: many are appalled, for example, that a person might have an abortion for purposes of sex selection. The problem lies in a secular discourse that seems unable to deal with difficult moral questions, combined with a marked tendency by many to rule those questions, politically and legally, out of bounds.

Consider, for example, the hypothetical case which is often treated as a close-out argument for choice—the Thomson violinist case. The case has the advantage of pointing out that imposing an obligation of unselfishness on women runs contrary to the usual libertarian legal (and cultural) assumption that one should be perfectly free to be perfectly selfish. Yet because the pro-choice position found itself framed so completely by Roe, and therefore by the issue of a woman’s “right,” defense of that libertarian right became oddly aggressive, as in Tribe’s account of the Violinist Case. “Indeed, just about everybody would agree with Professor Thomson that no law could justly compel you to take this situation lying down, at least if the violinist were an uninvited intruder—and perhaps even if he had been invited but had overstayed his welcome.” (Would Tribe suggest that economic regulation demanding self-sacrifice for moral purposes, such as mandatory family)

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744 The claim of “neutrality” seems as problematic as its counterpart in Reitman v. Mulkey, 387 U.S. 369 (1967), where the Court struck down California’s Proposition 14 (affirming a decision of the California Supreme Court), which had “repealed” fair housing laws by constitutionalizing freedom of choice in housing rentals or sales. Id. at 377. By removing the issue from the legislative process altogether (albeit by referendum), California was guilty of “encourag[ing]” racial discrimination in housing. Id. at 381. Roe, by judicial decision alone, similarly removed the abortion issue from the legislative process nationally by constitutionalizing freedom of choice.


Thomson poses the hypothetical case of a person who finds herself waking up having been involuntarily plugged into a life support system for a famous violinist who will otherwise die unless the hapless and involuntary supporter is kept so connected and confined for nine months. See Thomson, supra.

leave time, would be unconstitutional because anti-libertarian?) As Tribe does successfully argue, the problem with Roe is not its supposed unconstitutionality, but the failure of its “rights” methodology to grapple with the moral issue. More exactly, the language of rights, as formulated by Roe, and even more glaringly by Thomson, seems to exclude analysis of precisely those points one would want to consider in order to do a careful moral analysis of the problem.

There are, of course, many ways in which Thomson’s case, morally, is simply different from abortion—in some ways easier, in some ways harder. As the careful Aristotelian philosopher Rosalind Hursthouse argues, many of those contextual differences are precisely the ones that would require emphasis if one were to frame the issue in terms of virtue, or the supposed correlative to rights, the question of duty. For Thomson, those contextual differences can be ruled irrelevant since the issue is framed so starkly as a question of rights alone. Because the only analytic presupposition is a self with rights, the only analytically appropriate moral question is whether the self’s rights have been invaded, not the substantive question of virtue. This is, of course, the Enlightenment version of rights, wrenched, as Maritain said, from the context of the moral order, as if (going back to d’Entreves) one could logically separate the question of rights from the moral foundation upon which we build a conception of duty.

This rights-based language of choice fails to capture the moral and social experience of many women. It assimilates disparate experience to a false Enlightenment universal. Not surprisingly, it captures most closely the experience of white, educated, middle-class women who, as Condit writes, were in a “position to articulate this private vocabulary as a public one,” whereas poor women were not. “Because the ‘articulate’ class’s primary limits on their choices were not economic, but legal, these primary arguments were directed at the single factor that prevented their wants from being realized—the coercive power of the state.” Thus, for

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748 Id. at 129.
749 See R. Hursthouse, supra note 13, at 181-94 (critical of Thomson).
750 C. Condit, supra note 4, at 35-36, 76-77.
751 See id. at 76-77 n.25. Condit rejects the “feminist account, which attributes the entire contemporary controversy to desires to continue male control of procreation.” Id. at 74 n.5. This raises the issue of the origins and politics of the abortion reform/repeal movement in
them, the libertarian emphasis on choice was consistent with experience. As a result, however, the needs of other particular groups of women—especially the poor—were "pruned out" of the pro-choice discourse. This was not a function of ill will but of the interplay between language and power, combined with our culture's general inability to confront the question of class.

For many poor women, legalized birth control and abortion may mean coercive pressure to limit childbearing. Forced sterilization was reported in some areas of the United States, and even in

the pre-Roe years. While modern feminists may yearn for a "full, documented history . . . of the national and international involvement of the sixties women's movement in abortion reform in the decade that ended with Roe," the actual story, based on already available histories, is more complicated and heavily dependent on the role of male, as well as female, law and health professionals. Cohen, Comparison-Shopping in the Marketplace of Rights, 98 YALE L.J. 1235, 1242 n.24.

