

4-1-1988

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Recommended Citation

Smolin, David M. (1988) "The Judeo-Christian Tradition and Self-Censorship in Legal Discourse,"
University of Dayton Law Review. Vol. 13: No. 3, Article 2.
Available at: <https://ecommons.udayton.edu/udlr/vol13/iss3/2>

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Cover Page Footnote

The author wishes to thank Howard Bromberg, Michael Debow, Scott Houser, Jack Nelson, Desiree Smolin, Barry Vaughn, Howard Walthall, and George Wright for their review of and comments on drafts of this article. I also want to thank Jay Hinton, Rhonda Pitts, John Stemberger, and Stephen Strickland for their research assistance.

UNIVERSITY OF DAYTON LAW REVIEW

VOLUME 13

SPRING 1988

NUMBER 3

THE JUDEO-CHRISTIAN TRADITION AND SELF-CENSORSHIP IN LEGAL DISCOURSE

David M. Smolin*

I want to direct attention to . . . the peculiar division between academic and religious thought in our culture Our fears of religious oppression, and perhaps our fears of religious truth, lead us to maintain a false ideology. . . .¹

There is a presumption in some circles that the Judeo-Christian tradition is not an appropriate authority in legal discourse.² This view is best exemplified by those most aware of what we lose by such an exclusion. The late Professor Arthur Leff, for example, candidly stated that the death of God has destroyed any possibility of creating normative systems, including legal systems.³ Indeed, Professor Leff appears to have stated that even Hitler's regime cannot definitively be condemned without reference to God.⁴ The insight that the death of God is the

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1. White, *Response to Roger Cramton's Article*, 37 J. LEGAL EDUC. 533 (1987). While Professor White was directly addressing the role of religion in law school classroom discussions, I understand him also to be alluding to the wider concern of this article: the role of religion in legal discourse generally, including scholarly discourse.

2. The banishment of religion and theology from the academy in general, and the law school in particular, is acknowledged and to some degree bemoaned in a recent set of articles in the Journal of Legal Education. See Cramton, *Beyond the Ordinary Religion*, 37 J. LEGAL EDUC. 509, 516 (1987); Elkins, *Reflections on the Religion Called Legal Education*, 37 J. LEGAL EDUC. 522, 526-28 (1987); White, *supra* note 1.

3. Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1232.

4. *Id.* at 1249. Bernard Murchland, in his review of Alasdair MacIntyre's *After Virtue*, similarly notes that students in his course in ethical theory rarely are able to relate their emotional horror at Hitler's acts "to any recognizable ethical theory or tradition. In other words, they cannot give reasons for what they feel." Murchland, *Rediscovering Morality*, COMMONWEAL, Jan. 29, 1982, at 60 (discussing A. MACINTYRE, *AFTER VIRTUE* (1st ed. 1981)).

birth of moral relativism dates at least to Nietzsche.⁵ Of interest, however, is Leff's logic. Leff moves from the premise that God is undiscussable in a law journal article to the conclusion that humans are left alone to create law themselves.⁶ Refusing to discuss someone, of course, does not support a conclusion that he doesn't exist. Modern thinkers, however, often reason in this manner; they begin by assuming God's irrelevance and end by proclaiming, however sorrowfully, His death.⁷ Leff's lament is not atypical: Theoretically, the exclusion of God has eliminated the possibility of creating a normative legal system;⁸ practically, "[n]either reason, nor love, nor even terror, seems to have worked to make us 'good,' and worse than that, there is no reason why anything should."⁹ Leff's paper ends with the words "God help us."¹⁰ There is something strange about declaring God the only possible source of help, and then declaring even the possibility of His existence off limits for discussion. Just as ironical is Leff's only stated reason for rendering God, and His relation to law, undiscussable: that the question of "whether or not He exists and can ground [a legal or ethical system] . . . is not something that can be decided here."¹¹ Yet, if Leff is correct, *nothing* can be decided here—in a scholarly journal—except that nothing can be decided.¹² Yet our inability to definitively "decide" issues clearly hasn't stopped anyone from writing about them. What, then, is it about God that makes Him undiscussable?

This paper is an attempt to demonstrate the necessity and legitimacy of discussing God, and the Judeo-Christian tradition, in American legal discourse. This thesis runs against the grain of deeply held assumptions, as exemplified by Professor Leff's assumption that "obviously" such subjects cannot be settled, and hence discussed, "here."¹³ Our refusal to discuss God *here*—in the scholarly journals in particular, in legal discourse generally—separates us from much aid that He

5. See, e.g., F. NIETZSCHE, *THUS SPOKE ZARATHUSTRA* 6 (T. Common trans. 1933); W. JONES, *A HISTORY OF WESTERN PHILOSOPHY, KANT AND THE NINETEENTH CENTURY* 253 (2d ed. 1975).

6. Leff, *supra* note 3, at 1233, 1249.

7. Cf. A. BLOOM, *THE CLOSING OF THE AMERICAN MIND* 195-96 (1987). "Nietzsche replaces easygoing or self-satisfied atheism with agonized atheism, suffering its human consequences." *Id.* at 196. Professor Leff finds the death of God simultaneously joyous and sorrowful. "The result of that realization is what might be called an exhilarated vertigo, a simultaneous combination of an exultant 'We're free of God' and a despairing 'Oh God, we're free.'" Leff, *supra* note 3, at 1233.

8. Leff, *supra* note 3, at 1232-33.

9. *Id.* at 1249.

10. *Id.* at 1249.

11. *Id.* at 1232.

12. See *id.* at 1232-33, 1245-49.

might otherwise render us. More importantly, it tends to separate the operational legal system, which must decide profoundly troubling moral questions, from His aid. We begin by assuming that God is undiscussable in a scholarly journal, and end by making decisions profoundly touching people's lives without His aid, based on our *unexamined* conclusion that we are all we have. The assumption that we should exclude God from legal discourse, once examined, proves itself to be both irresponsible and false. Or such it is my task to demonstrate to what is no doubt an audience of doubting Thomases.

Part I of this paper examines at some length the proposition that a society without objective values is inherently tyrannical. This case has been made many times, often very eloquently, by others. Indeed, the lament of our inability to affirm objective values has become a virtual chorus.¹⁴ Nonetheless, the predominance of legal theories built on a relativist foundation suggests the need for a thorough-going demonstration that such theories are inherently flawed.

Many eloquent laments for our lost sense of values collapse when they move to the constructive task of identifying or creating those objective values which we as a society can and should affirm. Part II of this paper begins with an introductory section discussing the methodological problems associated with discourse between persons of disparate perspectives. This section addresses the question, intrinsic to my thesis, of how the theistic believer addresses the nonbeliever. Part II of the paper then seeks to demonstrate that American legal scholars who do not personally believe in God, or in the validity of substantive Judeo-Christian morality, are nonetheless required by their own standards to assume the authoritative nature of the Judeo-Christian tradition in American legal discourse. The format of this demonstration is an analysis of the Judeo-Christian and Enlightenment traditions in the context of American history and culture.

I. RELATIVISM AND TYRANNY

Some forty years ago C.S. Lewis wrote, "A dogmatic belief in objective value is necessary to the very idea of a rule which is not tyranny or an obedience which is not slavery."¹⁵ Variations of this thought can be found in the writings of current legal scholars.¹⁶ Yet, most modern

14. See, e.g., R. BELLAH, *THE BROKEN COVENANT* (1975); A. BLOOM, *supra* note 7, at 195-96; A. MACINTYRE, *AFTER VIRTUE* (2d ed. 1984); Christenson, *Uncertainty in Law and Its Negation: Reflections*, 54 U. CIN. L. REV. 347, 364 (1985).

15. C. LEWIS, *THE ABOLITION OF MAN* 46 (MacMillan ed. 1947).

16. R. UNGER, *PASSION* 47 (1984); Christenson, *supra* note 14, at 364. These writers state that the failure to agree to substantive content reduces the legal process of conflict-resolution to just another form of power struggle. The implication is that the winners of such conflicts will have

legal scholars have preferred to construct legal theories that avoid questions of objective values.¹⁷ These attempts to avoid substantive value judgments arise from skepticism regarding the supportability and plausibility of such truth-claims.¹⁸ Yet against this skepticism stands the accusation of Lewis, and others, that without such claims any political or legal system necessarily is tyrannical.

The inevitability of domination without objective values can be demonstrated as follows. Assume that values choices are mere personal preferences, and that there exist no criteria by which to judge the truthfulness or moral correctness of any such preference. Given such a relativist position, many nonetheless hold to autonomy and freedom as the ultimate values.¹⁹ Actions can then, at least, be judged wrong if

furthered their own interests by dominating the losers, an apparent form of tyranny. These writers, however, do not necessarily believe that such agreement necessitates an agreement to objective values; mere agreement is arguably all they require.

17. John Hart Ely's procedural theory of Constitutional interpretation, for example, ridicules the notion that fundamental values are discoverable, and thus seeks to develop a theory of judicial review which relies on the text of the Constitution interpreted in light of the court's role in protecting the political process. See J. ELY, *DEMOCRACY AND DISTRUST* 43-88 (1980). Dworkin's theories, sometimes viewed as representative of the natural law tradition, are perhaps based on his conviction that "political decisions, must be, so far as possible, independent of any particular conception of the good life, or of what gives value to life." R. DWORKIN, *A MATTER OF PRINCIPLE* 191 (1985). Arguments regarding who ought to have the authoritative voice in resolving conflicts which pose questions of objective value can and do arise among those who believe such values to be both discernible and available. Many modern legal scholars, however, appear to approach the issue from exactly the opposite perspective: they assume that objective values are non-existent, and then wonder who ought to be left with the authority to resolve value conflicts. The two time-honored responses, represented here by Ely and Dworkin, are the majority through their representatives (except where the people have previously defined a right or the political process has been hampered), and the individual. Believing value choices to be essentially irrational and subjective can therefore lend itself to any answer along the interpretivist-procedural-activist range of judicial review theorists, depending on whether one desires to locate the ultimate authority for values choices with either the individual or the majority's representatives. The latter choice can be argued, of course, on a purely utilitarian basis. Cf. Sunstein, Lochner's *Legacy*, 87 COLUM. L. REV. 873, 879-80, 903-06 (1987) (suggesting that a Holmesian judicial deference to democratic power politics is inconsistent with republicanism and overlooks the practical failings of majoritarianism). But certainly the position that the individual has the inalienable right to make values choices precisely because no standard exists by which such choices may be objectively judged stands natural rights theory on its head; it is based on a skepticism icy enough to support legal positivism. Indeed, such a theory in effect considers skepticism itself to be the overriding "natural law" position.

18. See, e.g., Sunstein, *supra* note 17, at 879-80, 904-05 (noting relation of skepticism, as exemplified by Justice Oliver Wendell Holmes' dissent in *Lochner v. New York*, 198 U.S. 45 (1905), to various modern theories of law); J. ELY, *supra* note 17, at 43-72 (ridiculing view that courts can discover fundamental values).

19. See, e.g., R. DWORKIN, *supra* note 17, at 191. Dworkin's principle that "political decisions must be, so far as is possible, independent of any particular conception of the good life," *id.*, effectively enthrones individual autonomy as the ultimate value. As a definition both of what it means for a government to treat its citizens as equals, and what it means for government to treat all its citizens as free, this principle of "neutrality" resolves the tension between equality and

they impermissibly interfere with the autonomy or freedom of others. Of course, the choice of autonomy as an ultimate value is itself arbitrary; a true relativist would have to admit that the preference for freedom and autonomy over tyranny and domination is itself an arbitrary preference. Nonetheless, it is a preference that most people appear to share. Positing autonomy as the ultimate value is very appealing, because it appears to permit one to argue that relations among persons can be ordered in regard to a preference that all or most of us share, without resort to other, more divisive, value choices. A political theory that can give us both freedom and productive, peaceful, ordered relations with others has obvious appeal. America, moreover, was founded on the belief that freedom is better than tyranny.²⁰

Your freedom ends, however, at another's nose. The key problem in constructing procedural theories of law is distinguishing between permissible and impermissible infringements of another's freedom. These theories attempt to regulate conflict between persons without regard to objective values. In order to do so, theorists construct and interpret what they perceive to be the procedural rules of the game. Political, economic, and personal relations are conceived as arenas in which the theorist can only define fair rules of competition, cooperation, and conflict.

We live in a world of scarcity. In the resolution of conflicting desires for scarce resources and services, as well as conflicting value preferences, the human condition dictates that there will be winners and losers. A theorist's procedural rules for determining winners and losers can be contrasted to the hypothetical condition of nature, where brute force is the only rule of law. The so-called natural condition clearly fails to maximize the over-all freedom of persons, because the constant state of war minimizes the production of wealth, which is the source of economic freedom, and minimizes security in one's person and life, which is the basis of all freedoms.²¹ The hypothetical condition of nature is, however, both relativist and procedural. It is relativist because it posits no particular value preference as objectively correct. It is procedural in that it contains a mechanism for resolving conflicts among persons: that of brute force. The condition of nature, however, is inimical to those who view freedom and autonomy as the ultimate value both because it fails as a system to maximize the freedom of persons, and because its mechanism of conflict-resolution is intrinsically

freedom and thereby enthrones a single principle—individual autonomy—as the ultimate value of liberal political morality. *See id.*

20. *See, e.g.,* The Declaration of Independence para. 2 (U.S. 1776).

21. *See, e.g.,* T. HOBBES, *LEVIATHAN* 104-09 (Bobbs-Merrill Co. ed. 1958) (1st ed. 1651).
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tyrannical. A system that resolves conflicts over values and goods through force places the principle of tyranny—brute force—over that of freedom.

The rules of the game, therefore, must both maximize freedom and provide a mechanism of conflict resolution which is not intrinsically inimical to freedom and autonomy. The second task, that of providing a mechanism of conflict resolution that is not inherently tyrannical, is apparently impossible without positing objective values in addition to freedom and autonomy. This fundamental point can be made by examining the position of the person or group who lose a particular conflict, whether it be a conflict over goods and services, or a conflict concerning value choices. Any such loss amounts to a loss of freedom; the individual's or group's will has been frustrated. A theorist must nevertheless be able to demonstrate to such losers that his or her methods or principles of conflict resolution are intrinsically compatible with freedom, and must be able to do so without regard to other values that might cast light on the substantive correctness of the results of the conflict. The method of conflict resolution must, to use a popular term, have legitimacy. The loser should be made to feel like the boxer who, upon being defeated, shakes hands with his opponent with the assurance that it was after all a fair fight, and the best man has won; if the loser believes that the referee has been bought off, the results of such conflict will clearly be illegitimate.

Some critics of procedural theories of law clearly believe that the referee has been bought off. They argue that legal rules are indeterminate, and that courts in applying such apparently neutral rules consciously or unconsciously make their decisions upon other, hidden, and thus illegitimate, bases: usually a favoritism of the rich and powerful, but for some theorists, equally illegitimately a favoritism of the poor and marginalized.

More fundamentally, however, modern theorists find domination intrinsic even to systems where the referee faithfully carries out the mandate of clear, determinate rules. This domination occurs because of the arbitrariness of choosing between different procedural or conflict-resolving rules, the choice of which impacts on likely winners and losers. Thus, a basketball league has the choice of crediting a team for either two or three points for shots made beyond the thirty-foot marker. Either rule is capable of being enforced in a determinate, neutral manner. The adoption of the three-point rule, however, clearly favors teams with players gifted at long shots, as opposed to teams not so fortunate. The choice between the rules requires an evaluation as to the most relevant criteria for evaluating basketball teams: for example, what should be the relative importance of long shot ability, as opposed, for example,

to a strong "inside" game of tall, strong short-shooters? We make the same kind of judgments as teachers when we determine the relative importance of rule memorization or analysis, and allocate examination points between stating the rule and applying it.

Procedural rules are not neutral in the sense that they determine the criteria by which substantive decisions will be made. The loser of a particular conflict can thus argue that, even though the referee determinately and neutrally has applied the rules, the rules themselves are inherently illegitimate and tyrannical because they favor those with characteristics not possessed by him or her. The defenders of the system are then forced to argue that the favored characteristics are appropriate. For example, it has been argued that certain tests used in educational and vocational settings favor those with a knowledge of standard written English and those with a knowledge of middle-class white culture, thus discriminating against poor, black persons. The losers, disappointed applicants to a police department, for example, are essentially claiming that those favored characteristics are not as important to the job of an officer as the test's framers believed them to be.²² However difficult such an issue may be, the framer of a general theory has an even greater task: to determine the relevant characteristics of human beings for the purpose of creating rules which will settle all conflicts over goods, services, values, and behavior.

America's primary set of political procedural rules can be summarized under the term representative democracy.²³ Americans, however, have recognized from the outset that tyranny can be accomplished through representative democracies, just as it can be accomplished through the rule of absolute despots. Thus, if our hypothetical basketball league is governed under democratic principles, and a majority of teams, through their representatives, vote for the three-point rule because they each lack tall players while enjoying an abundance of good outside shooters, then the minority of teams voting against the three point rule, who will likely suffer many defeats because of it, have suffered under the well-known tyranny of the majority.²⁴ America's "solution" to the problem of majoritarian political tyranny has included constitutional limitations protecting minorities against certain majoritarian

22. Cf. *Washington v. Davis*, 426 U.S. 229 (1976) (purposeful discrimination not shown by differential impact of written objective test on black applicants for employment as police officers). Even if the Supreme Court is correct in its application of the equal protection clause to this situation, the question of whether the test is fair, as opposed to whether it is constitutional, requires a demonstration that the test identifies characteristics relevant to employment as a police officer.

23. See, e.g., J. ELY, *supra* note 17, at 5.

24. Cf. *id.*, at 78; 1987

abuses of power. These constitutional provisions, many of which are inherently open-ended and ambiguous,²⁵ are given their authoritative interpretation by nine appointed individuals. Thus, America's solution of the problem of majoritarian tyranny opened the door to the tyranny of the minority over the majority, and of nine (or five) Supreme Court justices over the nation. These dangers, moreover, were perceived from the very beginning.²⁶ The reason this problem has not been solved is simply that it is insoluble. As Professor Ely notes, one cannot simply say that the majority rules but the majority does not rule.²⁷ Proposed solutions, like that of Professor Ely, offer guidance on when the majority will and will not win, but do not, and cannot, answer the charge of despotism from the losers of particular conflicts.

America's procedures for determining wealth production and distribution encompass both the so-called free market and our political processes. Our private economic processes, and our political processes, are symbiotically joined.²⁸ The markets could not function as they do without the frameworks established by the government: frameworks including the definition and punishment of theft, the maintenance of peace through non-violent methodologies for distributing political power and settling civil disputes, the provision of important infrastructures and services such as roads and fire departments, the regulation of industries and of markets themselves. America's complex economic and political system implicitly and effectively defines those human characteristics which will be determinative of wealth.

The degree to which, for example, human need and human productivity are the bases of wealth distribution presents the same sort of fundamental dilemma as whether the majority or minority governs. The substantive value of autonomy or freedom cannot determine whether productivity or need, in a given conflict, is more important, because that value, taken alone, is so vague as to be usable by any of the adversaries. Those who lack what they need can claim a loss of freedom, even if they are unproductive; those who receive less than they produce can claim a loss of freedom, even if they live in luxury and possess far more than others. Thus, without agreement on the relevant characteristics by which conflicts over goods, services, behavior

25. See, e.g., *id.* at 11-41.

26. See Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 902-13 (1985) (anti-federalists claimed proposed Constitution would produce the despotic rule of the federal judiciary).

27. J. ELY, *supra* note 17, at 7-8.

28. Cf. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927) (discussing relation of property and sovereignty); Sunstein, *supra* note 17, at 873 (arguing that *Lochner* defined neutrality by market ordering under the common law and exploring an alternative neutrality defined by

and values should be settled, the loser—whether in America, the Soviet Union, Sweden, or some hypothetical utopia—can always claim that the rules identified the wrong characteristics, and therefore that the enforcement of such rules, against his or her will, constituted an act of tyranny.

The standard response to this dilemma of choosing relevant characteristics without positing values other than freedom is to posit a system based on consent of all its members. The initial mechanism of consent provides a foundation for developing a set of rules that will subsequently resolve conflicts, and determine winners and losers. The reply to the loser is that his or her loss is not an act of tyranny or domination because he or she at some earlier time had freely consented to be bound by such rules. The present use of force to guarantee the winner his or her spoils is thus not an act of tyranny, but an act wholly consistent with the premise that freedom and autonomy are the only substantive values enthroned by the system.²⁹

The essential problem with systems of consent is that they are either hypothetical, in which case one can manipulate the position from which the consent was given, or else actual, in which case the consent is contaminated by the circumstances of its procurement. In any event, the original position from which the consent is procured can, like other procedural rules, be arbitrarily varied so as to produce different results. Thus, in John Rawls' original position persons must arrive at a consensus as to society's rules without knowing their individual characteristics. Persons must deal without knowing whether they will be mentally retarded or mentally gifted, mentally disturbed or mentally stable.³⁰ Richard Posner, on the other hand, specifically rejects Rawls' original position, stating that "[t]o treat the inventor and the idiot equally so far as their moral claim to command over valuable resources is concerned does not take the differences between persons seriously"³¹ Theories of consent thus become the ultimate procedural rules, and the original position from which consent is procured can be manipulated in conformity with the theorist's view of the relevant characteristics by which conflicts over goods, services, values, and behavior should be

29. For example, under the interpretivist theory of judicial review, a court striking down a statute answers the charge of being undemocratic by arguing that the people had consented to be bound by the Constitution. See J. ELY, *supra* note 17, at 8–9 (quoting Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 705 (1975)).