The modern American abortion reform movement began with the ALI's Model Penal Code reform, influenced by British jurist Glanville Williams, with subsequent and important support for reform/repeal coming from those concerned with population control and medical autonomy (for example, Alan Guttmacher and Robert Hall respectively) and the publicity of the Sherri Finkbine case in 1962. As the 1960s drew to a close, distinctively feminist voices began to join the others (remember that Ms. did not appear until 1972). See, e.g., D. CALLAHAN, supra note 13, at 448-83; F. GINSBURG, supra note 13, at 35-42; K.LUKER, supra note 13, at 73-113 (focusing on California); THE ABORTION QUESTION, supra note 13, at 94-104 (emphasizing legal rights).

Consider Luker's account of the California reform movement:

As we have seen, women as individuals were amply represented in the elite groups that supported the Beilenson [reform] bill; women who were lawyers, public health officials, and physicians argued forcefully and effectively that the 1872 law was oppressive and unfair. But two critical points about those women must be kept in mind. First, with very few exceptions, they were, like their male colleagues, professionals who had been trained in and were affiliated with elite institutions. Second, their arguments in favor of the bill were virtually indistinguishable from those of their male peers. . . . The language of a right to abortion, however, was not to be found in their claim.

. . . .

The emergence of women as a self-conscious interest group that claimed abortion as a right marked a new and fundamentally different stage in the abortion debate. Although its origins can be traced back to 1961, this interest group was only a nascent force when much of the debate on the Beilenson bill took place. Its full effect came only after 1967, in the period leading up to the Supreme Court decision of 1973.

K. LUKER, supra note 13, at 92-93. As Ginsburg points out, lobbying efforts that helped produce the legislative successes gained strength from the affiliation of diverse groups, such as the National Organization of Women (NOW) (1968), the AMA (1967), the American Civil Liberties Union (ACLU) (1969) and Planned Parenthood World Population (1969). F. GINSBURG, supra note 13, at, 37-38.

††† See supra note 692.
Canada. In Canada, where coercion was more subtle, Kathleen McDonnell reports that "less educated women were two to ten times more likely to be sterilized in conjunction with an abortion than educated women," with physician pressure being cited as a "probable factor." Moreover, while women usually seek abortions for a complex set of reasons, economic hardship is the most frequently proffered reason. Rarely is it the only reason, but it is often the "paramount factor, the one that tips the scales." Of course this is most true for low-income and single women.

The pro-choice movement has been sensitive to this fact, pointing out that illegal abortions are most likely to be either dangerous or unavailable to those without money. Yet the "choice" rhetoric only conceals the reality of no choice:

If poverty is the reason [a woman] is terminating the pregnancy, if in fact she wants the child but cannot afford to have it, she is actually being coerced into an abortion. She does not, in fact, have a choice at all. For many women, this is precisely their perception of the situation: they go to abortion counsellors saying that they "have no choice," they "have to" have an abortion.

In fact, even for those not facing extreme economic hardship, there are other social pressures that can give one the experience of having "no choice." Those pressures include an internalized feminist pressure to be successfully autonomous and independent, and, as pro-life advocates have argued with some force, male pressure for women to be sexually available without reproductive consequences. "Choice" contains its own coercions, in other words, which may be a necessary price to pay but should not go unnoticed. Ironically, it is the pervasiveness of the language of choice and freedom in our

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753 K. McDonnell, supra note 19, at 68-80 (discussing inherent coercions in the concept of "choice").
754 Id. at 71.
755 Id.
756 Id.
757 See id. at 71-80.
758 Id. at 60. For the "pro-life feminist" position that derives from this observation, see Callahan, Abortion and the Sexual Agenda, in The Ethics of Abortion, supra note 13, at 131, 140.
culture which makes a forthright examination of those coercions so legally and politically out of bounds. Because we so resolutely and uniformly process all of social reality, rhetorically, as being a function of private choice, from income distribution to purchasing behavior, to politics, to lifestyle, we seem unable even to think about the paradoxes of freedom's relation to coercion—one of those real post-Reformation dilemmas that, as d'Entreves warned his American audience at Notre Dame, were as yet unresolved.

Perhaps for that reason the current academic move away from the problematics of choice to the rhetoric of "reproductive freedom" rings hollow. How are we, morally, to understand the meaning of this freedom? When does freedom bring coercion, and when is coercion an instrument of freedom? Calvin, who thought deeply about that dilemma and cared about freedom with the intensity that comes of believing salvation itself to be on the line, was too given to mistaking coercion for freedom. At least, however, he recognized the paradox. It is easy to be confident of having left Calvin behind, only to find that Calvinist dilemmas tend to reappear.

In its starkest, but hardly unusual, form, our contemporary secular notion of freedom combines expectations of security or entitlement on the one hand, with unaccountability on the other. This vision is basically that of the spoiled suburban teenager who expects to be fed, clothed and otherwise taken care of, but becomes indignant at authoritarian interference with lifestyle choice.

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759 According to Patrick Collinson, "Luther and all subsequent Protestants" (including Calvin) understand the "gospel of Christ" as follows:

The key to this transaction was faith, defined as a total and trustful commitment of the self to God, and in itself not a human achievement but the pure gift of God. “Faith cometh by hearing and hearing by the word of God”: fides ex auditu. Thereafter the justified Christian man, in himself and of his own nature a sinner but not seen as a sinner by God, brings forth those good works which consist in the love of God and neighbour, not slavishly to win any reward but gladly, that service which is perfect freedom.


760 As reported by Lawrence Friedman, of Stanford Law School:

Contemporary individualism implies as large a menu of choices as possible for each human being; only in this way can people freely develop their selves, their personalities, their central core of being... Modern individualism is far from inconsistent with security; indeed, it thrives on security, it depends on security. ... The world of modern individualism ... presupposes, in the West, a certain
There is another kind of freedom, however, which would have been more familiar to Calvin,\textsuperscript{761} and is more familiar to contemporaries like Vaclav Havel.\textsuperscript{762} That version presupposes a relationship between freedom and responsibility; it is a freedom that understands both gratitude and obligation, not toward people but God.

The second version of freedom has obvious implications for the abortion debate, which is not to say, however, that the appropriate policy is equally obvious. The second version may not demand criminalization of abortions, but may offer a broader context for looking at the issue, even without certainty of outcome. Consider base of wealth and leisure, and, what is more, a basic floor of guarantees, entitlements, social services, and rights.

L. FRIEDMAN, THE REPUBLIC OF CHOICE 109 (1990). In fact, the entire Friedman volume is a celebration of this version of freedom, which is most aptly characterized by the word "choice."

\textsuperscript{761} See supra note 759.

\textsuperscript{762} According to Havel, in his speech to Congress, [T]he salvation of this human world lies nowhere else than in the human heart, in the human power to reflect, in human meekness and in human responsibility. . . .

. . . We are still incapable of understanding that the only genuine backbone of all our actions, if they are to be moral, is responsibility. Responsibility to something higher than my family, my country, my company, my success—responsibility to the order of being where all our actions are indelibly recorded and where and only where they will be properly judged.

\textit{TIME}, Mar. 5, 1990, at 14, 15 (publishing the text of Havel’s speech). He also has observed that,

We are going through a great departure from God which has no parallel in history. . . . I feel that this arrogant anthropocentrism of modern man, who is convinced he can know everything and bring everything under his control, is somewhere in the background of the present crisis. It seems to me that if the world is to change for the better it must start with a change in human consciousness, in the very humanness of modern man.

V. HAVEL, DISTURBING THE PEACE: A CONVERSATION WITH KAREL HVIZDALA 11 (Paul Wilson transl. 1990). See also id. at 181.

We find ourselves unpersuaded that Robin West's facile appropriation of Havel is anything other than a tactical ploy to shore up the same old liberal agenda (e.g., Ronald Dworkin, whom she cites approvingly). We think she is being less than faithful to Havel's context, which, as she concedes, was opposition to bureaucratic totalitarianism, and his content, which we think is as spiritual as it is secular, as the passages quoted above indicate. For West's rendition of Havel's notion of freedom and its application to abortion, see R. West, \textit{Foreword: Taking Freedom Seriously}, 104 HARV. L. REV. 43, 43-47, 63-85 (1990). Our reaction to West is similar to our critical reaction to those who were touting "republicanism" a year or two ago. See Mensch & Freeman, \textit{A Republican Agenda for Hobbesian America}, 41 U. Fla. L. REV. 581 (1989). On the other hand, we do think it is an advance to talk about freedom plus responsibility, if done sincerely, over freedom regarded as sheer unaccountability.
the views, for example, of noted Catholic moral theologian Richard McCormick, who wants to be both faithful to Catholic tradition and sensitive to contemporary conditions. In fact, he regards himself as occupying the "extreme middle."763