30. See J. RAWLS, *A THEORY OF JUSTICE* 136–37 (1971).

31. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 128 (1979). My comparison of Rawls and Posner as a means of demonstrating the arbitrariness of autonomy-based procedural theories follows Professor Leff's analysis. See Leff, *supra* note 3, at 1243–45.

settled.³²

Hypothetical theories of consent also suffer from the positing of a certain rational process by which all persons, according to the theorist, should make their decisions.³³ The imposition of this process of thought by the theorist on the human race as a whole is in itself a value imposition.

Theories of actual consent often possess elements of mythology and symbolism rendering them closely akin to theories of hypothetical consent. America's Declaration of Independence, for example, declares that governments derive their just powers from the consent of the governed.³⁴ Yet, as Professor Ely has noted, our fundamental political document, the Constitution, was ratified and made binding over all Americans despite substantial and fervent opposition.³⁵ More fundamentally, subsequent generations were bound, so that our system creates the tyranny of one generation over all subsequent generations.³⁶ The notion, then, that America has a social compact to which all have consented to be bound cannot be taken too literally.

To the degree, however, that theories rely on the actual positions of persons as the starting point for negotiations, the theories adopt a value judgment that such starting point is just. Thus, Posner rejects Rawls' hypothetical starting position in favor of one that includes the

32. Thus, it has been argued that Rawls' requirement that persons in the original position deal free from any moral convictions and commitments implies a particular, highly debatable conception of the person, or else a particular, highly debatable conception of the good; in either event, Rawls has failed to define principles of justice which are impartial as to differing moral and religious traditions. See Perry, *A Critique of the "Liberal" Political-Philosophical Project*, 28 WM. & MARY L. REV. 205, 206-19 (1987). I agree with this critique. Indeed, it would seem that a theory of justice which seeks to deal equally or neutrally between opposing religious, philosophical, and moral convictions is impossible simply because some of those traditions teach the necessity of not being neutral; by choosing the neutrality principle one has already chosen a substantive principle opposed by some of the traditions toward which one is supposed to act neutrally. See also A. MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 3-4 (1988).

33. See, e.g., J. RAWLS, *supra* note 30, at 137, 142-43, 153-56, 168-72 (persons in original position, bargaining behind the veil of ignorance, must bargain conservatively, and without regard to their conception of the good). For criticisms of Rawls' approach, see *supra* note 32.

34. The Declaration of Independence para. 2 (U.S. 1776).

35. J. ELY, *supra* note 17, at 6. Professor Ely notes that once the Constitution was ratified virtually everyone in America accepted it immediately as the document controlling his destiny. Why should that be? Those who had opposed ratification certainly hadn't agreed to such an arrangement. It's quite remarkable if you think about it, and the explanation has to be that they too accepted the legitimacy of the majority's verdict.

Id.

36. See *id.* at 11. In article V of the Constitution, the founding generation appropriated to itself the power to define the restrictive terms under which future generations would be permitted to amend America's fundamental compact. Seen in this light, this century's free and creative interpretation of the Constitutional text can be perceived as a successful coup by later generations

actual characteristics of persons as a relevant characteristic. Posner thus characterizes Rawls' philosophy as involving a redistribution of wealth that is an improper interference with the autonomy of individuals—referring apparently to the talented and strong individuals whom he views as naturally possessing property.³⁷ By adopting the actual wealth-producing characteristics of individuals as the original position (by which the original *distribution* of property is made), Posner effectively determines that wealth-producing characteristics, rather than need, are the relevant human characteristics. The choice between an actual and a hypothetical original position from which this preference of characteristics ensues, however, is itself a value-imposition. Put another way, persons who consent with a gun held to their head have not, by at least some moral accounts, truly consented. Nature has clearly put the gun to the head of, for example, the down syndrome child, and circumstances arguably have done the same for certain poor persons. The fact that the more fortunate can extract a consent to almost any terms from the less fortunate does not necessarily mean that tyranny and domination are not at work.

Theories of consent, moreover, are vulnerable to the uncertainties, psychological and philosophical, attendant to the very concept of consent. The value of a theory of consent is that it posits free acts, rather than forced acts, as the ultimate basis of conflict resolution. Yet many clearly believe persuasion to be merely the most insidious form of domination: that of one mind over another.³⁸ Thus, under one view a woman who "consents" to a traditional marriage has been persuaded, through her upbringing and culture, in such a way that her consciousness itself has been dominated and invaded. The internalization of values through the persuasive processes of compulsory education, socialization, and child-rearing make the very idea of a free consent problematic. The process of throwing off these internalized restraints raises the question of trying to separate one's supposedly true self from the entire history of other persons' attempts to influence us.³⁹ Once we succeed in remov-

37. See *supra* note 31.

38. MacIntyre describes how members of the Bloomsbury group used various forms of intimidation to win philosophical arguments. See A. MACINTYRE, *supra* note 14, at 17.

39. R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER & S. TIPTON, *HABITS OF THE HEART* 78 (1985) [hereinafter R. BELLAH]. Thus, leftist critical theorists seek to overcome "false consciousness." When you have overcome, do you reach true consciousness, or must all consciousness by definition be false? See Hutchinson & Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 229 n.132 (1984); see also *id.* at 213–30. Erich Fromm noted the problem as follows:

[A]uthority can appear as internal authority, under the name of duty, conscience, or superego . . . the development of modern thinking from Protestantism to Kant's philosophy can be characterized as the substitution of internalized authority for an external one.

ing these shackles (if such a thing is even possible), we must somehow "freely" respond to the clamor of conflicting voices that address us.⁴⁰ Arguably, anytime we "agree" with another human being, that person has, through force of will, personality, or intellect, dominated us.⁴¹ The task is made more complex by the equally clamorous, equally conflicting voices within. Without any ordering system we will soon find ourselves enslaved to this chaos. On another level, there are those who will tell us that we only have the illusion of making free choices, as we are, after all, merely a determined part of the great cause and effect machine.⁴² The free, autonomous self choosing in the void, uninhibited by either outside forces or a definitive self, may be an inaccurate description of who we are as human beings. Yet any other version of the self that we can construct is arguably incapable, in the full sense of the word, of truly consenting.

A completely free self anyway appears arbitrary and unattractive to many. Such a self must make decisions based on mere preferences, yet has no basis—even in itself—from which to prefer anything.⁴³

With the political victories of the rising middle class, external authority lost prestige and man's own conscience assumed the place which external authority once had held . . . the conquest of his natural inclinations, and the establishment of the domination of one part of the individual, his nature, by another, his reason, will or conscience, seemed to be the very essence of freedom. Analysis shows that conscience rules with a harshness as great as external authorities, and furthermore that frequently the contents of the orders issued by man's conscience are ultimately not governed by demands of the individual self but by social demands which have assumed the dignity of ethical norms. The rulership of conscience can be even harsher than that of external authorities, since the individual feels its orders to be his own; how can he rebel against himself?

E. FROMM, *ESCAPE FROM FREEDOM* 166–67 (1941). On the role of law in shaping private preferences, the ambiguity of the concept of autonomy, and the inadequacy of private preferences as the basis for social choice, see Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986).

40. Bob Dylan expressed one variation of this dilemma in the following lyrics:

You lose yourself, you reappear/ You suddenly find you have nothing to fear/ Alone you stand with nobody near/ When a trembling distant voice, unclear/ Startles your sleeping ears to hear/ That someone thinks/ They really found you. A question in your nerves is lit/ Yet you know there is no answer fit to satisfy/ Insure you not to quit/ To keep it in your mind and not forget/ That it is not he or she or them or it/ That you belong to.

B. DYLAN, *It's Alright Ma (I'm Only Bleeding)*, in *WRITINGS AND DRAWINGS* 172 (1973).

41. Cf. Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 211–13 (1979) (fundamental contradiction); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (individualism versus altruism); Gabel & Kennedy, *Roll over Beethoven*, 36 STAN L. REV. 1 (1984) (discussing repudiation of the fundamental contradiction and philosophical discourse; intersubjective zap as descriptive of a sudden experience of connectedness).

42. See, e.g., B. SKINNER, *BEYOND FREEDOM AND DIGNITY* (1971); cf. B. RUSSELL, *MYSTICISM AND LOGIC* 47 (1929) ("[Human] origin, . . . growth, . . . hopes and fears, . . . loves, and beliefs are but the outcome of accidental collocations of atoms . . ."), quoted in C. Becker, *THE HEAVENLY CITY OF THE EIGHTEENTH-CENTURY PHILOSOPHERS* 13–14 (1932).

43. Thus, Allen Bloom, speaking of University students, notes: "They can be anything they

Many prefer to view humans as having definitive, free selves, which become more of what they, in essence, really are even as they freely choose. This view posits the self as having substantive characteristics capable of maturation. A self chooses well, under this view, when it makes choices consonant with the needs of the substantive self to mature and grow. A society which maximizes freedom, under this view, is one that maximizes the best conditions for such growth to occur.⁴⁴ Such a society can then be justified under a consent theory because all selves that make choices based upon their best interests would consent to its rules.

Maturation theories of the self, however, are inherently problematic. First, although substantive theories of the human self, including theories of growth, have been posited, such theories in fact contain implicit value assumptions. To place one's value system into a theory of the self is an attempt to transpose value questions into fact questions.⁴⁵ The attempt may be admirable, but the descriptive evidence simply does not allow a choice of one such theory over another, apart from one's preferences for the values implied by each theory. C.G. Jung claims that individuation is the highest human activity,⁴⁶ while sociobiology posits the propagation and survival of our genes as our fundamental purpose or function.⁴⁷ Freud subscribes to the sexual and death

want to be, but they have no particular reason to want to be anything in particular." A. BLOOM, *supra* note 7, at 87. MacIntyre, who analyzes this view of the self in relation to Sartre's and Erving Goffman's work, notes: "This democratized self which has no necessary social content and no necessary social identity can then be anything, can assume any role or take any point of view, because it is in and for itself nothing." A. MACINTYRE, *supra* note 14, at 32; cf. 5 W. JONES, A. HISTORY OF WESTERN PHILOSOPHY 341-42, 351 (2d ed. 1975) (Sartre portrays the free, authentic self as having no reason to do one thing rather than another).

44. This sort of substantive view of the self, though partially obscured by equivocation and ambiguous terminology, is what underlies Unger's work. See Note, *Roberto Unger's Theory of Personality, Law, and Society: Critique and Proposal for a Revised Methodology*, 55 U. CIN. L. REV. 423 (1986) (authored by David M. Smolin, the present author).

45. MacIntyre rejects the fact-value distinction posited by this statement. See A. MACINTYRE, *supra* note 14, at 57-59, 83-84. MacIntyre is apparently correct that factual premises do yield value conclusions in the context of a teleological, functional description of human life. If we know the true nature and end of human beings, the chasm between factual and value statements is bridged. The distinction is appropriate, however, as MacIntyre would acknowledge, to a relativist mindset; it is used here as part of an illustration of the results of such a mindset for legal discourse. Theorists who ridicule the non-rational, non-empirical foundations of theistic moral systems often claim to derive their "morals" from the hard rock of data and logic. Such claims jump ahead of the available evidence; in this sense they disguise leaps of faith (answers to value questions) as discovered facts.

46. See, e.g., C. JUNG, *MEMORIES, DREAMS, REFLECTIONS* 196-97 (Vintage Books ed. 1965); C. JUNG, *The Relations Between the Ego and the Unconscious*, in *THE PORTABLE JUNG* 121-38 (J. Campbell ed. 1971).

47. See, e.g., J. BECKSTROM, *SOCIOBIOLOGY AND THE LAW* (1985); R. DAWKINS, *THE SELFISH GENE* (1976).

instincts,⁴⁸ Unger to self-assertion,⁴⁹ and Maslow to self-actualization,⁵⁰ as the primary or highest drives of human life. Until and unless we are blessed with the knowledge of what is truly best for each human self, our opinions in such areas amount to the imposition of our view of what is best for others, upon those others.⁵¹ Such knowledge, moreover, is unobtainable through natural means, because such means do not permit us to look beyond the grave. We cannot truly know what is good for human beings unless we are aware of their ultimate and eternal destinies, and the view that the grave is our only afterlife, so that life should be actualized only in terms of its potentialities for *this* life, is itself an unprovable unassumption not necessarily shared by,⁵² and not properly imposable upon, our fellow human beings.

The second reason that maturational, substantive theories of the self cannot be used to construct tyranny-free social systems is that they depend, as must other supposedly value-avoiding systems, on a maximization doctrine. Theorists of the self may attempt to construct a society that will maximize the growth or maturation of individual selves, just as theories based on autonomy as the only objective value may, as mentioned above, try to justify a particular scheme of procedural rules on the basis of freedom maximization. Thus, for example, wealth maximization, in the form of efficiency, is arguably a secondary goal derived from the primary goal of either human freedom or human growth. Wealth maximization has frequently been used to construct or support a set of procedural rules, i.e., the rules governing the "market-place." The problem with all theories of growth, freedom, or wealth maximization, however, whether based in self-psychology or law and economics, is that the theories require implicit or explicit choices between different freedoms, which in turn require just the sort of values

48. See, e.g., E. FROMM, *supra* note 39, at 182 (Freud's later theories considered sexual libido and death instinct as two basic human strivings).

49. See R. UNGER, *supra* note 16, at vii, 3-5, 20-22, 95-100; Note, *supra* note 44, at 427-31.

50. J. NASH, *DEVELOPMENTAL PSYCHOLOGY* 500-03 (1970) (citing A. MASLOW, *MOTIVATION AND PERSONALITY* (1954)).

51. Unger's proposal, for example, that society become more flexible is built upon his belief that the growth of faith, hope, and love depend on the loss and sacrifice of our "settled place in a settled world." His gamble is that destabilizing society and thus demanding loss and sacrifice of its members will produce more faith, hope, and love than disbelief, despair, and distrust. See Note, *supra* note 44, at 438-39 & n.86 (quoting R. UNGER, *supra* note 16, at 73). Because Unger has failed to demonstrate the truth of his premise about human nature, his proposal for society amounts to an imposition of his personal preference for personal and societal flexibility upon a largely unwilling populace. See generally Note, *supra* note 44.

52. See, e.g., GALLUP REPORT NO. 236, *RELIGION IN AMERICA, 50 YEARS: 1935-1985*, at 53-54 (1985) (seventy-one percent of Americans believe in an afterlife; seventy-one percent believe in heaven and fifty-three percent in hell).

choices the theories were designed to avoid. For example, let us assume that we possess the resources to either provide a single middle-aged man of great learning and aesthetic appreciation with goods, services, and leisure equal to his high capacity for enjoyment and appreciation, or else support twenty orphaned children with a nutritionally adequate diet and enough shelter and clothing to make it likely that they will grow into reasonably healthy adults. There is no doubt that taking away our gentleman's scenic views, fine foods and wines, and impressionist paintings could, on one view, sharply diminish his freedom, as well as his opportunities for growth. It may well be that what this gentleman is able to experience while, say, viewing his *Reniors*, or looking out at the sea from his beachside home, or using his leisure time to reread Goethe, or Shakespeare, represents achievements of the self far beyond those of which the rest of us are capable. Would a system that took away his servants, property, and leisure and put him to work to raise the essentials for our twenty orphans have, overall, lessened or increased either freedom or growth? The answer to this question, of course, requires one to place freedoms (or satisfactions) in a listing of priorities, to assign values to various activities within this hierarchy, and then to decide the relative priority of spreading out freedoms among people as compared to allowing a few to attain the highest levels of human growth and satisfaction. All three of these steps are fraught with the very value choices that a maximization theory is designed to avoid. There is certainly a view of human freedom available that suggests that a system that feeds the needy incapable of feeding themselves, by reducing the luxury of wealth-producers, has attained a greater overall level of freedom even if the G.N.P. of the nation has, through lowered incentives, been reduced. Freedom and growth, in other words, can be defined in a number of ways, and the ways we define them reflect value choices not inherent in the concepts themselves. Maximization theorists try to tell those who lose conflicts that the common good demanded this result; the easy reply is that any petty tyrant can make the same claim.⁵³

We have seen that Lewis, and others, are right: a system not based on objective values is inherently tyrannical, precisely because the lack of objective values means that the ruled—and in particular the ruled who lose conflicts concerning goods, services, behavior, and values—have in one way or another been dominated and defeated through the force and will of the rulers and winners. A system based on objective values, however, can say to the loser: It was right that you lost. I,

53. He who rules in the name of the common good, and is free to define that term, rules

the ruler, I, the winner, have not defeated you, but rather this true moral principle, which objectively rules us both, has determined that you shall lose this particular conflict.⁵⁴ If there are no objectively true moral principles, then conflict within a society is, as Alasdair MacIntyre has noted, in one form or another a civil war, or as Unger has noted, a brutal and amoral power struggle.⁵⁵ Only objectively true moral values truly allow there to be a form of government that is not in one way or another a form of tyranny.

II. THE JUDEO-CHRISTIAN TRADITION AND LEGAL DISCOURSE

A. *Introduction: On Discourse Between Persons of Disparate Views*

The problem of discourse between persons of disparate views emerges as the problems of presupposition and common ground. Presuppositions are those first premises from which all else is inferred or deduced. Discourse between persons of disparate views is often useful in revealing the disparate presuppositions which underlie other disputes. The question then becomes: how does one get beyond a simple and basic conflict in presuppositions? The answer is to search for some common ground: a principle neutral in the sense that all participants will accept it as a criterion of either the true, the good, or both. The hope is that argumentation from a shared premise will lead to agreement, either because the shared premise will come to be seen as a more fundamental presupposition than those premises that are not shared, or else because the discussion based on shared premises will somehow persuade one or both participants to modify their disparate presuppositions.

The argument in Part I of this paper proceeded by assuming that most readers would find common ground in the presupposition that tyranny is bad. The argument thus sought to demonstrate that relativism must also be bad. (That which produces evil is itself evil, is the inference.) Finally, objective values are introduced both as the opposite of the bad (relativism), and as, by logical demonstration, the only means of avoiding evil (tyranny). The inference, therefore, is that objective values are good.

54. See A. MACINTYRE, *supra* note 14, at 8-9.

55. See *id.* at 253; R. UNGER, *supra* note 16, at 47. Arguably, MacIntyre and Unger require mere moral consensus in a society to avoid the situations they describe and deplore. It is, moreover, entirely possible that a society could produce moral consensus without possessing objectively true moral values: either the society could hold its values to be objectively true, and be wrong, or the society could agree to affirm certain values on the basis of a shared sense of subjective preference. Ultimately, however, if the values themselves are not objectively true, tyranny has occurred; the losers (and the human condition dictates that there are always losers) will have been persuaded to "consent" on the basis of a falsehood, or at least without the benefit of the truth.

The relativist may make a number of replies. First, the relativist may state that a demonstration that objective values are good or useful fails to show that they exist or are true. Those relativists whose presuppositions include the nonexistence or nondiscoverability of objective values are apt to rephrase the problem of tyranny as follows: Given the lack of valid objective values, how do we resolve conflicts between persons of disparate values? The relativist is likely to argue that more evil (tyranny) will be produced by pretending that objective values exist, then by owning up to the truth that they don't. Second, some relativists may argue that objective values are not really a good, but are in fact an evil. This is true, the relativist might argue, because the agreed-upon evil, tyranny, has as its opposite the foundational good of individual autonomy. Individual autonomy is only possible, however, where there are no objective values; objective values are inherently limiting to the desire of the individual to create his own values. The common ground of the objectivists and the relativists, their purported joint distaste for tyranny, was therefore illusory, for the two define the term in fundamentally conflicting ways: The objectivist defines tyranny in opposition to the good of living under objectively valid values, while the relativist defines tyranny in opposition to the good of individual autonomy, which, as defined by at least some relativists, requires that there *not* be objectively valid values.

The objectivist may attempt to regain common ground by defining tyranny specifically in terms of the subjugation of one person by another. This definition of tyranny, however, only underscores the disparate assumptions regarding the existence of objective values: the objectivist assumes objective norms, and therefore holds certain losses by persons to be mandated by the objective norm, not by the arbitrary will of another person; those who assume that objective norms are not available must assume that all such attributions to objective norms disguise the imposition of one will upon another. The attempt to find common ground can therefore be labeled a failure.

The discussion in Part I nevertheless serves several useful functions. First, it demonstrates that the relativist is incapable, in the formal sense, at least, of constructing a legal system that avoids the tyranny of some persons interfering with the autonomy of others. The relativist who values individual autonomy thus must concede at least a measure of self-contradiction, and thus tragedy, in his system.⁵⁶ Second, this demonstration should encourage the badgered objectivist, who has been told by the relativist that his attempts to impose "his" values

56. Cf. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1358 (2d ed. 1988) (noting tragic nature of life and law in regard to resolution of abortion issue).
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on society through law constitute tyranny. The objectivist should know that, based on his own presuppositions, he furthers tyranny precisely when he abandons the attempt to make objective values the basis of the law. Indeed, the objectivist should know that his views offer the only real hope of a system that in principle (if not in actual practice) completely avoids the subjection of one person by the arbitrary will of another. The objectivist also learns that his rock-throwing opponent lives in a house with a good deal of glass, for the relativist legal system must, even by its own terms, fail to solve the problem of the subjugation of one person by another.

My argument is thus far dependent on the existence and discoverability of objectively valid or true norms. Unknown or nonexistent objective norms cannot serve the function of avoiding tyranny by resolving conflicts between persons. The defeat of individual autonomy through a principle that is widely embraced but not objectively true or valid can in formal terms constitute no more than the subjugation of the individual by the group: clearly a form of tyranny. Thus, if objectively valid and true norms and values are not discoverable, the argument in Part I is useless.

By necessity, then, I must go on to argue that objective norms exist and are discoverable. While it might be possible to argue the point in the abstract, this would serve little purpose: the bare fact that such norms exist and are discoverable are useless to us until we can point to those norms, or at least to the materials and methodology by which the norms will be ascertained. My task for Part II of this paper will thus be to demonstrate that the Judeo-Christian tradition constitutes the source materials for the discovery of objective norms.

Addressing myself first to fellow Christians, I can, based on the common presuppositions that Christianity is both good and true, urge that what is good and true should be accepted as the basis of American law. This is not as simple as it at first sounds, for many Christians have been persuaded by the relativists that no one set of norms, particularly religious-derived norms, should form the basis of our legal system, *even if they are in fact true and good*. Part I of this argument is therefore particularly relevant when I address Christians, because it demonstrates the necessity of basing the law on what is in fact actually true and good, and because it demonstrates that the relativist has not solved the problem of tyranny. Part II will be relevant to the Christian because it argues that relativism is not only tyrannical in principle, but that the use of relativism and individual autonomy as guiding principles of American law has produced, and is producing, real subjugation of actual persons in the specific context of twentieth-century American life.

The more difficult question, however, is how the believer addresses the nonbeliever. The nonbeliever by definition does not believe that Christianity is true; some nonbelievers may find part or even all of Christianity to be good, while others will believe it to be principally bad. The argument addressed to the non-Christian therefore must search for some common ground as a basis for arguing either that Christianity is true, or that Christianity is good, or both. The argument that Christianity is good, moreover, must take the specific form that it would produce good (defined in the nonbeliever's terms) to apply Christian norms in our legal system.

An attempt to demonstrate the truth of Christianity invokes a venerable discussion: the relation between reason and faith. If Christianity can be shown to be true based on a reasoning process that is common to believer and nonbeliever, then a method of discourse that will not be defeated by ultimately contrary presuppositions is open. If Christianity is based on irrational faith, however, then how can those with this faith ever address those without it?

Relying at this crucial juncture on the Reformed tradition of Christian doctrine and apologetics, I will argue as follows. First, reason cannot truly serve as a common ground between believer and nonbeliever, for much the same reason that a common concept of tyranny fails to serve as common ground: the term means different things to believer and nonbeliever, and thus does not truly constitute common ground. From the theist's perspective, reason centers around God; to the nonbeliever, reason centers around, in one fashion or another, the human mind. For the theist, God himself is the criterion of what is reasonable, just as God is the criterion of what is true; thus reason which denies God is by definition unreasonable. It would be illogical for the Christian to accept reason as a separate criterion of whether God exists, for then reason, rather than God Himself, would constitute the ultimate criterion of truth. Thus, even discourse that demonstrates that God probably exists is by definition illogical and unreasonable, for God himself is the criterion and author of all reason, making the mere possibility that He could *not* exist an illogical absurdity. What the nonbeliever asks for from the Christian is an admission that a specific methodology of thought—various reasoning processes that by definition are separate and independent of God—be accepted by the Christian as the ultimate arbiter of their dispute over whether God exists. For the Christian to accept this dare is to accept a criterion that by definition embraces the presupposition of the nonbeliever and specifically rejects his own presupposition. This amounts to intellectual suicide.

Reformed doctrine substantiates the above argument. Reformed doctrine acknowledges the revelation of God to man, in creation, man,

and scripture, to be clear and plain and thus admits to no rational doubt that God exists. The denial of God's existence, power, and goodness therefore derives not from the evidence, which is plain, but from the depraved nature of man. God's gift of faith is *not* a product of additional information given to the believer; instead, God gives believers a new nature capable of accepting that which He has already clearly revealed concerning Himself. God Himself, operating as the third person of the Trinity, the Spirit, testifies in the believer's heart to the truth of what God Himself has previously revealed in nature, man, and scripture. Thus, the ultimate criterion of truth for man is not man's reason, which in its depraved state is wont to deny and suppress knowledge of God, but God Himself, who testifies within the human heart to His own power and goodness.

The theist from this perspective cannot expect any criterion, such as reason, which by definition is autonomous and separate from God, to serve as a common ground between believer and nonbeliever. The theist testifies, through the power and will of God, to God; God is the beginning and end, and can admit of no criterion above or beyond Himself.⁵⁷

The theist therefore cannot expect to be able to demonstrate in the nonbeliever's terms and based upon the nonbeliever's presuppositions that the God revealed in scripture exists, for the ultimate criterion of the nonbeliever must by definition exclude and deny the existence and governance of this kind of God. The theist may, however, argue in terms borrowed from the nonbeliever for a separate purpose: demonstrating the destructive, self-contradictory nature of presuppositions that deny God. Thus, Part I of this paper sought to demonstrate, in formal terms, that a relativist legal system, which by definition denies God's existence and governance, and which tends to define as its chief good the maximization of human autonomy, must of necessity fail to solve the problem of safeguarding human autonomy from the subjugation of other autonomous persons.

57. The following works on Reformed doctrine and apologetics, which show remarkable substantive consistency over a period of some 450 years, are representative of some of the best works of this tradition, and are germane to the points raised in the text: J. CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION* 35-99, 241-348, 537-621 (J. McNeill ed.; F. Battles trans. 1960); J. EDWARDS, *A Treatise Concerning Religious Affections*, in 2 *THE WORKS OF JONATHAN EDWARDS* (J. Smith ed. 1959) [hereinafter *WORKS*]; J. EDWARDS, *Freedom of the Will*, in 1 *WORKS*, *supra* (P. Ramsey ed. 1957); J. EDWARDS, *Original Sin* in 3 *WORKS*, *supra* (C. Holbrook ed. 1970); J. FRAME, *THE DOCTRINE OF THE KNOWLEDGE OF GOD* (1987); C. VAN TIL, *THE DEFENSE OF THE FAITH* (3rd ed. 1967); *THE WESTMINSTER CONFESSION OF FAITH*, chs. I, VI, VIII, IX-X, *reprinted* in 3 P. SCHAFF, *THE CREEDS OF CHRISTENDOM* 600-73 (4th ed. 1884). *Romans* 1:18-32 is one of the most frequently noted scriptural passages concerning the plainness of God's revelation of Himself in nature, and the consequent responsibility of those who reject Him.

Part II of this argument will similarly argue that, in the context of American law, it is, in the nonbeliever's own terms, tyrannical and self-contradictory for those involved in legal discourse to censor discussion and use of the Judeo-Christian tradition. The argument concerning tyranny has essentially two components: First, given the historical and cultural centrality of the Judeo-Christian tradition and the supposedly democratic nature of our institutions, it is tyrannical for an elite group of intellectuals who hold disproportionate power to banish serious discussion and use of that tradition from legal discourse. Second, given the relativist foundation of most modern American legal discourse, it is inevitable that the tyranny that relativism in principle must produce (see Part I) would become actual. Thus, relativism, which by its nature cannot resolve competing claims among persons, and which in its most common current form considers individual autonomy to be the ultimate value, has in the very name of that autonomy already brought about crimes against humanity.

The argument for the self-contradictory nature of modern American discourse follows from the arguments concerning tyranny. Legal relativism claims to be more compatible with democracy and freedom than a norm-based legal system; yet legal relativism, both in principle and in actuality, has within its relatively short period of dominance as a mode of legal discourse produced at least two important acts of tyranny: First, the displacement in our legal system of the mode of thought dominant throughout our history with a mode of through dominant among a minority class of intellectuals; and second, the legalization of the killing of the unborn. A method of discourse designed to avoid tyranny that produces egregious acts of tyranny is self-contradictory. These tyrannic acts, moreover, are logical, predictable results of the relativist discourse, rather than mere aberrations. As such, they discredit the relativist legal enterprise.

The argument below, because it is made primarily in terms of the inadequacies of the present relativist legal mindset, will be largely contextual and utilitarian in nature. This is, as explained above, legitimate as a tool in demonstrating the destructive and self-contradictory nature of reason and practice that denies the existence and governance of God. It is not, of course, in the strict sense an argument *for* God; at most it demonstrates the need for, rather than the existence of, God, who is, as Professor Leff explained, the only really possible source of objective values. There is, as described above, really no direct way to demonstrate the existence of God to the nonbeliever, because there is no common ground upon which to mediate between the acceptance and denial of God. The believer must finally, in presenting the truth and goodness of God, always rely on God to testify concerning Himself; the argu-

ment for God, as opposed to the argument *against* Godlessness, can never be translated into terms amenable to the nonbeliever. The argument below, however, is useful not only in demonstrating the need for God, but also in addressing to the nonbelieving legal thinker the following question: Even if you do not believe in God, or in objective norms, are you not required, given your own contextual and utilitarian standards and your own distaste for tyranny, to engage in legal discourse that assumes the authoritative nature of the Judeo-Christian tradition in American legal discourse?

It may be useful before continuing to define in more specific fashion the legal relativist mindset, since such a mindset has been alleged to be both dangerous and dominant. The relationship of that mindset to the valuation of individual autonomy should also be evaluated. The legal relativist begins with the presupposition that objectively valid or true norms are either nonexistent or undiscoverable, and then proceeds to ask how, given this presupposition, a legal system should be constructed. Some legal relativists may take a similar, but seemingly absurd, position, arguing that although objectively valid or true norms do exist and are available, such norms should not be used as the basis of law because their use would be tyrannical in regard to those who do not—however foolishly—embrace those true norms. In either event, the governing principle, once objective norms are abandoned, becomes the promotion and protection of individual autonomy. In this sense, the relativist legal mindset is distinctly not relativist, because it so frequently posits individual autonomy as an ultimate good. Indeed, some modern legal thinkers begin, not with the rejection of norms, but with the embracing of individual autonomy, and thus consider themselves in some sense as within the natural law tradition. The consequence of embracing individual autonomy as the ultimate norm, however, is the rejection of the legitimacy of other norms that do not serve individual autonomy. Relativism and individual autonomy are thus, within the modern legal mindset, corollaries; each is derivative from the other, so it matters little which one is put forth as the initial premise. While it would be theoretically possible to hold to relativism without embracing the ultimate value of individual autonomy, this position at present is rare.

Formally, my definition of the relativist legal mindset includes all those who embrace either of these presuppositions, because either effectively denies the existence of objective norms beyond the individual self. In practice, the relativist mindset almost invariably includes both the denial of objective norms and the ultimacy of individual autonomy. Theologically, this is to be expected, for the ultimate position of the natural man since the fall is said to be a rejection of God, who is the source of objective norms and the stumbling block of man's claim to

individual autonomy.

To avoid a misunderstanding, it is important to add a warning: the acknowledgment of Christianity as true and good, and of God and His revelation as the source of objective norms, would not itself avoid the difficult question of which true and good norms ought to be enforced through the particular mechanism of state-enforced law. But the unaddressed question of methodology, of how to derive and address law from the materials of the Judeo-Christian tradition, must itself be recognized as a question to be answered from the materials themselves. Clearly, not all objectively valid norms derivable from scripture can or should be enforced through law. But the difficult questions pertaining to the enforcement of objective norms through law should be answered in terms of what the Judeo-Christian tradition itself says about the use, nature, and function of law; rather than by the imposition of some foreign methodology onto the materials. The methodology, in other words, is itself a part of the materials.

This paper will generally not attempt to describe the methodology found in the materials; that is work for another day. It is important, however, to state that theistically based legal theorists who elevate the value of individual autonomy to ultimacy have either distorted the Judeo-Christian tradition, or else have, while claiming to be relying on a Judeo-Christian foundation, employed an interpretive methodology foreign to that foundation. Indeed, if the Judeo-Christian tradition merely teaches the ultimacy for law of individual autonomy, then this article is useless, for then the tradition in validating the current method of legal discourse exhausts itself and becomes otherwise irrelevant. Given my contrary view that the proper use of the Judeo-Christian tradition in legal discourse would radically alter the current state of such discourse, the argument below acquires significance.

B. The Enlightenment and Judeo-Christian Traditions in American History and Culture

Commentators on American history and culture have commonly identified two traditions as predominant: The Biblical, or Judeo-Christian, and the Enlightenment, or philosophical.⁵⁸ While space does not permit a full account, a number of observations can be made.

58. See, e.g., H. MAY, *THE ENLIGHTENMENT IN AMERICA* xi-xii (1976) (ideas of Protestant Christianity and European Enlightenment comprise main clusters of ideas present in eighteenth century America). Robert Bellah and his associates discern three traditions predominate in American history and culture: the Biblical, Republican, and Individualist. See R. BELLAH, *supra* note 39, at 27-51. The latter two, I believe, are traditions identifiably descended from either the Biblical or the Republican, or the interplay between the two.

1. The Development of the Puritan Experiment: From Colonization to Nation

Many of America's first colonists, notably the Puritans of Massachusetts Bay, came to America for the specific purpose of constructing a society based on Christian principles.⁵⁹ Governor John Winthrop's famed sermon, "A Model of Christian Charity," composed en route to America in 1630, placed before the Massachusetts Bay colonists the terms of their corporate covenant with God, and their special role as a "City upon a Hill": an example to the world of the truly constructed Christian society.⁶⁰

The acceptance by the American people of the Revolutionary cause, more than one hundred forty years later, was predominantly a product of the religious consciousness of the people. Their acceptance of the Lockean principles declared in the Declaration of Independence, including the duty to resist tyranny, the notion of government by the consent of the governed, and the doctrine of inalienable rights, arose specifically out of the religious events of the intervening years between settlement and revolution. Perry Miller describes this phenomenon as follows:

[W]e do know that well before the Civil War began in England, Parliamentarians—and these include virtually all Puritans—had asserted that societies are founded upon covenant; that the forms of a particular society, even though dictated by utilitarian factors, are of divine ordination; that rulers who violate the agreed-upon forms are usurpers and so to be legitimately resisted. This complex of doctrine was transported bodily to early Virginia and most explicitly to Puritan New England. The turmoils of Massachusetts Bay—the expulsion of Roger Williams and Anne Hutchinson, the exile of Robert Child, the disciplining of the Hingham militia, and the first trials of the Quakers—whatever other issues were involved in them, were crises in the political creed . . .

The development of New England, however, steadily encouraged the citizens to deduce that they themselves, in framing the compact, had enumerated the items which made up the good . . . By the mid-eighteenth century, even in "semi-Presbyterial" Connecticut, good Christians were certain they could designate both the duties and the limitations of magistrates. In basically similar fashion, though not so easily traceable, the same transformation was wrought among the Protestant, or at least among the "Calvinistic," elements of all the communities. To put the matter bluntly, the agitation which resulted in the War for American

59. See, e.g., I S. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 187–99 (Image paperback ed. 1975); P. MILLER, *ERRAND INTO THE WILDERNESS* 1–15, 141–52 (1956).

60. See R. BELLAH, *supra* note 14, at 14–15 (quoting 2 WINTHROP PAPERS 294–95 (Mass.)).
<https://www.dayton.edu/udlr/vol13/iss3/2>

Independence commenced after an immense change had imperceptibly been wrought in the minds of the people. That they needed from 1765 to 1776 to realize this was not because they had, under stress, to acquire the doctrine from abroad, but because they did have to search their souls in order to discover what actually had happened within themselves.⁶¹

A more recent account of the development of New England Puritan political ideas can be found in Harry Stout's book, *The New England Soul*.⁶² Stout's work, designed as a history of the New England sermon from 1620 to 1776, effectively describes how the New England Puritans for one hundred fifty years maintained a continuity in their basic religious perspective while making the political transition from theocracy to mixed constitutionalism, and then from monarchy to republic. Stout disputes the claims of earlier scholars that colonial New England became secularized, blaming their error on the failure to distinguish between regular (Sunday) and occasional sermons and on the emphasis on printed occasional sermons to the virtual exclusion of regular sermon notes.⁶³ Occasional sermons generally were designed to address important events, such as wars, political conflicts, and natural calamities, within the religious, providential matrix of the federal covenant.⁶⁴ Regular Sunday preaching, however, maintained a consistent emphasis on a Calvinistic sin-salvation-service sequence, and thus on the "otherworldly" concern for the state of each individual's soul.⁶⁵ Both regular and occasional preaching was religiously centered; occasional sermons, however, were subject to a greater degree of change as each generation of ministers attempted to interpret the developing political situation in terms of New England's peculiar identity as a covenant people. Stout's introductory comments on the political development of New England thought in the context of this continued spirituality emphasizes the predominance of religious over secular themes:

The implications of enduring spirituality in the pulpit and pew are especially important for understanding the "meaning of America" as it unfolded in the Revolutionary era. By 1776, Congregational ministers in New England were delivering over two thousand discourses a week and publishing them at an unprecedented rate that outnumbered secular

61. P. MILLER, *NATURE'S NATION* 98 (1967).

62. H. STOUT, *THE NEW ENGLAND SOUL* (1986).

63. *See id.* at 6.

64. *See, e.g., id.* at 27-31.

65. *See id.* at 6, 32-47. Stout emphasizes the continuity of this sin-salvation-service sequence, and of basic, otherworldly, salvation preaching, throughout the five generations of colonial Puritan sermons. *See, e.g., id.* at 268-71 (salvation preaching continued on Sundays in fifth generation).

pamphlets (from all the colonies) by a ratio of more than four to one. Unlike most pamphlets, which were composed in private for a limited, informed audience of the educated elite, printed sermons originated in speech and more accurately express Revolutionary sentiments as they were heard by the main body of New England patriots. The more one reads these sermons the more one finds unsatisfactory the suggestion that ideas of secular "republicanism," "civil millennialism," or class-conscious "popular ideology" were the primary ideological triggers of radical resistance and violence in the Revolution. Such temporal concerns may have motivated other colonists, and they certainly engaged "Americans" after 1776, but they were not the ideological core around which the Revolution in New England revolved. In Revolutionary New England, ministers continued to monopolize public communications, and the terms they most often employed to justify resistance and to instill hope emanated from the Scriptures and from New England's enduring identity as an embattled people of the Word who were commissioned to uphold a sacred and exclusive covenant between themselves and God. The idea of a national covenant supplied the "liberties" New Englanders would die protecting, as well as the "conditions" that promised deliverance and victory over all enemies. It also provided the innermost impulsion toward radical thought and violent resistance to British "tyranny" in New England.

Covenant theology as it evolved over five generations of New World preaching comprised a view of history and corporate identity that could best be labeled "providential." In this view God entered into covenants with nations, as well as with individuals, and promised that he would uphold them by his providential might if they would acknowledge no other sovereign and observe the terms of obedience contained in his Word. Covenanted peoples like those of ancient Israel and New England were the hub around which sacred (i.e., real) history revolved. Such peoples might be ignored or reviled by the world and figure insignificantly in the great empires of profane history, but viewed through the sacred lens of providential history they were seen as God's special instruments entrusted with the task of preparing the way for messianic deliverance. As Israel witnessed to God's active involvement with nations in ancient times and brought forth the Christ, so New England's experience confirmed God's continuing involvement with nations that would persist until Christ's return to earth, when history itself would cease and be swallowed up in eternity. Within this historical covenant perspective, resistance to England was only secondarily about constitutional rights and political liberties. Ultimately, resistance became necessary the minute England declared the colonies' duty of "unlimited submission" in "all cases whatsoever" and, in so doing, set itself alongside God's Word as a competing sovereign. Such demands were "tyrannical" and left New Englanders no choice but to resist unto death or forfeit their identity as a covenant people. As explained from the pulpit, New Englanders' revolu-

tion was first and foremost a battle to preserve their historic identity and unique messianic destiny.⁶⁶

The modern tendency, despite the work of careful historians such as Ahlstrom, Miller, and Stout, is to caricature the Puritans as intolerant theocrats, while portraying the classical American themes of liberties and rights as essential secular, Enlightenment concerns. It may therefore be useful to summarize the New England Puritan journey from theocracy to republic.

The first generation's "New England Way" can be characterized as theocratic: God's word was considered sovereign over both church and civil government, and civil power was employed to enforce man's duty to God, as summarized in the first table of the Decalogue. Religious intolerance of heretics was thus considered a duty, and only church members could vote. On the other hand, Massachusetts Bay was governed by a bicameral system with a franchise wider than England's. The clergy, while possessed of tremendous influence through their virtual monopoly on public communications, nonetheless had less formal authority than that of any contemporary Western nation. The very concept of the New England theocracy, that God rules through His sovereign Word, implied to the Puritans that all human power must be limited, particularly in view of the tendency of the sinful human nature to seize power. The New England Puritans had, before emigrating to North America, witnessed Charles I's usurpation of power from Parliament. They were concerned from the beginning with the problem of avoiding tyranny.⁶⁷ The use of the term theocracy can thus blind us to the very real liberties that the New England Way provided for its people.

The New England Way was also characterized by the wide-spread adoption of the Cambridge Platform. Prepared by a New England ministerial synod, the Cambridge Platform addressed the then-raging English Puritan dispute between Presbyterianism and Independence and the analogous New England dispute between Presbyterians and Congregationalists by adopting a connectional Congregationalism. The

66. *Id.* at 6-7 (footnote omitted). For Stout's full account of the period from 1764 to 1776, see *id.* at 259-311.