For McCormick, the abortion debate raises the "general problem for the Catholic community of moral pluralism and public policy," or, more specifically, "what is to be done at the policy level when people disagree on the moral level that is the basis of the policy?"764 He rejects the notion that there is no relation between law and morality, noting that in the heat of the American debate on the subject, "the very relationship between morality and law has been obscured."765 From his perspective, the proper concern of law is the welfare of the community, which "cannot be unrelated to what is judged promotive or destructive to human beings, to what is morally right or wrong."766

Thus, the mere fact that an act is "private" does not exempt it from law. On the other hand, to be feasible, "law must rest on a sufficiently broad shared conviction or on a very fundamental moral or constitutional principle that people are reluctant to deny."767

What do we do when we are faced with profound conflict, where there is not agreement on the basic underlying equation? Some have suggested that present policy is a reasonably adequate way of living with conflict (no one forces another to have an abortion; no one forces another to carry a pregnancy). However, that is a deceptively simple point of view. What represents a better way of living

763 R. MCCORMICK, HEALTH AND MEDICINE IN THE CATHOLIC TRADITION: TRADITION IN TRANSITION 3 (1985). In an earlier volume, McCormick offered an excellent review of the literature on abortion as a moral issue. See R. McCormick, How Brave A New World?—Dilemmas in Bioethics 117-75 (1981). Also instructive is his brief chapter, "Rules for Abortion Debate," id. at 176-88, which includes suggestions such as "Avoid the use of slogans," id. at 178, "Represent the opposing position accurately and fairly," id. at 179, "Admit doubts, difficulties, and weaknesses in one's own position," id. at 181, "Distinguish morality and public policy," and "Incorporate the woman's perspective, or women's perspectives." Id. at 186.

764 McCormick, Health and Medicine in the Catholic Tradition, supra note 763, at 135.

765 Id. at 136.

766 Id.

767 Id. at 137.
with conflict will depend to some extent on what one supports as the resolution of the conflict. For example, if I grant that the conflict makes prohibitive law impracticable, but I believe (as a moral position) that nascent life is human life deserving of protection and hope that others come to share this view, then I might think the Supreme Court's decision [Roe v. Wade] simply deepens the difficulty of arriving at a resolution since it allows free abortion in a way that further blunts our sensitivities to the sanctity of nascent life. Widespread abortion is, after all, self-perpetuating.


What is to be done? Any moral position, whether that of Vatican II or that of the Supreme Court, is going to be experienced as an imposition. ... Indeed, the Supreme Court ... should have remanded the matter to legislature. ... Conditions are such that any legal disposition of the question must be accompanied by hesitation and large doses of dissatisfaction. That means that it is the right and duty of conscientious citizens to continue to debate the matter, to attempt to persuade in the public forum.768

Only a thoroughgoing insistence on the secular version of freedom described earlier renders irrelevant, as a matter of public policy, the concerns of those like McCormick, who would at least have us confront our obligation toward life regarded as a gift from God. There is some irony in the claim of post-Enlightenment secular rationalism to resolve moral and political problems without recourse to outmoded appeals to theology. Kant, we are told, was ashamed once, when he was discovered praying.769 More to the point, as Alasdair MacIntyre has so effectively demonstrated, both historically and philosophically, the very notions of "freedom" and "equality" so central to Enlightenment moral and political thought were rooted in theology.770

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768 Id. at 137-38.
769 See D. BONHOEFFER, ETHICS 146 (1955). On the fundamentally Christian basis of Kant's moral philosophy, as well as his own confrontation with faith, see P. LEHMANN, supra note 270, at 128, 165-89.
770 See A. MACINTYRE, AFTER VIRTUE, supra note 1, at 34-72. For a similar account, see C.
Thus, even as they rejected medieval concepts like “teleology” or “hierarchy,” turning instead to modern notions like “passions” (Hume) or “reason” (Kant), the very same philosophers took for granted that the resultant substantive morality would reflect Calvinist (Hume) or Lutheran (Kant) values.\(^7\) John Stuart Mill, similarly, saw in utilitarianism the realization of assumed Christian values.\(^7\) We have inherited these post-Enlightenment structures of thought, which form the basis of our secular moral discourse.

Detached from their theological origins, however, our moral positions, even when articulated as such, appear as little more than masks for expressions of personal preference. We are so accustomed to thinking of the realization of “self-interest” as the basis of market economics, for example, that we can no longer understand the morally corrective notion of self-interest, “rightly-understood,”\(^7\) which might form the basis for “responsible” capitalism, as an antidote to our unabashed greed and consumerism.\(^7\) Similarly, our inherited assumption of “domination” of nature for the instrumental realization of human goals has lost its grounding in stewardship, humility and respect.\(^7\) So long as there is some public consensus, we can avoid these issues and pretend that our moral vocabulary is about “something.” As soon as consensus breaks down, however, as with both animals/nature and abortion, respective positions become incommensurable.