67. See 1 S. AHLSTROM, *supra* note 59, at 196-97; H. STOUT, *supra* note 62, at 13-31. Ahlstrom, taking note of the representative tendencies of the original New England way, calls it "absurd" to label it a theocracy, while Stout consistently labels it as such. This discrepancy obviously arises from contrasting uses of the term theocracy. The term does not necessarily, as Stout uses it, imply a non-representational, authoritarian form of government. Indeed, Old Testament Israel, which must be a theocracy if anything is to be, itself possessed representational governmental tendencies of which later Puritans took careful note. See *infra* notes 81-82, 84 and accompa-

Cambridge Platform, while refusing to give church councils or synods coercive power, emphasized their advisory roles, and committed churches that adopted the Platform to the Calvinist position as expressed by the famous Westminster Assembly.⁶⁸

Finally, the founding generation of Puritans were marked by their use of covenantal theology. This use had many faces. Puritans would characteristically covenant with God and one another; God thus was specially related and involved not only with the individual believer, but also with the group. The type for these larger covenants, and especially for God's federal covenant with New England, was found in God's prior covenant with Israel as described in the Old Testament. New England's capacity to maintain its religious identity over the next one hundred fifty years was facilitated by each generation's capacity for finding relevant parallels to contemporary events and political views in the history of ancient Israel.⁶⁹

Thus, in 1630, as the first Massachusetts Bay colonists sailed to America, John Winthrop warned them with words taken from Moses' admonition to the Israelites as they prepared to enter the Promised Land.⁷⁰ Massachusetts Bay's founding generation left England at a time of great difficulties for Puritans; they came to the New World, however, not as separatists, as had the Pilgrims of Plymouth, but as nonconformists. They hoped that if they succeeded in their errand of establishing a pure Christian society, Europe—and especially England—would take note and follow their example. Their hopes were subsequently fueled by events in England: the eruption of the English Civil War, the execution of King Charles I, and establishment of the Puritan Commonwealth. England, however, failed to learn from New England's "City on a Hill." Cromwell and the victorious Independents adopted a policy of limited toleration; indeed, leading Independent divines criticized New England's policy of intolerance. The middle way between Presbyterianism and Independence represented by New England's Cambridge Platform had little influence in England, where the contending groups became increasingly fragmented. Puritan England proved unable to heal her divisions and establish a lasting government. Cromwell died in 1658, and monarchy was restored in 1660. New Eng-

68. See 1 S. AHLSTROM, *supra* note 59, at 204–06; H. STOUT, *supra* note 62, at 17–20, 50–53. American Puritans, defined to include Calvinistic Presbyterians, Congregationalists, and Baptists, persistently adhered to versions of the Calvinistic Westminster Creeds, with alterations made, as appropriate, on the sections concerning church polity and the role of the magistrate. See 1 S. AHLSTROM, *supra* note 59, at 177 n.5. Thus, Ahlstrom calls the Westminster Confession "by far the most influential doctrinal symbol in American Protestant history." *Id.* at 177.

69. See, e.g., H. STOUT, *supra* note 62, at 7–9, 17–18.

70. See R. BELLAH, *supra* note 14, at 15 (citing 2 WINTHROP PAPERS, *supra* note 60, at 199–200).
<https://monms.udayton.edu/udlr/vol13/iss3/2>

land's thriving Puritan Commonwealth thus became virtually irrelevant to the rest of the world. The original mission of New England as a light to the Old World, and especially to Old England, had thus to be re-oriented to a concern with the continuation of the covenant from generation to generation in the New World. New England could take comfort, however, from God's promise to outcast Zion to someday heal her wounds.⁷¹

Massachusetts Bay entered into a period of uncertainty when her charter was revoked in 1684. All of New England's colonies were incorporated into an administrative system governed by the crown and its representatives. Self-government was thus replaced by English royal government; the new government was charged with enforcing English law, including religious toleration. Theocracy ceased, in the sense that English law, rather than law based solely on the authority of God's Word, became effective in New England. Matters became worse when the tyrannical Sir Edmund Andros was appointed royal governor of the "Dominion of New England." Andros demanded the use of Boston's Old South Church to institute the first Anglican services in the Bay Colony, expropriated common lands in and around Boston for his own use, and suppressed civil liberties through crown-appointed vice-admiralty courts. In April 1688, unconfirmed reports reached Boston of Parliament's expulsion of James II from the English throne. Given this excuse, thousands from Boston and adjacent towns effected a revolution: they imprisoned Andros, abolished arbitrary government, and established "Committees for the Conservation of Peace" to preserve internal order. The interim government was orderly and effective; there was no violence or civil war. In May 1689, a special convention of town delegates voted to reestablish a representative government modeled on the old charter; unlike the old charter, however, all landowners and taxpayers could vote regardless of church membership.⁷²

New England's Glorious Revolution is an important prototype for the Revolution for Independence. It is, moreover, significant that, in defending their actions to England, the colonists chose to address their audience through discourses on English rights and liberties, rather than by reference to Congregational liberties or covenant theology. This use of the secularized language of English law and political philosophy would henceforth be standard in New England. It is therefore particularly important to realize that English liberties were conceived primarily in an instrumental sense as the liberty to preserve New England's

71. See S. AHLSTROM, *supra* note 59, at 134-36, 193-94, 205; H. STOUT, *supra* note 62, at 29, 50-64; P. MILLER, *supra* note 59, at 1-15.

72. See H. STOUT, *supra* note 62, at 111-16.

special covenant with God. The colonists learned to address England in England's own terms, as a way of obtaining the freedom they needed to pursue their covenantal duty to God. In time, the use of the secular English language of rights became familiar and, in a sense, internalized; it was not, however, understood in New England as representing an end in itself, but rather only a means of securing the freedom to pursue New England's peculiarly religious ends.⁷³

The linkage of English royal power and New England covenant identity became established when Increase Mather obtained a new royal charter in 1692. The republican interim government established by New England's Glorious Revolution was replaced. Massachusetts, expanded to include Plymouth and Maine, was given a crown-appointed royal governor and a popularly elected assembly that was empowered to pay the governor's salary and appoint his advisory board. The new charter guaranteed property rights, representative government, religious toleration, and a franchise based upon property rather than upon church membership. This government would last until 1774; the abolition of direct theocratic self-government was thus completed. Connecticut, however, was permitted to retain its original charter.⁷⁴

New England's identity as a special covenant people survived the abolition of the religiously coercive, theocratic state. The second and third generations of New England Puritans found that their Congregational Churches and Reformed Christian faith were able to thrive under the protection and freedom of the new royal charter. They concluded that the founders had been wrong to believe that the state must coercively destroy all other Protestant groups. The Congregational polity as defined by the Cambridge Platform, while laudable and appropriate for New England's well-trained laity, was not an essential: Reformed Presbyterian Christians, and even Reformed Baptists and Anglicans, were acknowledged as upright Christians. The role of the state was to enforce the moral law, uphold the rights of the people regarding life, liberty, property, and (Protestant) worship, and uphold and support the churches. Tyranny of the sort exemplified by Andros was to be avoided, for government under England's constitutional monarchy was still by compact, and the power of rulers was limited under the English constitutional order. The people of Massachusetts, moreover, enjoyed the power to elect the Governor's Council through their representatives; taxation without representation therefore would not occur.⁷⁵

73. See *id.* at 116–17, 121.

74. See *id.* at 117–18.

75. See *id.* at 118–22, 228–31, 366–72.

<https://ecommons.udayton.edu/udlr/vol13/iss3/2>

The second and third generation of New England Puritans believed that the exact form of church and civil government could properly vary; scripture established only certain broad patterns or principles. They continued, however, to believe that New England constituted a peculiar people in covenant relationship with God, and thus continued to look to the scriptures, and especially to Old Testament Israel, for their example. They found that the principles of constitutional monarchy had been established in Saul's and David's reigns over Israel, for those kings were presented for acceptance by the people before being anointed. Similarly, the present pattern of governor assisted by a representative council was analogized to the rule of Moses and Aaron assisted by a council of seventy elders selected from a larger group of elders who represented the various tribes. God, thus, ruled through godly leaders, rather than directly through His own voice. God's government of His people came to be identified with the principles that government should be contractual, limited, republican, and representative. So long as civil government performed its proper duties within its limited sphere, the work of the churches, upon which the continuation of the federal covenant depended, could continue.⁷⁶

The work of the churches did continue, and bore fruit during the fourth generation in a spiritual revival known as the Great Awakening. The Great Awakening is generally considered to begin or be prefigured in 1734, and to reach intercolonial significance in the early 1740s. The Great Awakening was a revival of Reformed, Calvinistic Christianity: the two most important figures, Jonathan Edwards and George Whitefield, both preached a thoroughgoing, experiential Calvinism.⁷⁷

The relationship of the Great Awakening to the American Revolution has been a matter of some controversy. In some respects, this controversy reflects the larger conflict concerning the respective importance of the Christian and Enlightenment motivations for the War for Independence. Within the present framework of explaining the historical development within colonial Christian America of republican, democratic ideals, several observations may be made.

First, the Great Awakening enhanced the authority, repute, and self-respect of the laity. Congregational polity, and to some extent nearly all Protestant church polity, tends to emphasize in varying degrees the authority and importance of the laity. In the context of New England Congregationalism, however, this tendency had been largely

76. See *id.* at 128–29, 166–74.

77. See, e.g., I. S. AHLSTROM, *supra* note 59, at 327–28, 346–402; A. HEIMERT, *RELIGION AND THE AMERICAN MIND, FROM THE GREAT AWAKENING TO THE REVOLUTION* 1–236 (1966); H. STOUT, *supra* note 62, at 185–211. See generally I. MURRAY, *JONATHAN EDWARDS* (1987).

latent. Ministers had persuasively established overwhelming authority through complete control of the most important medium, the sermon; through an emphasis on the University training and special mission of the ministry; and through the tradition of the jeremiad, whereby the ministers laid the responsibility for God's temporal punishments of New England upon the stiff-necked laity, who like ancient Israel ignored the many warnings of the prophets (ministers). In the Great Awakening, however, the people were given their own voice: lay people, even women, were encouraged to share their "testimonies"; untrained local men followed the example of the itinerant evangelist Whitefield and began to tour the land with their gospel message. Leaders of the movement, moreover, charged that the grievous spiritual condition of New England was primarily the fault not of the laity, but of the existence of large numbers of unconverted ministers. The ministers were generally divided into two groups: The "Old Lights," who opposed the Great Awakening, and the "New Lights," who supported it. Some New Light representatives, moreover, became so extreme that even leaders such as Jonathan Edwards were highly embarrassed by their excesses. The net affect of the criticisms of, and split among, the ministers, was to further elevate the laity at the expense of the embattled ministers.⁷⁸

Although the split in the ministry was healed relatively quickly (in part because of the need to unite for the war effort against France), the Great Awakening did leave a lasting legacy in the form of greater regard for the piety and authority of the laity. The elevation of the laity vis-a-vis the ministry arguably contributed to an atmosphere of greater assertiveness by the people toward their government. Having been told that they must defend the true Christian church upon occasion from particular ministers, the laity were no doubt most willing and zealous to defend their federal covenant with God when it was imperiled by English royal tyranny.⁷⁹

Second, the Great Awakening was conducive to a consciousness of American unity. The Great Awakening was *not* just a New England event; Whitefield and others preached in the middle and southern colonies as well as in New England. Thus, the entire, diverse nation-to-be was touched (to varying degrees) by the same message of revivalistic Reformed Christianity.⁸⁰ The intercolonial significance of the Great

78. See H. STOUT, *supra* note 62, at 185-218.

79. See *id.* at 211-38, 273-75, 285-87; A. HEIMERT, *supra* note 77, at vii-viii, 18-19. Alan Heimert concluded that, while those of a liberal (anti-Calvinist and/or anti-Awakening) religious view were generally politically and socially conservative, and only reluctantly became rebels, "Calvinism, and Edwards, provided pre-Revolutionary America with a radical, even democratic, social and political ideology" A. HEIMERT, *supra* note 77, at vii-viii.

80. See J. S. AHLSTROM, *supra* note 59, at 350; A. HEIMERT, *supra* note 77, at vii-viii,

Awakening is best seen in light of the Revolutionary rhetoric, which a generation later would in effect add the other nine colonies to God's covenant with New England.⁸¹ Americans were thus identified, at the very outset of our history as a separate nation, as a covenant people.⁸²

The Independence cause was thus presented to the people, by both their governmental bodies and their churches, through the matrix of the federal covenant. Thus, the Continental Congress, the various colonial bodies, and the clergy persistently called for days of public humiliation, fasting, and prayer, stating that God would award them victory over the British if the people would only repent and purify their ways. Thus, in the defeat of Britain, one could see New England's traditional formula of repentance before God combined with the active effort that confidence in God's providence inspired.⁸³

The Revolutionary rhetoric joined the themes of national sin and repentance with those of liberty and of Lockean duties and rights, and thus followed the tradition of speaking a double language of apparently secular liberties and covenant responsibilities. The secular language had changed: the English system of constitutional monarchy had proved inadequate to prevent tyranny and it was replaced with a variety of more radical ideologies. The focus of the federal covenant also changed. While the first two generations had focused on direct divine rule, and the third and fourth on constitutional monarchy under the Davidic dynasty, the Revolutionary generation concluded that Israel had been best governed by Judges, and had been brought to spiritual and political disarray by their demand that God give them a king. Thus, Israel's original form of government had been a "perfect repub-

12-14 (Awakening and Calvinism promoted American unity); H. STOUT, *supra* note 62, at 189-90.

81. See P. MILLER, *supra* note 61, at 92; H. STOUT, *supra* note 62, at 295-96, 301-02; A. HEIMERT, *supra* note 77, at 14.

82. Stout warns against "reading America as New England writ large," but also warns against "understat[ing] the importance of New England's religious culture to the evolving American Republic and, more particularly, the influence of Puritan rhetoric on the American identity." H. STOUT, *supra* note 62, at 9. Space does not permit me, in this context, the luxury of detailing the significance of the religious development of the other regions. It seems most appropriate to center on New England because the Puritan experiment, which was also carried on to some degree in other regions, was most concentrated there, and because the Puritan vision was in some sense adopted by the nation during the struggle for independence. Indeed, the Reformed doctrine of a federal covenant was well known in many of the other colonies. See P. MILLER, *supra* note 61, at 92. In addition, New England dominated intercolonial communications during the Revolutionary period; thus, while the New England view was everywhere heard, contrasting interpretations remained localized. See *id.*; H. STOUT, *supra* note 62, at 284. Finally, the Great Awakening was, as noted above, an intercolonial event. All of this suggests that the most important story to be told is that of Puritan New England, and the manner in which its vision of America was adopted and transformed.

83. See P. MILLER, *supra* note 61, at 90-108; H. STOUT, *supra* note 62, at 259-311.

lic," urged President Langdon of Harvard College in May 1775. New England had successfully governed itself for two generations before coming under the spiritually and politically corrosive rule of the English crown. Moreover, Connecticut, which had been allowed to retain its original charter, and thus had practiced self-government for five generations, had proven that self-government need not lead to anarchy. Even Thomas Paine's tremendously popular pamphlet, *Common Sense*,⁸⁴ recounted at length the story of Israel's "national delusion" in requesting a King, and thus argued that the Old Testament demonstrated God's displeasure with monarchical government. To a Protestant audience inclined to identify Roman Catholicism with the anti-Christ, Paine declared that "monarchy in every instance is the popery of government."⁸⁵ Paine, a deist who after the Revolution freely advertised his heretical views, managed to sound in some respects like a Congregational clergyman.⁸⁶ Indeed, Calvinist publications (quoting a 1773 election sermon) frequently condemned the view that public servants were not responsible to the public as "popery, either in religion or politics."⁸⁷

Miller's and Stout's work therefore demonstrates that Lockean ideas, as well as other apparently secular political concepts, were accepted and utilized because they coincided with the experience of the religiously motivated colonists in constructing and maintaining a Christian polity. The ease with which Puritan colonists could place such concepts within their Biblically based federal covenant should not be surprising. Modern scholarship, for example, indicates that Locke's political ideas were themselves derivative from theological and political concepts that had begun their development with the canonists of the twelfth century.⁸⁸ Locke's partially secularized political ideas and those of the colonists find their common root in Christian Europe's centuries-long struggle to order and define religious and secular authority.

From the vantage point of the colonists, apparently secular political concepts could be related to a much more ancient and eminent authority than the history of Christian Europe: that of the scriptures themselves. From a broad historical viewpoint, the colonists' perspective is justifiable: the American Revolution was the staging in the New World of the religious and political implications of the European Reformation, which emphasized as a movement the authority of scripture.

84. T. PAINE, *COMMON SENSE* (1776), reprinted in T. PAINE, *WRITINGS OF THOMAS PAINE* I (D. Wheeler ed. 1915) [hereinafter T. PAINE, *WRITINGS*].

85. T. PAINE, *WRITINGS*, *supra* note 84, at 19.

86. See H. STOUT, *supra* note 62, at 9, 259-311; P. MILLER, *supra* note 61, at 90-108.

87. A. HEIMERT, *supra* note 77, at 513.

88. See *supra* note 44.

One therefore cannot coherently discuss the Reformation, and colonial America, without reference to scripture, and the interpretation of scripture. In that context, it is easy to be cynical about the colonists' capacity to first embrace, then revile, monarchy. The colonists' perspective suggests another interpretation: God was teaching them, through events, and in His providence, to better understand the meaning of His desire that Israel not be like the other nations. The republican, and even the anti-monarchical, implications of scripture are, after all, by no means insubstantial.⁸⁹

In assessing the meaning of America, then, it is important to understand that America was at its outset a Protestant or Reformed Christian nation, rather than an Enlightenment nation; one has to journey to France to find an example of a contemporary revolution truly

89. The claim that the scriptures teach republican, anti-monarchical principles is too complex to be analyzed satisfactorily in the context of this article. The claim may appear implausible: Israel was ruled by monarchy for much of its history; the scriptures generally admonish obedience to political authority, including kings, see 1 *Peter* 2:13-17; *Romans* 13:1-7; and government by monarchy has been a commonplace for much of the history of the world. It may be helpful as a starting place for assessing this claim to quote at length from 1 *Samuel* 8, one of the key passages relied on by the anti-monarchical colonists. In analyzing this passage, one should be aware that it was considered virtually idolatrous, and certainly disobedient, for ancient Israel to be like the other nations. Indeed, God's command that Old Testament Israel not be like the other nations is a recurrent, dominant Old Testament theme. See, e.g., *Leviticus* 18:24-30.

1 *Samuel* 8 (New Int'l Version) states:

So all the elders of Israel gathered together and came to Samuel at Ramah. They said to him, "You are old, and your sons do not walk in your ways; now appoint a king to lead us, such as all the other nations have."

But when they said, "Give us a king to lead us," this displeased Samuel; so he prayed to the Lord. And the Lord told him: "Listen to all that the people are saying to you; it is not you they have rejected as their king, but me. As they have done from the day I brought them up out of Egypt until this day, forsaking me and serving other gods, so they are doing to you. Now listen to them; but warn them solemnly and let them know what the king who will reign over them will do."

Samuel told all the words of the Lord to the people who were asking him for a king. He said, "This is what the king who will reign over you will do: He will take your sons and make them serve with his chariots and horses, and they will run in front of his chariots. Some he will assign to be commanders of thousands and commanders of fifties, and others to plow his ground and reap his harvest, and still others to make weapons of war and equipment for his chariots. He will take your daughters to be perfumers and cooks and bakers. He will take the best of your fields and vineyards and olive groves, and give them to his attendants. He will take a tenth of your grain and of your vintage and give it to his officials and attendants. Your menservants and maidservants and the best of your cattle and donkeys he will take for his own use. He will take a tenth of your flocks, and you yourselves will become his slaves. When that day comes, you will cry out for relief from the king you have chosen, and the Lord will not answer you in that day.

But the people refused to listen to Samuel. "No!" they said. "We want a king over us. Then we will be like all the other nations, with a king to lead us and to go out before us and fight our battles."

When Samuel heard all that the people said, he repeated it before the Lord. The Lord answered, "Listen to them and give them a king."

dominated by the ideas of the philosophers. This is not to say that many of America's political leaders were not, in a broad sense, Deists. The people, however, were not motivated to fight by Deism, or rationalism; the people fought the Revolution for Protestant Christianity.⁹⁰ Rationalist political leaders therefore were inclined to use a kind of double language, referring to secular ideologies which could be supported either through the federal covenant or through rationalism, and referring to God without distinguishing carefully between a theistic or deistic God.

Thus, the Declaration of Independence, while clearly awash in Lockean concepts, found the people's entitlement to political independence based not only on nature but on "Nature's God." God was credited with the authorship of man's "unalienable rights" as part and parcel of his authorship of man. While this terminology can refer either to the deism of its author, Thomas Jefferson, or to the theism of Protestant Christianity, the final paragraph of the Declaration appeals "to the Supreme Judge of the World for the rectitude of our intentions," while similarly claiming "a firm reliance on the protection of divine Providence."⁹¹ Divine providence and judgment are characteristically theistic themes.⁹² Jefferson therefore was able to write in a way that largely satisfied both himself and his audience. Nevertheless, he found it prudent while President to refrain from publishing his compilation *The Philosophy of Jesus*⁹³ because its revelation of his heretical views would have been politically damaging.⁹⁴

2. The Nineteenth Century: The Trial and Restatement of the National Covenant in the Evangelical Era

While the seventeenth and eighteenth centuries were the time of the great Puritan experiment, the nineteenth century was the era of Evangelical America. The Puritan federal covenant became transformed into the millennial vision of Christian America. During this great era of optimistic evangelical faith, America's covenant with God was tested by the great Civil War. President Abraham Lincoln's restatement of the meaning of America in the midst of this great trial became a nationally normative interpretation of the transformed fed-

90. See, e.g., P. MILLER, *supra* note 61, at 103-04.

91. The Declaration of Independence, *supra* note 34, para. 32.

92. See, e.g., J. CALVIN, *supra* note 57, at 48 (those who deny God's providence and judgment shut him up idle in heaven and in effect deny his existence).

93. T. JEFFERSON, *THE PHILOSOPHY OF JESUS* (1804), reprinted in JEFFERSON'S EXTRACTS FROM THE GOSPELS 55 (D. Adams 1983) [hereinafter EXTRACTS].

94. See R. KIRK, *THE ROOTS OF AMERICAN ORDER* 342-43 (paperback ed. 1978). Kirk, like some others, calls Jefferson's first compilation, *The Philosophy of Jesus*, by the name of the second compilation, *The Life and Morals of Jesus*. See EXTRACTS, *supra* note 93, at 3.

eral covenant.