Peter Singer’s utilitarian analysis of the animal rights question, for example, assumes that the pleasure derived from cosmetics or from tender white veal meat cannot possibly outweigh the suffer-

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7 See A. MacIntyre, AFTER VIRTUE, supra note 1, at 51-60.
71 See id. at 63-66, 70-71.
72 See Kelly, Bayle’s Commonwealth of Atheists Revisited, in RELIGION, MORALITY AND THE LAW, supra note 14, at 78, 86.
73 For our own effort to talk about “responsible” capitalism, in the context of advertising and antitrust law, see Mensch & Freeman, Efficiency and Image: Advertising as an Antitrust Issue, 1990 DUKE L.J. 321; see also A. Etzioni, THE MORAL DIMENSION: TOWARD A NEW ECONOMICS (1988).
74 See supra note 619 and accompanying text.
ing incurred by the animals who are victims of their production.\footnote{See P. Singer, supra note 33, at 121-28.}

Hidden within that supposedly quantitative calculus is a (Christian) moral judgment about whether pleasures of vanity or gluttony should be allowed to outweigh the suffering of the innocent. One might likewise describe fetal suffering in abortion as minimal, since little or no pain is involved, unless one decided to count the cost of a lost potential life, which might be said to have incalculable value, as a gift from God. To speak of God is of course to return to the issue of appropriate public discourse.

V. AFTERWORD

We will not offer any programmatic solution to the abortion issue, for we doubt it is a problem that can be "solved." Perhaps, like other immediate issues of life and death, it must simply be confronted, which will lead to different solutions in different settings. Our goal has been more to explore the issue as one appropriate for moral debate and to question whether either side has the close-out resources (morally or politically) to compel an across-the-board solution in this culture at this time.

Abortion in particular, influenced by our prior thought about animals and nature, has led us to consider how our culture understands moral questions in general, especially those of life and death. What we discovered was an insistence on a peculiarly secular attitude, especially in elite institutional settings,\footnote{Another book with which we find ourselves in great agreement is C. Lasch, The True and Only Heaven, supra note 420. On the intellectual elite as "new class," and how its right- and left-wing members, despite their tendency to caricature each other, have more in common with one another than with the ostensible beneficiaries of their politics, see id. at 509-29. Their common outlook, in its idealized form, writes Lasch, is "an inordinate respect for educational credentials, a refusal to accept anything on faith, a commitment to free inquiry, a tendency to question authority, a belief in tolerance as the supreme political virtue." Id. at 527. The downside of this "critical temper" is that it can degenerate into a snobbish disdain for people who lack formal education and work with their hands, an unfounded confidence in the moral wisdom of experts, an equally unfounded prejudice against untutored common sense, a distrust of any expression of good intentions, a distrust of everything but science, an ingrained irreverence, a disposition (the natural outgrowth of irreverence and distrust) to see the world as something that exists only to gratify human desires.} with more traditional religious approaches relegated to the status of irra-
tional, supernatural or backward, despite the persistence and vitality of such traditions.

That insistence on and celebration of the secular is an instance of a venerable and recurring human folly—to universalize one's own physical or temporal moment, and then project its understanding across space, or time, accordingly: The spatial metaphor suggests how the interests of elite professionals can be universalized as those of all citizens, or all women, as with "choice," while ignoring the lived reality of those projected upon, especially their religious reality.

There is little novelty in observing that the relatively powerful, whether of the political left or right, will seek to present, and even experience, their particular agendas as universal norms. Such is the interplay of culture and power. More intriguing is the tendency to universalize one's moment in time, forgetting historical conditions of origin.

Just as Christianity, like it or not, is compelled by its origins to be engaged in a permanent dialogue with Judaism, and as Protestantism is similarly consigned to a never ending dialogue with Catholicism (the Reformation did not just happen, back then),

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776 The Jewish Bible is, after all, the Christian "Old Testament." The characteristically Christian injunction to "love your neighbor as yourself" appears first in the Torah, in Leviticus 19:17-18, 33-34. New England Calvinists, for example, identified themselves with the Israel of the Old Testament, and, accordingly, "as a people feel constituted by God's law." See C. Taylor, Sources of the Self, supra note 770, at 229-30.

Jewish/Christian similarity/difference becomes even more complicated when one seeks to understand the early Christianity, of, for example, the first century, A.D. The Sermon on the Mount, Matthew 5:3-7:27, which may be the oldest of Christian texts, is both a peculiarly Jewish Christian text, and a peculiarly Christian Jewish text. See generally H.D. Betz, Essays on the Sermon on the Mount (L.L. Welborn transl. 1985); see also Kermode, Matthew, in The Literary Guide to the Bible 387-401 (R. Alter & F. Kermode eds. 1990). On St. Paul as both Jew and Christian, see A. Segal, Paul the Convert: The Apostolate and Apostasy of Saul the Pharisee (1990). Perhaps, if the remaining Dead Sea Scrolls are ever released to the public, we will learn more about these complexities. See Who Controls the Scrolls?, Biblical Archeology Review, Mar.-Apr. 1991, at 52-60.

777 It was just a small shift in orthodox Augustinian theology that led the Reformers to understand "faith, defined as a total and trustful commitment of the self to God, and in itself not a human achievement but the pure gift of God." That small shift was, however, important enough to topple the entire institutional and theological structure of the Catholic system. See Collinson, The Late Medieval Church and its Reformation (1400-1600), in The Oxford Illustrated History of Christianity 233, 259 (J. McManners ed. 1990). On the closeness of Augustinian Catholicism to radical (Roger Williams) Protestantism, see G. Wills, Under God, supra note 340, at 349-50.

On the other hand, Rev. Richard Neuhaus, who as a Lutheran minister has been an avid
so also our secular culture, despite its pretentions, cannot outgrow its theological roots. When Dr. Hall, the abortion reformer/repealer, proclaimed that countries with stringent abortion laws have "buried their heads in the sands of time," he surely implied that fate for religion itself. Ironically, as of the onset of the 1990s, it seems that all three of the great "isms" of the twentieth century that sought to displace religion as the source of human meaning and possibility—Marxism, Freudianism and Existentialism—are rapidly fading blips on the screen of history.

The more durable adversary of religion in our culture has been science, which has often threatened, and in the twentieth century nearly succeeded in claiming the realm of truth for its own. Science itself, through which nature becomes more known, more manageable and more amenable to our wishes, is simply amoral and not in conflict with religion. In fact, when science proceeds provisionally, cognizant of doubt, in a spirit of humility and finitude, it is not only compatible with a religious sensibility, but may be regarded as part of shared enterprise.

ponent of "civic religion," see supra note 23, recently became a Catholic, having decided that Luther's goals have been achieved, and the Reformation should be over. See N.Y. Times, Sept. 9, 1990, § 1, at 26.

With respect to ethics and law, Paul Ramsey's Nine Modern Moralists, supra note 126, is an effort to prove that neither "Catholic" essentialism/natural law/absolutism nor "Protestant" faith/immediacy/particularity can effectively rule out the other, that both are two sides of the same ethical dilemma.

See Hall, Commentary, in Abortion and the Law 224, 234 (D. Smith ed. 1967). He expresses some incredulity, for example, that anything important might turn on "the meaning of a five-word phrase in the book of Exodus." Id. at 231.

In this retrospect, three works, dismissed at the time for their affront to orthodoxy, seem more prophetic in retrospect: E. Becker, The Denial of Death (1973) (cultural anthropologist criticizing orthodox Freudianism for its failure to understand religion and, consequently, death); J. Ellul, The Betrayal of the West (M.J. O'Connell transl. 1978) (French Protestant criticizing Western Marxism); F. H. Heinemann, Existentialism and the Modern Predicament (1958) (criticism "from within" with emphasis on religion and theology).

See also A. MacIntyre, After Virtue, supra note 1, at 103 (reminding us of our "vulnerability and fragility"). In a similar vein, see Ball, The City of Unger, 81 Nw. U.L. Rev. 625 (1987) (reviewing R. Unger, Politics (1987)), in which he suggests: that "the City of Unger has room, it seems to me, only for an elite that is both intellectually and politically athletic," id. at 641; that Unger's "self-transcending self travels deeper into its own space, losing contact with the limiting love of the neighbor and therefore with the possibility of transcendence," id. at 651; moreover, he chides Unger for trusting "in the ultimate harmony of being and goodness in human nature," and, consequently, leaving "out of account" what the "Bible calls sin." Id. at 661 & n.196 (quoting Unger, Knowledge and Politics 247 (1975).

Which Karl Barth understood as well as anyone. See supra notes 235-43 and accompa-
Science becomes wicked only when it becomes infused with pride, with the attitude that we can know everything and do anything. As Bonhoeffer noted in 1944, reflecting on our impulse to be "independent of nature":

Nature was formerly conquered by spiritual means, with us by technical organization of all kinds. Our immediate environment is not nature, as formerly, but organization. But with this protection from nature’s menace there arises a new one—through organization itself.