The mood among Christian leaders as the eighteenth century came to a close was one of increasing alarm. It had not taken long for the euphoria of victory to be replaced by the somber realization that independence had not obviated the need for spiritual repentance. The violence of the French Revolution was certainly a sober reminder that Enlightenment ideas in themselves cannot contain the dark passions of humans; the specter of humans sinking into unwashed depravity as the great West was settled by the white race was a further anxiety. The stage was thus set for renewed calls for Christian repentance and conversion and for the dramatic and important second Great Awakening.⁹⁵

The second Great Awakening, and the consequent nineteenth-century phenomenon of revivalistic, competitive, Protestant sectarianism, represent a gradual but definite modification of the spirit of the colonial-era first Great Awakening. Initially, the second Great Awakening was largely carried out under the auspices of ministers who were spiritual descendants of Jonathan Edward's intellectually vital and highly orthodox Calvinism. As the century went on, however, other approaches, often hostile to the strict Calvinist tradition, predominated. New England's tightly controlled Puritan establishments had been dominated by creeds such as the Westminster Confession and by a highly trained, learned ministry; a more mobile, more diverse population engaged in settling the West created a very different context of religious voluntarism and competition. Baptists and Methodists predominated, new sects formed and reformed, and the rigors of New England theology gave way to Armenian Wesleyanism, and to various simplified, highly emotional presentations of the gospel. Jonathan Edwards had labored against the rationalistic tendencies of his age on two fronts: he had sought to infuse Puritan New England with the spirit of revivalism and had restated the historic Puritan commitment to the Calvinist views of free will, original sin, human depravity, and irresistible grace. Edwards was thus anti-rationalistic in that he, in all things, depended *ultimately* on God's Spirit rather than on human reason, consent, or will: it was God's Spirit who brought revival, and engaged the human affections, and it was God's Spirit, working in the human heart, who could (according to traditional Calvinist doctrine) bring the depraved human heart to a saving faith. In the nineteenth century, however, a highly emotional revivalism joined forces with rationalistic doctrines that declared every person to have the power, apart from God's special grace, to accept salvation. Conversion became not so

95. See, e.g., G. MARSDEN, *THE EVANGELICAL MIND AND THE NEW SCHOOL PRESBYTERIANISM* (New Haven, 1964); P. MILLER, *supra* note 61, at 87-89, 105-20.

much a matter of the Holy Spirit converting the human heart, but of the persuasive powers of the preacher joining with the free will of his audience.⁹⁶

One can argue which doctrine—that of Edwards and Calvin or that of Wesley and Finney—had a greater democratic import. Edward's Calvinist revivalism emphasized that God's Spirit could visit anyone, regardless of class or level of education, and thus appeared more democratic than that of his contemporary opponents, who tended to embrace the spiritually hierarchical notion that the laity should silently and obediently follow their highly educated, and thus more spiritual, clergy.⁹⁷ The Wesleyan and Armenian revivalists of the nineteenth century, however, were certainly men of the people; they presented the gospel in forceful, easily understandable terms, and essentially told each person that it was up to him, rather than up to God, whether he would be eternally blessed or damned. Under the Wesleyan and Armenian revivalists, then, God "became" a democrat, for He allowed each individual a more or less equal chance to accept His offer of salvation.

Presbyterians and Congregationalists remained numerically and culturally very significant, and many Baptists remained largely Calvinist in their theological orientation. Calvinism—and particularly strict Calvinism—became, however, just one component of a broader vision of a Christian America. Christian America came to mean evangelical Protestant America: the term subsumed a spectrum of competing theologies whose proponents often managed, despite their fierce competitiveness, to find common ground in their confession of the Bible and in what one author described as "the great doctrines which are universally conceded by Protestants to be fundamental and necessary to salvation . . . the sum of which is 'repentance towards God,' and 'faith towards our Lord Jesus Christ . . .'"⁹⁸ The Evangelicals as a group were intensely active and reform-minded; they believed that Christianity could make individuals, and the nation, better and better. Evangelicalism became identified with a kind of millennial nationalism, as the evangelicals labored to bring about their dream of America as the apex of Christian civilization.⁹⁹

The abolitionist struggle, and the Civil War itself, occurred in the

96. See, e.g., 1 S. AHLSTROM, *supra* note 59, at 468–592; G. MARSDEN, *supra* note 95; I. MURRAY, *supra* note 77, at 445–66 (1987); *THE AMERICAN EVANGELICALS, 1800–1900* (W. McLoughlin ed. 1968) [hereinafter *THE AMERICAN EVANGELICALS*].

97. See H. STOUT, *supra* note 62, at 202–07.

98. R. BAIRD, *RELIGION IN AMERICA* (1844), *reprinted in part in THE AMERICAN EVANGELICALS*, *supra* note 96, at 29, 32, 37.

99. See, e.g., 1 S. AHLSTROM, *supra* note 59, at 468–592; G. MARSDEN, *supra* note 95; R. MURRAY, *supra* note 77, at 445–66 (1987); *THE AMERICAN EVANGELICALS*, *supra* note 96.

midst of the great Evangelical century, and thus must be viewed in that context.¹⁰⁰ The religious interpretation of the Civil War rose to nationally normative prominence in the words of Abraham Lincoln, often called America's greatest public theologian. Lincoln's famed words ring down to us precisely because he was able, at a time of national crisis, to resound and rejoin the themes of God's providence and religiously based Lockean freedoms.

Lincoln's religious premise, brought before the nation in his Second Inaugural Address and etched in granite at his memorial in Washington, posited that the Civil War was God's punishment of the entire nation—North and South—for the sin of slavery. The nation was still under covenant *as a nation* with God, who in His providence was judging it. Lincoln's Lockean premise was most beautifully phrased in the *Gettysburg Address*, memorized by generations of American schoolchildren, which asked whether a nation "dedicated to the proposition that all men are created equal . . . can long endure."¹⁰¹ Lincoln's Lockean premise was, moreover, solidly grounded in his religious premise: humans are "created equal" and "endowed with inalienable rights" specifically because God created them in His image.¹⁰²

Lincoln has been called "the spiritual center of American history."¹⁰³ The Revolutionary rhetoric had joined the notion of the colonists' covenant with God to that of a religiously based Lockean view of human rights and the polity. Lincoln is central because he, as America's leader in its greatest crisis, stated in word and deed that the Revolutionary rhetoric was not mere empty, self-serving verbiage, but rather was part of a pact with God, enforced by that almighty Governor and Judge. As a part of His plan to progressively realize the high ideals of the covenant, God was punishing his people for their continuing breach of the Lockean principles of that covenant. Lincoln is central because he pointed both backwards to the founding of the covenant, however marred by the compromise concerning slavery, and forward to the "new birth of freedom" and continuing progressive realization of our covenant ideals that would, with God's help, occur in the future.¹⁰⁴

100. See, e.g., 2 S. AHLSTRÖM, *supra* note 59, at 75–139 (discussing relationship of evangelical revivalism to humanitarian reformism; describing the responses of the churches, and Christian leaders, to slavery and the civil war).

101. A. LINCOLN, *ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS* 734 (R. Basler ed. 1946) (1971 reprint).

102. See W. WOLF, *LINCOLN'S RELIGION* 96–97 (1970); 7 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 17–23 (R. Basler ed. 1953); 8 *id.* at 332–33.

103. W. WOLF, *supra* note 102, at 153 (quoting Mead, *Abraham Lincoln's 'Last Best Hope of Earth': The American Dream of Destiny and Democracy*, *CHURCH HIST.*, Mar. 1954, at 3).
 Published by eCommons at 1987 describing Lincoln's view of the progressive realization of freedom).

Lincoln restated, and transformed, the Puritan and Evangelical theme of America as a redeemer nation, chosen by God to fulfill a special role in history. Lincoln identified America's sacred mission with the progressive realization of the principles contained in the Declaration of Independence, in particular the principles of equality and inalienable rights. Thus, in the *Gettysburg Address*, his primary concern was that the principles of liberty and equality embodied by the nation "shall not perish from the earth."¹⁰⁵ His December 1, 1862, message to Congress called the Union the "last best hope of earth."¹⁰⁶ In February 1861, Lincoln noted that the struggle for national independence had

held out a great promise to all the people of the world to all time to come I shall be most happy indeed if I shall be an humble instru-

Wolf's entire work is very helpful in analyzing the critical continuities between Lincoln's personal religious beliefs, and his historically-important political actions and statements. Wolf's work is also a very helpful analysis of Lincoln's public theology, which has been of such importance historically, and which can only be briefly described herein.

As Lincoln's personal religion has been a consistently controversial topic, both during Lincoln's life, and since, a brief summary of Wolf's conclusions may be appropriate.

Lincoln was raised in the context of revivalistic, highly sectarian and divisive, frontier religion. Much of his boyhood religious training occurred among Baptists who were probably Calvinist in orientation; they believed that God foreordained all events by divine decree. During his early manhood Lincoln became relatively rationalistic, and passed through a period of inner turmoil and doubt regarding his religious beliefs. He exhibited at the same time a pronounced tendency toward fatalism; he very likely attempted to state in secular philosophical language a version of the predestinarian doctrines he had learned as a child. Lincoln never joined a church, but he frequently attended, and came under the influence of several Old School Presbyterian ministers. He largely resolved his intellectual doubts prior to becoming President, and thus became intellectually convinced of the truth of the Christian religion. Lincoln remained, however, hostile to creedal formulations of the faith; his faith was centered on the scriptures, rather than on a church. His biblically-centered faith, moreover, was never completely orthodox; in particular, he maintained a belief (which he sought to prove by scripture) of universal salvation. This explains his refusal to join a church; he could not in good conscience have passed the creedal requirements of most contemporary churches, including in particular the churches he attended. His view of providence, that is, of God's governance of events, and of nations, was, however, apparently a spiritually-deepened version of the Calvinism he had been taught as a youth. Personal and national tragedy drove him, particularly during his presidential years, into a profound dependence on, and search for, the will of God. He became a man of prayer who, understanding God as the ruler of nations, strove as leader of a nation to be a humble instrument of God's will.

This interpretation of Lincoln's religious development appears more accurate than the charge that Lincoln was a nonbeliever who spoke to the people in religious terms merely as a means of motivating them. Nonetheless, even if the latter view is substantially correct, Lincoln's speeches can still be considered to represent the continuation of the covenantal view of American history; their plain meaning, which was, and continues to be, understandable to the American people, are surely of more significance than the hidden beliefs or motivations of Lincoln himself. Lincoln's speeches—in particular the Second Inaugural Address—belong to the people, for whom they were intended. Once the people have embraced them, it matters little whether they were spoken cynically or sincerely.

105. 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 102, at 21.

ment in the hands of the Almighty, and of this, his almost chosen people, for perpetuating the object of that great struggle.¹⁰⁷

The ambiguity of that famous phrase, "almost chosen people," might be said to evoke the conditional nature of the Puritan federal covenant, under which the colonists would continue as God's chosen people only if they remained faithful and obedient. However interpreted, this phrase, as well as Lincoln's many other statements, constitute central, well-known, and beloved statements of the meaning of America in the context of America's divinely appointed mission to the world.

3. The Secularization Thesis and the Twentieth Century

Lincoln confidently informed the American people that "it is the duty of nations as well as of men, to own their dependence upon the overruling power of God"¹⁰⁸ The words "under God," which are a part of our Pledge of Allegiance, are traceable to his spontaneous addition while delivering the Gettysburg Address; the motto, "In God We Trust," which appears on our coinage and is engraved on the walls of both houses of Congress, was first used in his administration; Thanksgiving was first established as a national holiday during his Presidency.¹⁰⁹ Yet the avalanche of material on our culture's secularization and pluralism could easily lead one to believe that Lincoln's religious premises are a part of American tradition the way that the flat earth theory is a part of Western tradition. Under such an analysis, the Judeo-Christian tradition would be useless to us in discerning the proper direction of the march of freedom. We have, the argument goes, cleansed that tradition of any particularistic moral or theistic notions that would have aided us, leaving only the indeterminate conceptualisms, such as freedom and equality.

One response to this theory is to note that one of the most successful¹¹⁰ reform movements of this century, the civil rights movement, was sustained by the Lincolnian premise, including, most emphatically, Lincoln's religious premises. The rhetoric and thought of Dr. Martin Luther King, Jr. were awash in Christian premises and imagery, as well

107. 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 102, at 236.

108. W. WOLF, *supra* note 101, at 162.

109. See E. TRUEBLOOD, ABRAHAM LINCOLN: THEOLOGIAN OF AMERICAN ANGUISH 6-7 (1973).

110. The civil rights movement was successful in replacing generations of *de jure* racial segregation with the principle of equal treatment before the law, and even affirmative action. The changes achieved in social practice were profound, and have apparently achieved normative status even in those parts of the country where the greatest resistance was encountered. On the other hand, the movement was unsuccessful in addressing economic issues, or in preventing a situation where a disproportionate percentage of black Americans are a part of a socially immobile underclass.

as in the specific imagery of the Civil War. To Dr. King and many of his followers, the words of the *Battle Hymn of the Republic* were just as applicable as when they were written some hundred years before.

A response to the secularization thesis, however, requires at least a brief treatment of both twentieth-century American religious history and modern sociological reports. Protestantism, in its Reformed, Puritan, and Evangelical forms, was culturally dominant in America from colonization through the greater part of the nineteenth century. The critical confrontation between Evangelical Protestantism and modernism can be approximately placed in the period from 1870 to 1930. The clash produced the Fundamentalist-Modernist split within American Protestantism.¹¹¹ The Fundamentalists were clearly defeated in the sense that liberal Protestantism became "mainline" Protestantism: the primary representative of the faith, both among elites and apparently among the mass of laity as well. The proper interpretation of this split clearly depends on perspective: in one writer's view, this period is labeled one of religious awakening;¹¹² from another perspective, the triumph of accommodationist Protestantism is a defeat for historic orthodoxy and a sell-out to secularizers.¹¹³ From either perspective, however, a fundamental shift has occurred.

Some argue that the mainline churches were successful, until about 1960, in carrying forward the vision of Christian America as a people in special covenant with God and an example before the world of Christian civilization. Events were, after all, cooperative: we emerged through the World Wars as the world's most powerful defender of Democracy, having defeated the Fascists and generously assisted in the rebuilding of Europe and Japan.¹¹⁴ The civil rights movement was a product of the black churches, with some support from liberal Protestants, Jews, and Catholics; white conservative Protestantism, on the whole, was either silent or critical. Confidence in the ruling trinity of America, Democratic Civilization, and Christianity¹¹⁵ was high, and the mainline churches were their primary representatives in

111. See, e.g., G. MARSDEN, *FUNDAMENTALISM AND AMERICAN CULTURE* (1980); J. HUNTER, *AMERICAN EVANGELICALISM* 27-34 (1983).

112. See R. NEUHAUS, *THE NAKED PUBLIC SQUARE* 215-16 (1984) (citing W. McLOUGHLIN, *REVIVALS, AWAKENINGS, AND REFORM* 152, 156, 157 (1978)).

113. See, e.g., *id.* at 215-16.

114. Cf. *id.* at 208-09 (quoting W. McLOUGHLIN, *supra* note 112, at 106); M. MARTY, *RIGHTEOUS EMPIRE* 255-60 (1970). Some commentators state that by the 1950s, American Catholicism and American Judaism had become mainline: to be American was to be either Protestant, Catholic, or Jewish. See, e.g., W. ROOF & W. MCKINNEY, *AMERICAN MAINLINE RELIGION* 14 (1987) (quoting W. HERBERG, *PROTESTANT-CATHOLIC-JEW* 56 (1960)).

115. Robert Handy analyzes the earlier development of this "trinity" in depth in R. HANDY, *Separation of Church and State* (1957). In R. NEUHAUS, *supra* note 112, at 208-12.

the religious community.

Whatever the success of mainline Protestantism earlier in this century, recent decades have seen its apparent demise, religiously and culturally, as the bearer of the American vision. This decline has a number of elements. Mainline Protestant churches have suffered from declining membership while conservative Protestant churches have grown.¹¹⁶ Moreover, becoming increasingly alienated from the laity, the institutional leadership of mainline Protestant churches apparently have placed virtually their entire moral capital behind the secular agenda of left-wing political groups, while paying little attention to the specifically religious beliefs and needs of their memberships. The mainline churches have become followers of secular causes whose leaders believe religion to be irrelevant.¹¹⁷ In the meantime, conservative Protestantism has reorganized and reasserted itself as the current Evangelical movement.¹¹⁸ Similarly, Roman Catholicism has, over time, come to numerical and cultural prominence in what was once a Protestant America. Evangelical Protestantism and Roman Catholicism have thus emerged as the primary bearers of America's religious life.¹¹⁹

Whatever the changes in American religious life, it is clear that Americans as a whole remain highly theistic in their beliefs. George Gallup, for example, reports the following in his 1985 Report on religion in America: Sixty-six percent believe in a personal God who watches over and judges people, seventy-one percent believe in life after death, seventy-one percent believe in heaven and fifty-three percent believe in hell, seventy-five percent believe that Jesus is God, fifty-six percent say religion is very important in their life, sixty-eight percent claim membership in a church or synagogue, forty percent attend church in a typical week, and forty percent claim a Christian born-

116. See GALLUP REPORT NO. 236, *supra* note 52, at 11, 27; W. ROOF & W. MCKINNEY, *supra* note 114, at 85-94, 231, 233-34.

117. See R. NEUHAUS, *supra* note 112, at 231-47.

118. See J. HUNTER, *supra* note 111, at 41-48. The current Evangelical movement has largely incorporated both the evangelical and fundamentalist groups within conservative American Protestantism. See *id.*; cf. H. COX, RELIGION IN THE SECULAR CITY 44-47 (1984) (describing differences and similarities between fundamentalism and evangelicalism).

119. See GALLUP REPORT NO. 236, *supra* note 52, at 11-12, 27-28 (1985); W. ROOF & W. MCKINNEY, *supra* note 114, at 148-85, 229-44; cf. H. COX, *supra* note 118 (examining anti-modernist movements and theologies, including fundamentalism, liberation theology, base communities, and traditional Catholicism as sources for emerging post-modern theology; declaring that the great era of modern theology is drawing to a close).

Judaism, a part of the Protestant-Catholic-Jewish mainline of the 1950s, see *supra* note 114, yet "always a minority religious tradition in the United States," faces "severe demographic challenges," although it appears likely to retain "considerable social and religious significance." See W. ROOF & W. MCKINNEY, *supra* note 114, at 232.

again experience.¹²⁰

If the American people are still vibrantly theistic, then why does Lincoln's notion of America in covenant with the Living Ruler of all creation seem to many quaint or illegitimate—hardly the awesome message of real-world Judgment displayed, for example, in Lincoln's Second Inaugural Address? Such a question may require a complex answer. Perhaps the simplest component, however, is that there is a cultural gap in America between the academy, including the law school, and the people.¹²¹ Paul in the first letter to the church at Corinth noted that "not many of you were wise by human standards."¹²² While the church has never been without its intellectually gifted apologists and theologians, it appears evident that a disproportionate percentage of our culture's intellectual elite—particularly in the areas of higher education and mass communications—are hostile or indifferent to traditional theism.¹²³ Thus, it remains to those most directly dependent on the people for their livelihood—politicians—to regularly invoke religious themes, whether sincerely or cynically.¹²⁴

120. GALLUP REPORT NO. 236, *supra* note 52, at 22–23, 38, 40–41, 42–43, 50, 51–52, 53–54. For an account of sociological research centered on religious belief and practice in one locality over a long period of time, see T. CAPLOW, H. BAHR, B. CHADWICK, D. HOOVER, L. MARTIN, J. TAMNEY & M. WILLIAMSON, *ALL FAITHFUL PEOPLE: CHANGE AND CONTINUITY IN MIDDLETOWN'S RELIGION* (1983). For documentation of the impact of religious belief on values, see THE CONNECTICUT MUTUAL LIFE REPORT ON AMERICAN VALUES IN THE '80S: THE IMPACT OF BELIEF (1981) [hereinafter CONNECTICUT REPORT].

121. See White, *supra* note 1. Professor White writes:

In the academic world we tend to speak as though all participants in our conversations were purely rational actors engaged in rational debate; perhaps some people out there in the world are sufficiently benighted that they turn to religious beliefs or other superstitions, but that is not true of us or, if it is true, we hide it, and it ought not be true of them Yet . . . [o]urs is an extremely, sometimes fervently religious nation, at least in its protestations and in some of its behavior as well, and one wonders about an academic world that seems to be blind to this fact.

Id.

122. 1 *Corinthians* 1:26. Paul was one of the early exceptions; indeed, Peter noted that some of Paul's writings are "hard to understand." 2 *Peter* 3:16.

123. See Bell, *The New Class: A Muddled Concept*, in *THE NEW CLASS?* 169, 186–87 (B. Bruce-Briggs ed. 1979); Berger, *The Worldview of the New Class: Secularity and Its Discontents*, in *THE NEW CLASS?*, *supra*, at 49; Lipset, *The New Class and the Professoriate* in *THE NEW CLASS?*, *supra*, at 67, 74, 81–82 (citing J. LEUBA, *THE BELIEF IN GOD AND IMMORTALITY* 219–87 (1921) (academics as a group more likely than non-academics to disdain religion, and academic eminence associated with religious disbelief within the professoriate)); see also CONNECTICUT REPORT, *supra* note 120, at 210–17; E. LADD, JR. & S. LIPSET, *THE DIVIDED ACADEMY: PROFESSORS AND POLITICS* 135–36, 162–67 (1975); J. LEUBA, *THE REFORMATION OF THE CHURCHES* 17–49 (1950); Lichter & Rothman, *Media and Business Elites*, *PUB. OPINION*, Oct.–Nov. 1981, at 42, 43.