But the spiritual force is lacking. The question is: What protects us against the menace of organization? Man is again thrown back on himself. He has managed to deal with everything, only not with himself. He can insure against everything, only not against man.783

As Bonhoeffer wrote those words, he was confined in Tegel Prison

nying text. One of the most astute twentieth-century philosophers of science, Michael Polanyi, affirmed both the provisionality of knowledge and the significance of presuppositions, and, like Barth, saw the resemblance, rather than opposition, between theology and science. As Polanyi describes Christian religious faith:

The indwelling of the Christian worshipper [sic] is therefore a continued attempt at breaking out, at casting off the condition of man, even while humbly acknowledging its inescapability. Such indwelling is fulfilled most completely when it increases this effort to the utmost. It resembles not the dwelling within a great theory of which we enjoy the complete understanding... but the heuristic upsurge which strives to break through the accepted frameworks of thought, guided by the intimations of discoveries still beyond our horizon. Christian worship sustains, as it were, an eternal, never to be consummated hunch: a heuristic vision which is accepted for the sake of its unresolvable tension. It is like an obsession with a problem known to be insoluble, which yet follows, against reason, unservingly, the heuristic command: "Look at the unknown!" Christianity sedulously fosters, and in a sense permanently satisfies, man's craving for mental dissatisfaction by offering him the comfort of a crucified God.


For both science and religion, absolute truth is the illusion:

Objectivism has totally falsified our conception of truth, by exalting what we can know and prove, while covering up with ambiguous utterances all that we know and cannot prove, even though the latter knowledge underlies, and must ultimately set its seal to, all that we can prove. In trying to restrict our minds to the few things that are demonstrable, and therefore explicitly dubitable, it has overlooked the a-critical choices which determine the whole being of our minds and has rendered us incapable of acknowledging these vital choices.

Id. at 286. On "religious doubt," see id. at 279-86.

783 D. BONHOEFFER, LETTERS AND PAPERS FROM PRISON 208-09 (1953).
in Berlin, and subjected regularly to bombing raids by the Allied Forces seeking to destroy Hitler's Nazi Empire. The success of that military technology would help to create a faith in science, technology and expertise that would permeate the post-War culture of both the victors and the vanquished, but especially that of ours, which had lost lives but never experienced bombs. There is at least some tragic irony in the fact that, as we write, renewed faith in American technology has been occasioned by its capacity to kill and immobilize an enemy in war.

Despite the best efforts of enterprises like the Natural Law Forum, which tried to suggest that the legacy of World War II and the Nazis was a profound moral and spiritual agenda, its more lasting legacy was the triumph and extension of science. Issues traditionally regarded as moral ones could be recast as questions of “medical judgment,” or submitted to the expertise of “social science.” Profound dilemmas like that of sin, once thought basic to the human condition, could be recast as occasions for “therapy.”

The same culture produced a generation, of which we were a part, that had little use for humility, no knowledge of our own sinfulness (as opposed to that of our enemies, whoever they were) and no sense of restraint or limits. In retrospect, a number of appropriate responses to oppressive conditions led to a culture of unrestrained excess. Thus, the Supreme Court’s long-overdue interventions with respect to race and reapportionment set the stage for bypassing more cumbersome political process and instead relying on federal courts to implement the new moral and political agenda with wave after wave of new “rights.”

Similarly, our reaction to the oppressive conventionality of the 1950s, especially with respect to matters of sex, led us to reject any and all moral orthodoxy, in the name of “lifestyle freedom,” to the point of defying all reli-

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784 See E. BECKER, THE DENIAL OF DEATH, supra note 781, at 268-81; A. MACINTYRE, AFTER VIRTUE, supra note 1, at 73-78. One aspect of this enterprise, which may be regarded as another reaction to Nazis, was the invention of the category of the “authoritarian personality” to offer a “scientific” explanation for fascism. The concept was employed in turn to recharacterize the culture and fervent religious belief of lower middle-class people as a kind of psychopathology. See C. LASCH, THE TRUE AND ONLY HEAVEN, supra note 420, at 445-65. For recent employment of the same basic idea, see also LIFTON & STROZIER, WAITING FOR ARMAGEDDON, N.Y. Times, Aug. 12, 1990, § 7, at 1, 24-25 (offering their generalizations about “50 million Americans” who are “fundamentalist Christians”).

785 See C. LASCH, THE TRUE AND ONLY HEAVEN, supra note 420, at 37.
gious tradition in assuming we had a "right" to "happiness.\textsuperscript{776} And more to the point, a sensible effort to modernize repressive abortion laws became a claim of right to abortion on demand, with some 1.5 million abortions as the current annual norm in the United States.

In our pridefulness, we took on the transformative utopian fantasy, which is perhaps the undoing of all revolutions, that a select elite could through mere human agency transform the entire social/cultural world around it and discard all inconsistent tradition to the rubbish heap of history.

In that euphoric process, we surely forgot our finitude. Ernest Becker, anthropologist and critic of therapy as religion, posed this question back in 1973 (the year \textit{Roe v. Wade} was decided):

What do we mean by the lived truth of creation? We have to mean the world . . . as it would appear to creatures who assessed their true puniness in the face of the overwhelmingness and majesty of the universe . . . . What are we to make of a creation in which the routine activity is for organisms to be tearing others apart with teeth of all types—biting, grinding flesh, plant stalks, bones between molars, pushing the pulp greedily down the gullet with delight, incorporating its essence into one’s own organization, and then excreting with foul stench and gasses the residue. Everyone reaching out to incorporate others who are edible to him. . . . not to mention the daily dismemberment and slaughter in “natural” accidents of all types: an earthquake buries alive 70 thousand bodies in Peru, automobiles make a pyramid heap of over 50 thousand a year [back in 1973] in the U.S. alone, a tidal wave washes over a quarter of a million in the Indian Ocean. Creation is a nightmare spectacular taking place on a planet that has been soaked for hundreds of

\textsuperscript{776} Jonathan Edwards had a different view of the matter. He understood that it is difficult to reconcile the “expectation of worldly success and happiness, so often undone by events, with the idea of a just, loving, and all-powerful creator.” For Edwards, the reality was “a God who did not regard human happiness as the be-all and end-all of creation,” and the “central paradox of Christian faith” was “that the secret of happiness lay in renouncing the right to be happy.” See C. Lasch, \textit{The True and Only Heaven}, \textit{supra} note 420, at 248 (discussing Edwards). On Edwards, see \textit{id}. at 246-56. On “rights,” see A. \textit{MacIntyre}, \textit{After Virtue}, \textit{supra} note 1, at 68-70, 119.
millions of years in the blood of all its creatures. The soberest conclusion that we could make about what has actually been taking place on the planet for about three billion years is that it is being turned into a vast pit of fertilizer. But the sun distracts our attention, always baking the blood dry, making things grow over it, and with its warmth giving . . . hope . . . .

Such a depiction is congenial to a theological tradition that runs all the way from Jonathan Edwards to Dietrich Bonhoeffer, both of whom had absorbed the lessons of Enlightenment rationality and were prepared to deal in their respective ways with a world come of age. To be sure, God reveals Himself in nature, but on His terms, not ours. We tend to forget what God reminded Job with relentless interrogation—that we, after all, are not the authors of creation. In a fallen world, there is no particular basis for immediate optimism, nor is there occasion for despair. Perhaps, as Christopher Lasch suggests, the best we can do is to exchange optimism for hope, and recall our own limits.

And the limit that marks our finitude regularly and relentlessly is death. We can neither avoid death, as some pro-choicers would have us do, by renaming the fetus as tissue, or, as the meat industry does, with its cellophane packages backed with sponge-pads to absorb the animal’s blood; nor can we conquer death, as some prolifers would have us do, by simply compelling the birth of all the unborn, or as animal activists would do, by banning all hunting or mandating vegetarianism.

The starting point for a discussion about abortion ought to be the frank recognition that the issue is life or death. To abort a fetus is to kill, to prevent the realization of a human life. But to say that much is not to answer the moral question involved. We (Americans) have just completed a war in which we killed many thousands of people, some of whom were civilians, others of whom were exposed to danger against their will. That we choose to kill does not make it wrong on that score alone; but we surely need a

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787 E. Becker, The Denial of Death, supra note 781, at 282-83. Despite his criticisms of Freud, Becker does acknowledge, approvingly, the “somber pessimism” of Civilization and Its Discontents. See id. at 281.

788 See Job 38:42-8.

vocabulary for talking about life and death issues in moral terms that underscore the seriousness of any choice for death. Our experience with abortion, and, perhaps, with war, suggests that the lack of such a vocabulary will lead inevitably to excess. Religion has served for many hundreds of years to offer some hope in the face of despair, to offer life in the face of inevitable suffering and death. We discard those traditions at our peril.