124. See, e.g., President's Address to the Nation: Soviet Union-United States Summit in Washington, D.C., 23 WEEKLY COMP. PRES. DOC. 1502 (Dec. 10, 1987). This speech of President Ronald W. Reagan stands firmly in the Lincolnian tradition of joining the themes of the march of freedom, divine guidance, and America's special role of sharing its traditions with the world.

Sociologists and other commentators have elaborated and debated the bias of modern intellectual elites against traditional theism as part of a discussion of the so-called "New Class." The New Class, while defined in a number of ways, certainly includes those in the universities and in mass media who earn their income through the processing, creation and propagation of information and cultural symbols.¹²⁵ The New Class becomes increasingly prominent because information, knowledge, and symbols are increasingly important products of our postindustrial society, and the New Class controls the means of their production.¹²⁶ The New Class speaks a common language of critical discourse whose underlying cause is the autonomy of the mind;¹²⁷ hence, the New Class as a group tends toward a natural aversion to traditional theism, which subjugates the mind's autonomy to the authority of God's revelation. Among university intellectuals, the autonomy of modern critical discourse and of the individual mind is sometimes considered to date from the overthrow of theism's moral and intellectual authority; the death of God becomes the birth and starting point for this group's common discourse.¹²⁸ Hence, although the difficulty or even impossibility of filling the void left by the death of God, or the overthrow of the Judeo-Christian tradition, is a major theme of intellectuals and New Class members, the one truly unthinkable position is that God and the Judeo-Christian tradition are very much alive and available to serve as the

Thus, President Reagan, after making specific reference to the call for freedom and peace spoken by "a chosen people in a promised land" and by the Nazarene carpenter, declared:

So, let us remember the children and the future we want for them. And let us never forget that this promise of peace and freedom, the gift that is ours as Americans, the gift that we seek to share with all the world, depends for its strength on the spiritual source from which it comes.

So, during this holy season, let us also reflect that in the prayers of simple people there is more power and might than that possessed by all the great statesmen or armies of the earth. Let us then thank God for all His blessings to this nation, and ask Him for His help and guidance so that we might continue the work of peace and foster the hope of a world where human freedom is enshrined.

Id. at 1505-06.

125. See, e.g., Bell, *supra* note 123, at 169, 182-83; Bruce-Briggs, *An Introduction to the Idea of the New Class*, in the *THE NEW CLASS?*, *supra* note 123, at 1; Kirkpatrick, *Politics and the New Class*, in *THE NEW CLASS?*, *supra* note 123, at 33.

126. Cf. Bell, *supra* note 123, at 174-85; Bruce-Briggs, *supra* note 124; Gouldner, *The New Class Project, I, THEORY & SOC'Y* 153, 168-76 (1978).

127. See Gouldner, *supra* note 126, at 176-83.

128. In this respect, as in many others, the new class are the intellectual descendents of the European Enlightenment, who perceived Christianity as the great enemy of reason and civilization. See P. GAY, *THE ENLIGHTENMENT: AN INTERPRETATION, THE RISE OF MODERN PAGANISM* 31-36 (1966). Although Gay claims that the Enlightenment's view of history as composed of ages dominated either by reason and science or superstition and belief "will find few defenders today," *id.* at 36, the broad theme that modern intellectual life is made possible by the victory of Enlightenment over religious authority and theistic dogmatism is certainly still pervasive.

true foundation of intellectual and moral life.

The apparently unholy alliance between business and New Class interests, represented most forcefully in the mass media culture and advertising, represents another explanation for the appearance of secularization of our society. As propagators of cultural symbols, New Class intellectuals have a natural interest in unrestricted power to create, transform, and transmit the symbols by which the populace lives and defines itself. The behavioral limitations and cultural identity provided by the Judeo-Christian tradition are potential barriers to such unrestricted power; it has therefore been in the interest of some to ridicule, distort, ignore, and subdue theism's place in the hearts and minds of the people. Business interests similarly have found it convenient to replace traditional values of thrift, moderation, and altruism with those of consumerism, lust, and possession as a means of fueling sales. Both business and intellectual elites gain from the displacement of traditional Judeo-Christian values and symbols. Business elites gain an insatiable consumer demand for goods and services; intellectual elites, the freedom to reshape the identity of a people based on the concept nearest and dearest to their hearts, the absolute, radical autonomy of each individual.¹²⁹ The business excesses facilitated by the overthrow of Judeo-Christian values can then serve as a basis for furthering government regulation, an arena amply suited to the New Class' threefold agenda of indoctrinating, caring, and planning.¹³⁰ The intellectuals of the New Class, purveyors of cultural symbols and managers of governmental and private institutions, are positioned as the seducers and the conscience of the destabilized, rootless masses,¹³¹ luring with the carrots of freed instinctual satisfaction, while simultaneously chastising with the rod of government regulation of personal, familial, and economic life.

Some commentators perceive New Class members, or modern intellectuals, as engaged in a rebellion against the human condition itself. Gender differences, the biological continuum of human procreation (heterosexual intercourse, pregnancy, childbirth, *mother* nursing child), the human propensity to evil in thought and deed, human isolation and alienation, are sometimes portrayed by modern intellectuals as limitations that autonomous human beings can and should overcome. Having

129. Cf. D. BELL, *THE CULTURAL CONTRADICTIONS OF CAPITALISM* (1976); Bell, *supra* note 123, at 185-89; Vree, *Christianity, Communism, and Sexual Revolution* (pts. 1-6), *NEW OXFORD REV.*, Jan.-Feb. 1983, at 12, *NEW OXFORD REV.*, Mar. 1983, at 10, *NEW OXFORD REV.*, Apr. 1983, at 22, *NEW OXFORD REV.*, May 1983, at 8, *NEW OXFORD REV.*, June 1983, at 14, *NEW OXFORD REV.*, July-Aug. 1983, at 8.

130. See Berger, *supra* note 123, at 49, 53.

eliminated God, the first enemy of autonomy, the New Class rebels against the remaining limitations imposed by the human condition and human nature. Of course the old nemesis, death, which cannot be overcome by naturalistic means or mere force of will, creates an overshadowing gloom in the works of many who urge us to create ourselves.¹³² Nonetheless, many see in the persistent moralism of the New Class a frustrated desire to find and create in human life those goods that appropriately can be supplied only by a transcendent force. This desire creates a sometimes unrealistic view of the degree to which suffering and evil can be overcome in human life. It is difficult, of course, to separate those things that can and ought to be changed from those that are either intractable or correct. The Christian life *is* a ceaseless struggle against the evil both within and without, but Christianity also teaches that ultimate victory is not achievable in this world or life, and is not achieved through human autonomy but rather through divine sovereignty.¹³³ No doubt many human evils have been self-servingly described as inevitable or necessary; the prophet's passion for justice is a common heritage of Judaism and Christianity. Yet, among many intellectuals it is possible to discern a whining quality, a refusal to accept the very fact of limitations or suffering or evil, that is more akin to a toddler's temper tantrum than to a prophet's call. Indeed, commentators have suggested that the New Class attributes of moralism, rebellion against limitations, surprised horror at human suffering, and over-

132. Many twentieth-century philosophers and writers appear gloomy not only because of death, but also in view of, variously, the absence of God, the absurdity of the human condition, and the view that human beings are merely determined accidental creations of the physical universe. See, e.g., C. BECKER, *THE HEAVENLY CITY OF THE EIGHTEENTH-CENTURY PHILOSOPHERS* 12-14 (1932); S. BECKET, *WAITING FOR GODOT* (1954); 5 W. JONES, *supra* note 43, at 157, 197-99, 332-63 (Bertrand Russell and Jean-Paul Sartre). Carl Becker quotes Bertrand Russell as follows:

That man is the product of causes which had no prevision of the end they were achieving; that his origin, his growth, his hopes and fears, his loves and his beliefs, are but the outcome of accidental collocations of atoms; that no fire, no heroism, no intensity of thought and feeling can preserve an individual life beyond the grave; that all the labors of all the ages, all the devotion, all the inspiration, all the noonday brightness of human genius are destined to extinction in the vast death of the solar system, and that the whole temple of man's achievement must inevitably be buried beneath the debris of a universe in ruins—all these things, if not quite beyond dispute, are yet so nearly certain that no philosophy which rejects them can hope to stand.

C. BECKER, *supra*, at 13-14 (quoting B. RUSSELL, *supra* note 42, at 47).

This apparently gloomy ultimate prognosis does not prevent Bertrand Russell from urging us to bring about mankind's happy, glorious, and joyful future. See B. RUSSELL, *HAS MAN A FUTURE?* 126 (1961).

133. One thinks of Martin Luther's magnificent hymn, *A Mighty Fortress Is Our God*, which declares: "Did we in our own strength confide, our striving would be losing . . . We will not fear, for God hath willed His truth to triumph through us." Luther, *A Mighty Fortress Is Our God* and *Other Hymns*, in *THE HYMNAL OF THE EPISCOPAL CHURCH*, no. 551 (1940).

riding emphasis on individual autonomy are traceable to the often both very permissive and very protective upbringing of members of the New Class.¹³⁴ We (for I recognize myself here) were encouraged to construct our own world, our own visions of reality, while simultaneously being protected from having these soap bubble worlds popped by reality's pins.¹³⁵

The child-rearing techniques being discussed are principally those of America's upper middle class; the dislike of some for that class and their offspring is evident.¹³⁶ There is apparently substantial overlap between the New Class and the upper middle class.¹³⁷ Whatever one thinks of the sociological or psychological critiques of these classes, the critiques illustrate several important points. First, the social science techniques by which secularist intellectuals have historically ridiculed the religiously inclined are a two-edged sword: Label the religiously inclined as authoritarian personality types¹³⁸ and be prepared to receive back the label of tantrum-throwing toddler;¹³⁹ explain religious beliefs with the reductionist tools of social science, and be prepared to have your secular beliefs explained with those same tools. Indeed, a social

134. Berger, *supra* note 123, at 50-54; Vree, *supra* note 129.

135. See Berger, *supra* note 123, at 53-54.

136. See *id.* at 54 (discussing relationship between upper-middle class and New Class approaches to child-rearing); Vree, *supra* note 129 (noting child-rearing techniques of the upper-middle class and their relationship to the sexual revolution, and displaying strong dislike for the American upper-middle class).

137. See, e.g., Berger, *supra* note 123, at 54; Vree, *supra* note 129; Ladd, *Pursuing the New Class: Social Theory and Survey Data*, in *THE NEW CLASS?*, *supra* note 123, at 101.

138. See, e.g., E. FROMM, *supra* note 39, 82-83 (1941) (Luther's personality and teachings display typical traits of the authoritarian character). Richard Neuhaus reacts to the charge that fundamentalist religion may be dismissed as "mere pandering" to the authoritarian personality by suggesting that personality development leads progressively from the authoritarian to the autonomous and then finally to the authoritative:

Instead of thinking only about the authoritarian and autonomous, we should pay attention to yet another kind of personality, namely, the person who recognizes what is authoritative [A]utonomy alone, thought of as unqualified fulfillment of self, is a new oppression. Religious geniuses such as Paul, Augustine, and Luther viewed such autonomy as *the* oppression of the imperial self, the source and shape of our alienation from God. Beyond autonomy is the *free* acknowledgment of that by which we are bound. We are bound to be free. We are bound to be free in the sense of being called or destined to freedom. And we are bound to be free in the sense that our freedom is only actualized in the free acceptance of that which authoritatively claims our assent and obedience.

R. NEUHAUS, *supra* note 112, at 17-18.

139. See, e.g., Vree (pt. 3), *supra* note 129, at 22-23. Dale Vree quotes Jerry Rubin as having stated in 1971:

I knew they [my parents] loved me so much that if I cried I'd get my way, if I screamed I'd get my way, if I insisted I'd get my way. It was really total toleration, total permissiveness. . . . I'm really convinced that the whole of my recent activity in the movement [New Left] has been a playing out on a massive political scale of the things I learned in the family.

science perspective that assumes that theistic beliefs are purely explainable through deterministic social and cultural factors by implication assumes that the lack of theistic beliefs is similarly explainable.

This is not the place to fully develop a theory that accounts for the degree, however poor, to which social science generalizations have predictive power and also allows room for human free agency.¹⁴⁰ Nor is this the place to fully describe a theistic theory that accounts for causation, human responsibility, and divine sovereignty, creation, and intervention. It should be sufficient to agree, as rules of discourse, that social science data and interpretation are useful as partial explanations of human behavior and belief, but that such theories do not possess either the explanatory or predictive power to eliminate, as a matter of proof rather than ideology, human free agency or divine action as additional foci of great import. It is fair, then, to discuss those causative social factors that might influence a class, group, or individual to either hold or not hold certain beliefs, so long as such causative factors are not held out as completely deterministic, and so long as the discussion is not taken to have subsumed the separate discussion of whether those beliefs are true. It is, moreover, equally fair to subject the intellectual classes to such scrutiny, for we cannot and should not assume that being intellectually inclined or engaged somehow frees one from the influence of social, causative factors.

Second, the above review of the New Class and related literature suggests that both the nature of intellectual work and the social, economic, and cultural position of those conducting such work constitute secularizing influences.

Third, while the secularizing influences on the intellectual classes do not demonstrate either the error or the correctness of secularist beliefs, examination of such factors should lead to a reconsideration of the "peculiar division between academic and religious thought in our culture," to use James Boyd White's phrasing.¹⁴¹ White suggests that the division is peculiar because it is relatively new in Western society, because religious sentiment remains so vibrant in America outside of the academy, and because the division suggests a radical dichotomy between rationality and religion that distorts the nature of each.¹⁴² A substantive debate on the appropriateness of the division would cer-

140. Cf. A. MACINTYRE, *supra* note 14, at 79-108. Note should also be taken of Professor Berman's call for a new social theory of law with a more sophisticated view of causation and law, for "the fact that Hegel was wrong in supposing that consciousness determines being does not mean that Marx was right in saying that being determines consciousness." See H. BERMAN, *LAW AND REVOLUTION, THE FORMATION OF THE WESTERN LEGAL TRADITION* 44 (1983).

141. White, *supra* note 1.

tainly appear to be in order.

4. The Descent of the Enlightenment Tradition

The disdain of many among our intellectual elite for theistic belief is particularly ironic in that many of the competing traditions are derivative, at least in part, from the Judeo-Christian tradition and share many of its premises. The irony is deepened when we note that a number of those premises of the competing intellectual traditions which are not shared by the Judeo-Christian tradition have generally come to be seen as false. It is, moreover, the failure of the competing secular traditions, in combination with the intellectual exiling of the Judeo-Christian tradition, which has led to the relativism that so many find destructive to us as a culture, a nation, and a people.

Many of the competing secular ideologies in American legal and political thought are descendants, in one way or another, of the European Enlightenment.¹⁴³ The premises shared by the Judeo-Christian tradition and the Enlightenment thinkers are essentially the inherent worth and dignity of human beings, both individually and as a species. The morality of the Enlightenment was at the outset largely a borrowed Judeo-Christian morality.¹⁴⁴ The political theory of the Enlightenment—particularly that of John Locke—can be traced ultimately to Christian Europe's changing views on religious and political authority.¹⁴⁵ Kant's morality and Locke's politics represent shared premises,

143. The emphasis on rights theory, whether that of the left or right, is a descendent of Enlightenment thought. See, e.g., E. CASSIRER, *THE PHILOSOPHY OF THE ENLIGHTENMENT* 234–53 (Koelln & Pettegrove trans. 1951) (1st German ed. 1932). Marx, who perceived natural rights theory as a product of the material conditions of the bourgeoisie, see 4 W. JONES, *supra* note 43, at 189–90 (quoting F. ENGELS, *SOCIALISM: UTOPIAN AND SCIENTIFIC* 3–4 (E. Aveling trans. 1892)), owes much to Hegel and Kant, see *id.* at 178, 192, and “belongs . . . to that empirical and scientific tradition that combined Condorcet's optimistic belief in the inevitability of ‘progress’ with the belief that human nature as well as the physical universe conforms to simple ‘laws’ that can be discovered by science.” *Id.* at 178. Feminism also has roots in the European Enlightenment, although modern feminists find much Enlightenment literature quite unenlightened in its discussion of the role and nature of women. See, e.g., M. CONDORCET, *SELECTED WRITINGS* 97–103 (K. Baker ed. 1976); E. HALEVY, *THE GROWTH OF PHILOSOPHIC RADICALISM* 20, 416 (1972); C. MONTESQUIEU, *Letters* xxvi, xxxviii, lxiii, in *THE PERSIAN LETTERS* 46–48, 65–66, 105–06 (G. Healy trans. 1964); S. OKIN, *WOMEN IN WESTERN POLITICAL THOUGHT* 99–230 (1979).

144. A. MACINTYRE, *supra* note 14, at 51.

145. See B. TIERNEY, *RELIGION, LAW, AND THE GROWTH OF CONSTITUTIONAL THOUGHT, 1150–1650* (1982). Tierney notes in particular the influence of George Lawson, an English clergyman, on Locke. See *id.* at 81 (citing Maclean, *George Lawson and John Locke*, 9 *CAMBRIDGE HIS. J.* 68 (1947); J. FRANKLIN, *JOHN LOCKE AND THE THEORY OF SOVEREIGNTY* (Cambridge 1978)). The broad theme of Tierney's work is that Western constitutional thought arose out of a long series of Christian writers and specific historical events, beginning with the canonists of the twelfth century. For a similar but broader treatment of the significance of the canonists, and of the influence of Christianity on Western law, see J. BERMAN, *supra* note 140. The broad thesis of

particularly with Christian Europe, largely because they are derivative from Christian Europe.

The Judeo-Christian tradition, however, looks to the creator God as the source of that worth and that morality. The Enlightenment philosophers broke with Judeo-Christian premises by attempting to locate the authority for their morality and politics apart from God, typically in either human reason or human nature. The Enlightenment was based on the confidence that human reason alone could find and demonstrate objective truths about issues such as morality and politics—or at least on the confidence that human reason could provide a better guide than had theistic revelation.¹⁴⁶ In contrast, although the Judeo-Christian tradition contains competing views on the role of reason, it relies ultimately on revelation, rather than reason, as its authority. Some Enlightenment thinkers, moreover, accompanied their faith in human reason with a confidence in the predominant goodness of human nature.¹⁴⁷ The Judeo-Christian tradition, by contrast, while cognizant of God's creation of humans in His image, has emphasized—through the doctrine of the Fall—the inherently flawed, sinful, and self-destructive human nature.

It is precisely those Enlightenment premises which broke with the Judeo-Christian tradition that moderns find most naive and flawed.

Tierney and Berman would apply equally to other writers also influential in America's founding, such as Blackstone, Coke, Rutherford, Burlamaqui, Pufendorf, Vattel, and Montesquieu. See, e.g., Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 860–65 (1978) (noting the importance of writers other than Locke to American Revolutionary Thought); cf. B. TIERNEY, *supra*, at 54–79 (development of federalism from thirteenth century to Althusius, Grotius, and Pufendorf).

146. On the Enlightenment confidence in reason, and hostility toward Christianity, see generally E. CASSIRER, *supra* note 143; C. BECKER, *supra* note 132; P. GAY, *supra* note 128. There was to some degree a progression to the Enlightenment, with early philosophers often being of at least nominal and sometimes quite sincere Christian convictions, followed by a movement toward Deism and then finally religious skepticism. The early thinkers, such as Newton and Locke, could believe Christianity and reason to be in sound accord; later Enlightenment figures believed the two to conflict, and chose reason as their guide. See, e.g., H. MAY, *supra* note 58, at 3–25; P. GAY, *supra* note 128, at 39–68.

Some Enlightenment philosophers, such as the famed skeptic David Hume, built their reputations by attempting to demonstrate that reason could not demonstrate objective truth; some also emphasized empiricism. Skeptics showed confidence in human reason, however, to the extent that they perceived the alleged unreasonableness of Christianity as a sufficient ground to reject it. In this sense even a supposed radical skeptic, by choosing human reason over divine revelation, can show his or her underlying confidence in, and preference for, his or her own reasoning powers. Empiricism, of course, implies confidence in the human faculties of both observation and inductive reasoning; to the extent that empiricism is viewed as an exclusive criterion of truth which denies the validity of theistic truth, it also represents both confidence in human reasoning and a choice of human reason over divine revelation.

147. On the Enlightenment rejection of the Christian doctrine of the Fall, and some varying Enlightenment views on human nature and the origin of evil, see E. CASSIRER, *supra* note 143, at

Hundreds of years of rational discourse on ethics and politics, and then on rationality and language, have taught us that human rationality in itself is painfully indeterminate.¹⁴⁸ The twentieth century has reminded us that human beings remain consistently capable of the most heinous and brutal evil. We have looked for a basis for morality and politics in our natures and our capacity to reason, and the mirror of our collective experiences is a sight virtually unbearable to behold.

Alasdair MacIntyre's recent critique of the Enlightenment project traces our descent into relativism. The Enlightenment philosophers, according to MacIntyre, attempted to justify morality apart from theological, theistic premises, and apart from the Aristotelian view of the essence and end of man. Thus MacIntyre, discussing Kant, notes:

On Kant's view it can never follow from the fact that God commands us to do such-and-such that we ought to do such-and-such. In order for us to reach such a conclusion justifiably we would also have to know that we always ought to do what God commands. But this last we could not know unless we ourselves possessed a standard of moral judgment independent of God's commandments by means of which we could judge God's deeds and words and so find the latter morally worthy of obedience. But clearly if we possess such a standard, the commandments of God will be redundant.¹⁴⁹

MacIntyre notes that many of the great Enlightenment philosophers agreed "to a surprising degree on the content and character of the precepts which constitute genuine morality," precisely because they had inherited them "from their shared Christian past."¹⁵⁰ However, as each philosopher failed in his turn to find a basis apart from God's authority by which to justify their essentially Christian morality, the seeds were sown for Nietzsche's clear-headed recognition that if God is dead, then so is God's morality. The project, in other words, of justifying Christian morality by reference to human nature, or human sentiment, or human reason, was an abysmal failure; without any justification, the system of morality itself was ready for dismantling.

The important point to realize here is that Nietzsche's amoral call for a great man, whose only morality is his own will to power, is simply a natural by-product of Kant's premise that we should not do something merely because God has commanded it.¹⁵¹ Nietzsche is famous

148. Cf. Sunstein, *supra* note 17, at 905 & n. 162 (noting modern skepticism regarding Enlightenment reason, and suggesting relation of this skepticism to various legal theories).

149. A. MACINTYRE, *supra* note 14, at 44-45.

150. *Id.* at 51.

151. It is noteworthy that Kant, elsewhere in his work, conceded that morality without a teleological framework was unintelligible. Kant therefore, after having apparently previously abandoned God as a basis for morality, smuggled Him in through the back door as a presupposi-

for that illogical slogan, God is dead. The slogan, however powerful, is illogical because, if the theistic God ever lived, he clearly could not have died. What can die, however, are our beliefs and confidence in God. Nietzsche's slogan is arguably descriptive of a sort of palace coup, where God, properly enthroned in the human heart, is "killed" so that the new king, self, may be enthroned in His place. Nietzsche, however, is not the culprit; he is merely a reporter of events past. For once we accept Kant's premise that we only obey God if we can find rational justifications for His commands, the coup has already occurred: for we have given our ultimate allegiance to human reason, rather than to God. Human reason, moreover, has turned out to be capricious.¹⁵²

MacIntyre informs us that Nietzsche's great man is not an aberration in "the conceptual scheme of liberal individualist modernity, but rather one more representative moment in its internal unfolding."¹⁵³ MacIntyre, of course, is not alone in tracing our cultural heritage, with its increasingly destructive relativism, to Nietzsche.¹⁵⁴ Doing so is most useful because it forces us to look more honestly at what we are becoming: a culture of isolated great selves, with less and less to mediate conflicts between us. It is also useful because it forces us to realize that such is the necessary conclusion of our willing acceptance of the terms of the Enlightenment project—that we must attempt to define morality without reference to God and the norms He has revealed to us.

A brief point can be made about the suggestion of some, such as Allan Bloom, that the classical philosophical tradition be the centerpiece of our civilization. Any system of absolutes, once accepted by a society as a valid set of first premises, can avoid *some* of the pitfalls of relativism; while only true premises actually avoid tyranny, widely held premises, whether true or not, at least provide for societal cohesion and cultural identity. Assigning a secular version of the classical tradition to this status, however, is inherently self-contradictory and thereby subject to a return descent into relativism. The classical tradition, as brought to us through the Enlightenment thinkers, posits human reason as an adequate and effective means of finding and demonstrating ethical and political truths. Yet it is precisely the ineffectiveness of human reason as a means of demonstrating truth that has produced our pre-

tion of practical reasoning. See *id.* at 56. The Enlightenment project as a whole, however, was consistent with Kant's original premise, and proceeded willy-nilly, and ultimately unsuccessfully, in its task of supporting morality without reference to God.

152. Pascal had warned that reason without revelation must end in skepticism. See E. Casirer, *supra* note 143, at 141–46.

153. A. MACINTYRE, *supra* note 14, at 259.

154. See A. BLOOM, *supra* note 7, at 141–56, 194–240; P. JOHNSON, *MODERN TIMES* 48

sent predicament. Even MacIntyre, in discussing the choice between Nietzsche and Aristotle, notes:

Arguments in philosophy rarely take the form of proofs Consequently those who wish to resist some particular conclusions are equally rarely without any resort We can often establish the truth in areas where no proof is available. But when an issue *is* settled, it is often because the contending parties—or someone from among them—have stood back from their dispute and asked in a systematic way what the appropriate rational procedures are for settling this particular kind of dispute.¹⁵⁵

Clearly the choice of one among many rational procedures for settling philosophical disputes is analogous to the choice of procedures for settling political disputes. That choice is itself not open to rational proof, and its selection necessarily entails the apparently arbitrary selection of the appropriate characteristics of truth, just as in the political realm one must select the appropriate characteristics of persons in settling disputes over goods and services. Thus, for example, MacIntyre suggests a return to Aristotelianism because it “restores intelligibility and rationality to our moral and social attitudes and commitments.”¹⁵⁶ MacIntyre has thus chosen intelligibility and rationality as the criteria for choosing among competing systems of thought, or competing truth-claims. He has not, however, previously shown that in reality truth possesses those characteristics. In philosophy as in religion, wishing it so doesn’t make it so. While we might prefer the truth to be intelligible and rational, the unproven assertion that it is requires (from a secular relativist perspective) a leap of faith similar to that made by the believer in a loving God. This leap of faith, moreover, has two components: Faith that reality itself has certain characteristics and faith that we, through our human faculty of reason, are capable of discerning such characteristics. A further aspect of this faith is the implicit belief that particular philosophers in a certain time and place succeeded, through the use of their reason, in discovering truths that somehow escaped other thinkers in other times and places. There is, however, something implausible, unsatisfying, and even self-contradictory about urging us to put our *faith* in human *reason*, when we as a culture and people have found human reason to be so capricious and indeterminate. It is as though we were instructed to forget all of our failures, and somehow through force of will to pretend that human reason had succeeded precisely where it had failed.

Theism, by contrast, has a certain plausibility. It does not require

155. A. MACINTYRE, *supra* note 14, at 259–60.

156. *Id.* at 259.

us to believe that human reason is a sufficient guide for our thoughts and actions. As Professor Leff has noted, it makes sense that God, if He exists, would be capable of establishing what is good and true. God *by definition* is so capable; we, either as individuals or a species, may not be so capable. God is simply a more plausible source for establishing the good and the true than is either human reason or human nature. This does not make theism true; again, wishing it so doesn't make it so. But it makes the intellectual snobbery surrounding theism all but incomprehensible. Intellectuals apparently discount theism in order to obtain and retain the pride and power that comes with being the discoverer and pronouncer of truth.¹⁵⁷ The Enlightenment, Bloom tells us, was designed to effectuate the rule of the philosopher-kings.¹⁵⁸

The reign of the philosopher-kings, unfortunately, has had a way of giving way to the reign of Nietzsche's great man. The rule of human reason almost inevitably descends into relativism precisely because, as MacIntyre concedes, those "who wish to resist some particular conclusion are . . . rarely without any resort": those who lose disputes can always claim that it was will, rather than reason, which necessitated such loss. Society's outcasts and dissident intellectuals spread the view that the legitimating principle of reason is merely a disguise, as Nietzsche accused, for the imposition of one will upon another. The stage is set for society to disintegrate into a community, if the term can so be used, of great men. Specific individuals may seek to attain the full measure of Nietzsche's ideal, and rule others through the raw imposition of their will. Hitler is the prototype of such a great man.¹⁵⁹

This paper at the outset noted Professor Leff's proposition that even Hitler's regime cannot definitively be condemned without reference to God. One response to this proposition might be that it is sufficient to be able, as a society, to agree subjectively to condemn Hitler's acts. Agreeing that there are no provable objective principles, we would nonetheless as a society subjectively hold to certain principles. Alternatively, we could as a society make the leap of faith necessary to establish the doctrine of inalienable rights, for example, as an objective value. We could on this basis support the principles of the Declaration of Independence and the Bill of Rights, even as we would ignore the

157. James White appears to implicitly acknowledge this possibility when he notes that perhaps the members of the secular academy fear religious truth. See White, *supra* note 1. Religious truth threatens the absolute autonomy of mind and monopolistic control over cultural truth sought by some secular academics; fear may therefore be an understandable, if not appropriate, response. Cf. Leff, *supra* note 3, at 1229 (we desire the freedom to create and choose the right and good, while simultaneously desiring to be ruled by discernible, authoritative rules).

158. See A. BLOOM, *supra* note 7, at 266.

159. See A. MACINTYRE, *supra* note 14, at 259; P. JOHNSON, *supra* note 154.

particularized Judeo-Christian morality that arguably gives support to those principles. We would then agree to embrace Lincoln's premise of America as an unfolding of those premises, but the principles of rights, and ultimately of liberty, freedom, and equality, would be cleansed of their Judeo-Christian roots. I would take this suggested course of action as being the project of much of liberal, and even conservative, legal scholarship: liberals seek to assist the spread of a list of freedoms and rights encompassing, for example, procreative and privacy rights on the one hand, and subsistence and development rights on the other; conservatives emphasize property rights, majoritarian rule, and freedom from victimization by criminal behavior. This demonstrates the obvious problem with embracing a secularized Lincolnian premise: any cause can be garbed in the rhetoric of freedom, in part because every cause, and its opposite, posits a realm where government should either stay out (freedom from government) or act protectively (freedom provided by government).¹⁶⁰

The indeterminacy of concepts such as freedom and equality has, of course, long been understood. What has not been sufficiently understood is that the exiling of the Judeo-Christian tradition, and consequent emptying of the ideals of freedom and equality of their original meanings, creates a situation where we not only cannot objectively condemn Hitlerian acts, but where we, as a society, fail to even subjectively condemn or prevent similarly evil acts within our own society. The project of continuing Lincoln's march toward equality and freedom with indeterminate, subjective conceptions of those terms is a project likely to produce institutions as abominable as those, such as slavery, that the project was initially created specifically to avoid.

The demonstration of this last point is both highly controversial and quite simple; it requires a discussion of that most emotional of issues, abortion.¹⁶¹ Abortion is an issue on which both sides can, and do, claim to have the force of the secularized Lincolnian premise on their side. Pro-choice advocates view the right of women to control their bodies and the procreative process as a part of a new species of rights that are nonetheless inherent in the march toward a greater realization of freedom (women's freedom from state regulation in procreative matters) and equality (women, through control of the procreative process, attaining equality with men). The revocation of the abortion right would no doubt be considered by some as a retreat to a kind of slavery:

160. Cf. Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982) (equality an empty principle, a mere tautology).

161. MacIntyre chooses abortion, along with debates over the morality of war and government regulation, to demonstrate the "interminable" nature of modern moral debate. See A.

MACINTYRE, *supra* note 14, at 6-11.

the ownership by society and by men of women's bodies. In contrast, pro-life advocates view the abortion right as an infringement—indeed, as the inequitable denial—of the basic freedom to live. The characteristics of developmental stage, physical location, and physical dependency, the pro-life community believe, are not sufficient to support a deviation from the legal principles that forbid the taking of innocent life. The pro-life community also perceives the abortion right in terms of the Lincolnian premise, except that they see the establishment of that right as a march backwards, toward the institution of a practice as contrary to the Lincolnian premise as was slavery itself. Thus the view that abortion on demand is a practice morally equivalent to slavery has been given careful elucidation by James Burtchaell,¹⁶² voiced by President Reagan,¹⁶³ and characterized as “plausible” by the late Robert Cover, himself a veteran of the civil rights struggle.¹⁶⁴ The comparison to the Nazi death camps, and to the Weimar and Nazi programs of “mercy-killing,” has similarly been made.¹⁶⁵

How, based on a relativist, subjectivist moral theory, are we to choose? Our embrace of a secularized Lincolnian premise is useless to us in deciding, because the premise, purified of particularistic, Judeo-Christian principles, supports either conclusion. Each side, moreover, would or does view its opponent's victory as establishing a practice morally equivalent to slavery. It is therefore, as I argued, *likely* that we will choose a path leading to a societal practice as evil as that which the secularized Lincolnian premise was specifically designed to avoid. We have something on the order of a fifty-fifty chance. Indeed, given our inability to objectively show the loser the propriety of his or her loss, it is certain that we must institute a practice that a significant segment of society considers to be the moral equivalent of slavery.

While realization of the dangers of the indeterminacy of the secularized Lincolnian premise is important, the full weight of my argument against the relativist legal mindset requires acceptance of the pro-life view that abortion is the taking of innocent human life. Abortion, thus defined, places the relativist-absolutist debate in a radically different light. This point can best be made by brief reference to the recent history of the relativist-absolutist debate.

162. J. BURTCHAELL, *RACHEL WEeping* 239–87 (1982).

163. Reagan, *Abortion and the Conscience of a Nation*, in *ABORTION AND THE CONSCIENCE OF THE NATION* 19, 27–29, 36–38 (1984).

164. See Cover, *The Bounds of Constitutional Interpretation: Of the Word, the Deed, and the Role*, 20 GA. L. REV. 815, 832 (1986). Cover's comments center on the interpretation of *Roe v. Wade*, 410 U.S. 113 (1973), “as the *Dred Scott v. Sandford* [60 U.S. (19 How.) 393 (1857)] of our day.” *Id.* (footnote omitted).

165. See, e.g., J. BURTCHAELL, *supra* note 162, at 141–238; Muggeridge, *The Humane Holocaust by the Commons*, 1987 CONSCIENCE OF THE NATION, *supra* note 163.

Catholic intellectuals have argued for some fifty years that certain absolutes, including belief in God and in a substantive moral law, were requisites of democracy, and that the replacement of those absolutes with moral relativism had produced the totalitarian regimes of the twentieth century. The reply from relativist intellectuals was that absolutism of all kinds is dangerous and inimical to democracy: Catholicism and totalitarianism, both being absolutist, were bedfellows; relativism and democracy, both being pluralistic and pragmatic, were virtual symbiotic twins. The relativists clearly won the hearts and minds of the intellectual classes, if not those of the people themselves.¹⁶⁶

The debate has nonetheless continued: the English Catholic Paul Johnson recently published a history of the twentieth century that presents the atrocities, tyrannies, and chaos of recent history as the unleashing of Nietzsche's will to power, as a consequence of the embracing of relativism and the general failure of the Christian faith.¹⁶⁷ Rawls' much-lauded work, *A Theory of Justice*,¹⁶⁸ synthesized in Kantian, natural-law terminology the relativist view that particular conceptions of the good, including moral and religious absolutisms, must by definition be excluded when constructing the theoretical basis of the modern, liberal, democratic state.

The absolutist argument has traditionally suffered from a certain weakness: it contended that moral relativism had caused the moral vacuum that produced Hitler and Stalin, but it could not really succeed in making the establishment liberal, however much a relativist, really equivalent to, or directly responsible for, the atrocities produced by such men. Labeling totalitarian dictators and establishment liberals relativists proves no more than the corollary practice of labeling fascists and Catholics absolutists. There are, arguably, different sorts of relativists, and different sorts of absolutists.

Western liberal intellectuals did, of course, for a time manage to make fools of themselves in their embrace of Stalin and Soviet Russia.¹⁶⁹ Nonetheless, they have for the most part repented of such errors, and have maintained the integrity of their tradition as one that embraces the progressive march of human freedom and dignity against all forms of mistreatment and tyranny. Western liberals stand in principle

166. These debates, which occurred to a significant degree among legal scholars, are described in detail in Edward Purcell, Jr.'s very helpful study. See E. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY* (1973).

167. See P. JOHNSON, *supra* note 154.

168. See J. RAWLS, *supra* note 30.

169. See, e.g., P. JOHNSON, *supra* note 154, at 260, 275-77 (citing P. HOLLANDER, *POLITICAL PILGRIMS: TRAVELS OF WESTERN INTELLECTUALS TO THE SOVIET UNION, CHINA AND CUBA 1928-1978* (1981)).

against the Gulag Archipelago and Auschwitz, and against Cuban and Argentinian human-rights abuses.

The story of humanity, from the Western liberal perspective, is one that cautions that beliefs in absolutes (other than human autonomy) have a consistent tendency to produce tyranny, prejudice, war, and divisiveness. This association is reflected in the quotation from James Boyd White that opens this paper, as he warns that "[o]ur fears of religious oppression, and perhaps our fears of religious truth, lead us to maintain a false ideology"¹⁷⁰ Allan Bloom's lament is that the predominant mindset has become so frightened of absolutes that it no longer is willing to search for the truth; since *the* truth is such a dangerous commodity, it might be better to run from it than toward it.

Abortion, at least when viewed as the taking of innocent human life, places the relativist-absolutist debate in a radically new context because it constitutes the great crime against humanity of the relativist, liberal establishment. Just as German Fascism produced the Holocaust, and Soviet Marxism produced the Gulag, American establishment liberalism, assisted by feminists and the extreme left, produced mass abortion on demand.¹⁷¹

Indeed, *Roe v. Wade*¹⁷² is the embodiment and the culmination of the legal relativist tradition. The Justices of the Supreme Court, faced with a question that they admitted to be of some difficulty, responded by declaring it unresolvable, and hence handed it over to each individual woman. They would not decide when human life began; but they did agree that the law for the first two trimesters would not protect the fetus, whatever it was. They decided the legal question by declaring the moral question out of order.¹⁷³

Roe reflects the liberal relativist assumption that divisive and difficult moral questions cannot be answered by the state, but must instead be answered by each individual. The contrasting conservative, relativist assumption is that appointed Justices may not take difficult moral questions away from the majoritarian, democratic processes without direct authority from that great compact, the historical Constitution. Thus, the debate between, for example, Justice Brennan and Judge Bork is about who should decide: a question of procedure. Judge Bork's ap-

170. White, *supra* note 1.

171. Abortion is a world-wide phenomenon; rejection and acceptance of abortion can occur for a variety of reasons in various countries. In this context, I am speaking only of the acceptance of mass abortion on demand in America.

172. 410 U.S. 113 (1973).

173. See *id.* at 152-66. John Noonan and Charles Rice, both Catholic legal scholars, have made the closely-related argument that *Roe* reflects the positivism of Hans Kelsen. See Noonan, *The Root and Branch of Roe v. Wade*, 63 NEB. L. REV. 668 (1984); Rice, *The Dred Scott Case of the Twentieth Century*, 19 NEB. L. REV. 1059 (1973).

proach would tend to promote Judeo-Christian absolutist morality because the people, on the whole, still subscribe to such morality to a far greater degree than do the intellectual classes from which the judiciary are drawn. Judge Bork, however, may be more of a moral relativist than Justice Brennan is; he may be as comfortable with abortion on demand as a matter of social policy as Justice Brennan is. The relativist approach appears to so dominate both liberal and conservative legal reasoning that there is almost no available legal language left by which it can be simply declared, even in a dissenting opinion, that abortion on demand—which involves the violent mass destruction of innocent human life—is simply wrong.

The continuing descent of the Enlightenment is revealed both in the inability of our legal system to maintain a method of discourse by which it can morally condemn and legally prevent mass abortion on demand, and also by the increasingly brutal manner in which abortion on demand is defended. The Supreme Court had before it in *Roe* briefs describing fetal development and containing the familiar photographs of the human form of the fetus.¹⁷⁴ It is striking that all of the Justices, including the dissenting Justices, chose to pass over in silence the actual characteristics of the fetus. The only characteristic of fetuses considered relevant was viability, which is primarily a *relational* characteristic defined by the fetus' ability to survive without the assistance of his or her mother. What fetuses are, in and for themselves—the development of their brain, heart, and other organs, their appearance, their activities, their experience—was deemed unworthy of discussion.

The Justices thus dehumanized their victims, and maintained a semblance of humanitarianism. By specifically declaring that the Court need not decide when human life begins, and by foregoing all discussion of the characteristics of the fetus, Justice Blackmun avoided having to state that women had been permitted to kill their babies. His implicit statement, however, was merely one step away: women would be permitted to have abortions even if, "in the development of man's knowledge," it later was learned that they had been killing their babies.¹⁷⁵ The second implicit message of *Roe*, which is directed specifi-

174. Appellee's Brief at 29-53, *Roe*, reprinted in 75 LANDMARK BRIEFS AND ARGUMENTS 264 (P. Kurkland & G. Gasper eds. 1975); Amicus Brief of Certain Physicians, *Roe*, reprinted in 75 LANDMARK BRIEFS AND ARGUMENTS, *supra*, at 381.

175. See *Roe*, 410 U.S. at 159. Justice Blackmun thus stated:

Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

cally at women, is more devastating still: you may legally obtain an abortion *even if you believe that you are killing your baby*.¹⁷⁶

The Court's slippery avoidance of the nature and characteristics of the fetus has never been particularly convincing; it was bound to lead those who must continue the debate to the point of having to justify more forthrightly—and thus more brutally—the abortion right. Thus, Professor Laurence Tribe, writing some twelve years after *Roe*, finally conceded: "the more people have learned about the fetus as a growing being with brain waves and familiar human features, the stronger have been the feelings of many that the woman's freedom is pitted against a genuine baby's life."¹⁷⁷ Tribe has thus been forced to produce what the Court avoided: a defense of mass abortion on demand in the context of the assumption that "pre-viable fetuses [are] full human beings."¹⁷⁸ Tribe does not commit himself to the view that pre-viable fetuses are full human beings; what he argues, however, is that this view is plausible, and that, even if it is fully true, it should not change the result in *Roe*. Thus, while the Court claimed that states could not protect pre-viable fetuses because there is no consensus on their status, Tribe is arguing that, even if we all agreed that fetuses are full human beings, we must allow women to kill them. The question of the humanity of the fetus is consequently rendered irrelevant, because the answer cannot affect the result.¹⁷⁹

Tribe's defense of abortion as killing follows quite logically from *Roe*'s use of the relational standard of viability as the only relevant characteristic of the fetus. Human beings, Tribe argues, may be killed by those upon whom they are uniquely dependent, precisely because of that dependency. The child—even when acknowledged as a full human being—has no inherent right to demand of his or her mother the favor of being carried to viability, and society would be wrong to force the mother to do so. Establishment liberalism, which has often championed

Id. (emphasis added).

176. Justice Blackmun conceded that the view that human life begins at conception was both the "official belief of the Catholic Church . . . [and] is a view strongly held by many non-Catholics as well, and by many physicians." *Id.* at 161. Probably, the view that human life begins at conception, when combined with the view that it begins at some point well within the first, and certainly, the second trimester, are sufficiently widespread to put most women having abortions in the position of admitting to themselves, either before or after the abortion, that they have killed their child.

A recent pro-choice essay in the Sunday *New York Times Magazine* declared: "[T]he fact is, when your back is against the wall of an unwanted pregnancy, it doesn't matter whether or not you think the fetus is a person." Pollitt, *Children of Choice*, N.Y. Times, Nov. 20, 1988, Magazine, at 28, 30.

177. L. TRIBE, GOD SAVE THIS HONORABLE COURT 17 (1985).

178. L. TRIBE, *supra* note 56, at 1354.

the cause of the weak and dependent, declares unique dependency the primary characteristic of legal nonpersonhood.¹⁸⁰

Tribe makes it clear that he supports abortion rights largely because lack of access to abortion disadvantages women relative to men.¹⁸¹ The choice of establishment liberalism and feminism¹⁸² is clear: to equalize men and women, they will allow women to kill their babies. The descent of the Enlightenment may not be complete, but its nature should be sufficiently clear.

I do not want to overstate my position. The pro-life community has among its notable members some prominent liberals. There is a sense in which the pro-life cause would naturally fit the establishment liberal agenda, for the cause seeks to protect a group whose members quite literally cannot protect themselves. Rarely before, moreover, has establishment liberalism been willing to carry the relativist agenda to the point of allowing one human being to physically injure or kill another; typically, the principle of relativism is halted at the point when direct harm to an innocent other is contemplated. American liberalism could still repent of its broad-based allegiance to mass abortion on demand, and recoup at least a good portion of its ideological consistency.

Such a turnabout, however logical, unfortunately seems extremely unlikely. The broad support of American liberalism for mass abortion on demand, despite increasing acknowledgment of the human characteristics of the fetus, does not seem to be seriously waning. The Democratic party, an important institutional voice of establishment liberalism, seems incapable of sustaining a serious anti-abortion Presidential candidacy; at least that appears to be the lesson to be drawn when politicians such as Richard Gephardt scrap their pro-life position before entering presidential politics. The liberal Justices of the Court remain vigilant in their defense of abortion rights, even to the point of striking down apparently constitutional postviability abortion restrictions.¹⁸³ Establishment liberalism has long lent a sympathetic ear to those to its ideological left, while holding in contempt those on the ideological and, especially, religious right; to be allied with Jerry Falwell

180. *See id.*

181. *See id.*

182. *See, e.g.,* C. MACKINNON, *FEMINISM UNMODIFIED* 93-102 (1987). MacKinnon states: The second issue . . . is . . . the moral rightness of abortion itself. My stance is that the abortion choice must be legally available and must be *women's*, but not because the fetus is not a form of life. In the usual argument, the abortion decision is made contingent on whether the fetus is a form of life. I cannot follow that. Why should women not make life or death decisions?

Id. at 94.

183. *See Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 88 *Comm. on Judiciary* (H.R. 101-1, 101-2, 101-3, 101-4, 101-5, 101-6, 101-7, 101-8, 101-9, 101-10, 101-11, 101-12, 101-13, 101-14, 101-15, 101-16, 101-17, 101-18, 101-19, 101-20, 101-21, 101-22, 101-23, 101-24, 101-25, 101-26, 101-27, 101-28, 101-29, 101-30, 101-31, 101-32, 101-33, 101-34, 101-35, 101-36, 101-37, 101-38, 101-39, 101-40, 101-41, 101-42, 101-43, 101-44, 101-45, 101-46, 101-47, 101-48, 101-49, 101-50, 101-51, 101-52, 101-53, 101-54, 101-55, 101-56, 101-57, 101-58, 101-59, 101-60, 101-61, 101-62, 101-63, 101-64, 101-65, 101-66, 101-67, 101-68, 101-69, 101-70, 101-71, 101-72, 101-73, 101-74, 101-75, 101-76, 101-77, 101-78, 101-79, 101-80, 101-81, 101-82, 101-83, 101-84, 101-85, 101-86, 101-87, 101-88, 101-89, 101-90, 101-91, 101-92, 101-93, 101-94, 101-95, 101-96, 101-97, 101-98, 101-99, 101-100, 101-101, 101-102, 101-103, 101-104, 101-105, 101-106, 101-107, 101-108, 101-109, 101-110, 101-111, 101-112, 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and against Gloria Steinem is probably more than the average liberal can bear. Finally, there is the very real problem of repentance, and of saving face. It is perhaps easier to look the fetus in the eye and call it a nonperson than to look at oneself in the mirror and admit to complicity in mass murder.

The recent decision in *Webster v. Reproductive Health Services*¹⁸⁴ merely underscores the attachment of establishment liberalism to the policy of abortion on demand. The liberal Justices are now willing to defend the abortion right in absolutist language, as when Justice Blackmun declares that a previable fetus "cannot reasonably and objectively be regarded as a subject of rights or interests distinct from, or paramount to, those of the pregnant woman."¹⁸⁵ It is ironic that Justice Blackmun, who originally bottomed the abortion right on the supposedly unresolvable nature of the dispute concerning when life begins, now is willing to categorically label the pro-life position on fetal rights as objectively unreasonable. Whence comes Justice Blackmun's supposedly "objective" truth? In moving from a relativist to an absolutist defense of the abortion right, the liberal Justices have now all endorsed the view that certain inherent fetal characteristics represent objective determinants of fetal rights.¹⁸⁶ The liberal Justices are giving only cursory, distorted attention to fetal characteristics;¹⁸⁷ nonetheless, it is fas-

184. 57 U.S.L.W. 5023 (July 3, 1989). It may be appropriate to disclose that the author co-authored an amicus brief in the *Webster* case in support of the State of Missouri. The brief was submitted on behalf of the Southern Center for Law and Ethics.

185. See *id.* at 5040 (Blackmun, J., dissenting). Justice Blackmun's use of language in this key sentence is clearly meant to signal a belief that he is expressing demonstrable objective truth, rather than subjective belief:

"The viability line reflects the *biological facts and truths* of fetal development; it marks that threshold moment prior to which a fetus cannot survive separate from the woman and cannot *reasonably and objectively* be regarded as a subject of rights or interests distinct from, or paramount to, those of the pregnant woman."

Id. (emphasis added).

186. This position was first advanced by Justice Stevens in his 1986 concurrence in *Thornburgh*, when he argued that the state's interest in fetal life "increases progressively and dramatically as the organism's capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings increases day by day." 476 U.S. at 778 (Stevens, J., concurring). *Roe*, as noted *supra*, had only discussed the relational characteristic of viability, or capacity to survive; Stevens' concurrence adds three inherent characteristics. Justice Blackmun's dissent in *Webster*, which was joined by Justices Brennan and Marshall, specifically quotes and adopts Justice Stevens' belated use of inherent fetal characteristics to defend the viability standard. See *Webster*, 57 U.S.L.W. at 5039-40 (Blackmun, J., dissenting).

187. The Justices have named three relevant inherent fetal characteristics—abilities to feel pleasure, to feel pain, and to react to surroundings—without ever discussing the technical and sometimes contradictory research concerning at what times and to what degree the developing fetus possesses these characteristics. The Justices also have failed to discuss the apparent fact that the fetus possesses at least the capacity to react to its surroundings, and possibly the capacities to feel pleasure and pain, prior to viability. See, e.g., Gianopoulos, Elias, Simpson & Tamura, *Ultrasound Assessment of Fetal Response to Second-Trimester Amniocentesis*, 67 OBSTETRICS &

cinating to watch legal relativists argue that certain "facts" about fetal development objectively must lead all reasonable persons to certain legal conclusions about fetal rights. It seems that Justices Blackmun, Stevens, Brennan, and Marshall are now the only sources of objective truth in the Universe, having displaced God through their sweeping interpretation of the establishment clause.¹⁸⁸

It is also noteworthy that at least three of the liberal Justices have now accepted the feminist wisdom that the abortion right is necessary to the equality of women.¹⁸⁹ These Justices have therefore adopted the inherently controversial view that gender equality requires the law to minimize the impact of real gender differences, such as the fact that only women can bear children. The implications of requiring the law to undo the supposed harms created by inherent gender differences are draconian and involve the Court in social engineering. The liberal Justices, as proud bearers of the liberal dream, are quite willing to remake

GYNECOLOGY 410-13 (1986) (amniocentesis in the second trimester elicits a change in fetal movement pattern).

188. Justice Stevens claims in his *Webster* dissent that there can be no secular interest in protecting the potential life of an embryo, and thus that the Missouri preamble declaring that life begins at fertilization contravenes the establishment clause of the Constitution. See 57 U.S.L.W. at 5043-45 (Stevens, J., dissenting). It would certainly seem possible to take the apparently-secular position that the fertilized ovum, or zygote, is a genetically-distinct form of developing human life that deserves state protection. Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, implied that anti-sodomy statutes were unconstitutional under the establishment clause. See *Bowers v. Hardwick*, 478 U.S. 186, 211-12 & n.6 (1986) (Blackmun, J., dissenting). The liberal Justices seem quite willing to employ a sweeping interpretation of the clause in order to displace traditional Judeo-Christian morality.

189. This view is implied in the following passage from Justice Blackmun's majority opinion in *Thornburgh*:

[T]he Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government. That promise extends to women as well as men. Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.

476 U.S. at 772 (citations omitted).

While Justice Blackmun's *Thornburgh* opinion hints that the abortion right is necessary to women's equality, his *Webster* dissent, joined by Justices Brennan and Marshall, sounds like a feminist tract:

Thus, "not with a bang, but a whimper," the plurality discards a landmark case of the last generation, and casts into darkness the hopes and visions of every woman in this country who had come to believe that the Constitution guaranteed her the right to exercise some control over her unique ability to bear children. The plurality does so either oblivious or insensitive to the fact that millions of women, and their families, have ordered their lives around the right to reproductive choice, and that this right has become vital to the full participation of women in the economic and political walks of American life. The plurality would clear the way again for the State to conscript a woman's body and to force upon her a "distress life and future." *Roe*, 410 U.S., at 153.

the world in their own image, the image of a brave new world, even as they declare when convenient that truth and good are unknowable and undefinable.¹⁹⁰ It would seem that declaring truth to be relative is a convenient ruse for freeing the hidden arrogance and pride of human rulers, for if truth is relative and God is unconstitutional then those who are the ultimate arbiters of the social compact are absolutely uninhibited in their will to power.

The church has its own history of outrages. The voice of God is often misheard; deeds done on His behalf are often merely reflections of human depravity. A popular song once declared that "[t]oo many people have died in the name of Christ for anyone to heed the call"¹⁹¹—a profoundly silly thought. The call of God does not die, despite such misdeeds, because God and His call are severable from man's distortion of that call. God has always been able to maintain His good name on this earth despite the tomfoolery done in His name; He has always ensured that the tomfoolery would not completely eclipse the witness of those who, often at great cost, manage on the whole (through His power) to glorify Him in their deeds. A merely secular ideology, such as fascism, marxism, or American liberalism in the secular form that it has adopted, must by contrast always justify itself by a purely utilitarian calculation of the good versus the evil done in the name of that ideology. The Enlightenment tradition stripped itself of any association with the Judeo-Christian tradition and begot a host of competing secular ideologies, among which are marxism, feminism, and liberalism. The value of those ideologies, and of the Enlightenment tradition itself, must surely be judged in the light of the crimes each has committed and defended.

III. CONCLUSION

My thesis is open to several additional objections. Some may argue that employing the Judeo-Christian tradition in legal discourse violates the spirit, if not the letter, of the religion clauses of the First Amendment. The short answer to this objection begins with the observation that the Supreme Court held in *Harris v. McRae*¹⁹² that the fact that a law coincides with the doctrines of certain religious sects is not a basis for its invalidation.¹⁹³ Nearly every religious purpose, whether it be

190. See *Bowers*, 478 U.S. 186, 205–06 (1986) (Blackmun, J., dissenting) ("right" and "wrong" in area of sexuality is relative and open to individual self-definition); *Roe*, 410 U.S. at 159–62 (Texas may not adopt one theory of life because medicine, philosophy, and theology are unable to arrive at a consensus).

191. CROSBY, STILLS & NASH, *Cathedral*, in CSN (1977).

192. 448 U.S. 297 (1980).

193. 448 U.S. 297, 318–20 (1980); cf. *Bowen v. Kendrick*, 56 U.S.L.W. 4818, 4822 n. 8, Published by eCommons, 1987

prohibiting abortion, promoting chastity, or feeding the poor, can be separated from its religious roots and presented as a secular motivation. The use of "religious motivation" as a criteria for judicial review is inherently problematic. Christians, for example, are exhorted to do *everything* "in the name of the Lord Jesus."¹⁹⁴ Does this require a court to invalidate every act of a legislature composed predominantly of believing Christians? How is a court to examine and characterize the motivations in the hearts of religious believers without impermissibly becoming entangled in religious questions?¹⁹⁵

Nonetheless, we can ask what the proper decisional sources of opinion are for a judge. The view that judges should decide profound moral questions without reference to the foundational moral tradition of our civilization is dangerous. Judges today are called upon to decide such issues in areas where the law to be applied, whether constitutional, statutory, or common, is silent or ambiguous. Indeed, if the defeat of Judge Bork has any substantive meaning, it is that the American people expect the Supreme Court to exercise moral judgment in safeguarding and defining our fundamental liberties, rather than merely to enforce the morality of the framers and ratifiers. That moral judgment will be most informed if conscious reflection on the Judeo-Christian tradition is undertaken. The Supreme Court in framing fundamental law has sometimes spoken of "liberties that are deeply rooted in this Nation's history and tradition."¹⁹⁶ Those liberties cannot be properly understood apart from the religious history and religious traditions of this nation. Indeed, it has been the task of this article to seek to demonstrate that the attempt to understand those liberties in purely secularized, abstracted terms has and will lead to the anomaly of tyranny that rules in the name of liberty.

A complete reply to objections based on the religion clause would require an extensive exploration of the religion clauses. This is work for another day. A further objection to my thesis is that the Judeo-Christian tradition for which I purport to speak is, as Alasdair MacIntyre recently claimed, an "unfortunate fiction."¹⁹⁷ Clearly the term embraces a number of competing traditions, which the familiar trilogy Protestant-Catholic-Jew only begins to describe. I have used the term because I believe that the traditions it subsumes possess an important,

4824 (June 29, 1988).

194. *Colossians* 3:17.

195. For two recent explorations of the role of religious convictions in lawmaking, see Garvey, *A Comment on Religious Conviction and Lawmaking*, 84 MICH. L. REV. 1288 (1986); Greenawalt, *Religious Convictions and Lawmaking*, 84 MICH. L. REV. 352 (1985).

196. See, e.g., *Bowers v. Hardwick*, 106 S. Ct. 2841, 2844 (1986).

197. A. MACINTYRE, *SUPREMACY* 32, 41, 11

central core, when placed in comparative reference to the secularized Enlightenment tradition and its modern offshoot, the legal relativist tradition. This common core is sufficient to provide a common content and common methodology in regard to American law. We can speak to each other; we can speak to the meaning of America. Indeed, in some ways the most significant dividing line among us relates to the extent that we hold traditional, rather than liberal, or modernist, versions of our faiths. Some adherents of the Judeo-Christian tradition have, I would argue, so embraced modernist, relativist notions that they have essentially abandoned the discourse, and the common core, of which I speak. To the extent that we do not radically depart from the traditional forms of our faiths we must repudiate much of the dominant mode of legal and intellectual discourse.

I do not mean to suggest that the common core of which I speak is an adequate or complete language of faith, even in regard to the restricted subject of American law. Each of us can and should, where necessary or helpful, speak from his or her own particular tradition. This paper, for example, bears the marks of the Reformed Christian tradition. It is not out of place to argue for the truth or validity of a certain Jewish or Christian tradition, or element of a tradition, as opposed to all other teachings. We need not speak in unison, but speak we must.

It is inescapable that my thesis must address and affect different readers in different ways. Even among adherents of theistic faiths, my argument will produce varying reactions. Adherents of faiths that at various stages of American history were excluded from the dominant cultural discourse, or that today are numerically or culturally vulnerable, may instinctively shrink from any association of religion and law. Several points in this regard can be made. First, the American commitment to religious freedom, in the sense of freedom for individuals and communities to worship and practice their religion, is not seriously endangered by my thesis. Investigation would reveal, I think, that the voluntary principle, which was embraced by the Evangelicals of the nineteenth century,¹⁹⁸ is theologically supported today by adherents of

198. See, e.g., G. MARSDEN, *supra* note 95, at 12–13 (discussing the evangelical acceptance of the voluntary principle). Marsden describes the American voluntary principle in terms of the realization that “if the church or any other group were to influence American society, it must depend not on imposed authority, but rather on the voluntary response of the people.” *Id.* at 12. In using this term, I do not want to be understood as embracing the privatizing, individualistic views which the term may currently evoke. See, e.g., W. ROOF & W. MCKINNEY, *supra* note 114, at 140–71 (analyzing the “new voluntarism” in current American religious life). The term in its more original sense refers to a certain relationship between church and state. Once the state ceases to financially support certain religious organizations, and also ceases to restrict alternative religious organizations, religious organizations must operate through the voluntary participation of

all the representatives of the traditional Jewish and Christian faiths, except perhaps for a few fringe groups. This paper has described to some degree the manner in which the relatively intolerant New England Puritans gradually were forced to come to terms with this principle, even before the Revolutionary era. The Reformed tradition, moreover, has long included other, more voluntaristic strains: the English Puritan Independents, who during the 1640s criticized New England's relative intolerance, and the Calvinistic Baptists, who presumably shared the traditional Baptist desire for religious freedom. Thus, even among Calvinists, the group most scorned for its supposed intolerance, the theological foundations for religious freedom were laid long before the birth of America as a nation. Indeed, it is the reclaiming of the principle of religious freedom in theological, rather than Enlightenment, terms that will be most likely to safeguard it. If you require the devout to abandon their beliefs for the sake of a merely secular freedom, you can always expect them to rebel from the mutilation of their faith.

The mere guarantee of religious freedom, however, fails to satisfy many members of minority religions. The issue is somewhat deeper: what is required to be fully American? The issue is one of being, and of feeling, included; the inclusion at issue is not mere citizenship but the desire to belong, in the full cultural sense, in America. America as defined by the New Class appears to include everyone who wants to be included. The cause of the New Class is freedom; the stance of the New Class is neutrality. Vulnerable minorities of all kinds, including religious minorities, may believe they are both safer, and more fully participants, under the regime of the New Class.

This belief, I think, is largely incorrect. The freedom of the New Class connotes a specific agenda, including the promotion of the abortion right and the elimination of traditional male and female roles. The neutrality of the New Class is necessarily illusory: in the many public conflicts which a society, through law and other means, must resolve, there will be winners and losers; references to so-called fair procedures cannot eliminate the responsibility for enacting rules of conflict which favor one side or another. The claim of neutrality is a cover for a program that promotes the predominate interests and views of a certain minority group, the New Class. The program of the New Class is at

its adherents. This form of voluntarism need not endorse the view that individuals do not owe a religious duty to the organized church, or that religious views are so private and individualistic that any use of them in public life is offensive and improper. Nor does the original form of the voluntary principle contradict the insight that all people are morally obligated to worship their

base hostile to all forms of traditionalist religious culture, including, ultimately, minority religious culture.

It is true, of course, that New Class members typically treat minority religious groups, no matter how absolutist in their beliefs, with a certain tenderness and interest. It is also true that the New Class unleashes its full disdain upon religious movements that are powerful enough to threaten it. The New Class thus can appear to serve as the defender of minority religion, protecting it from the powerful forces of majoritarian religion. It is a mistake, however, to believe that traditionalist members of minority groups can really be full participants in the New Class power structure; the relationship of the New Class to minority religion must rather be one of paternalism and corrosion. The New Class displays a kind of protective paternalism toward non-threatening absolutist minorities, but the New Class contempt for traditional forms of religious belief lead it to regard such groups as immature. It is assumed that in time the forces of modernity, which are most powerfully unleashed under the New Class regime, will corrode the traditionalist beliefs of minority religious groups. This "maturation" will lead, of course, to the destruction of minority religious culture.

Many minority faiths, by contrast, are historically brother faiths to the culturally dominant faiths. The common core of traditionalist theistic belief suggests an opportunity for at least some minority faiths to make a substantial contribution in the public realm of law and values, in an America governed under religious, rather than relativist, principles.

There is no denying, however, that vigorous majoritarian religion poses grave risks for minority religion, even in a society devoted to religious freedom. The theological and cultural differences that divide minority and majority faiths in the Catholic-Protestant-Jewish-Muslim¹⁹⁹ spectrum are quite significant, and one cannot ask adherents of such traditionalist faiths to give up their claims to truth and their efforts to convince others of those claims. In this sense, given the free marketplace of competing religious ideas, minority religious groups are always at risk in America. Surely the answer to this dilemma, even for vulnerable religious groups, is not to destroy the public legitimacy of all claims to religious truth. Arguably, at least, minority religious groups

199. I have not previously discussed Islam, obviously one of the world's important monotheistic faiths; I mention it in this context because it is an increasingly important minority faith in America, and because it clearly shares a great deal with the Jewish and Christian faiths which historically have played a much greater role in American life. I am not prepared at this time to discuss the relationship of Islam to the term Judeo-Christian tradition, nor am I ready to discuss the larger issues presented by the growth of Islam in America. These issues are, of course, deserving of serious treatment.

are at greater risk in the long run under the New Class regime than they would be under a regime of, for example, Evangelical and Catholic America.

One cannot legitimately speak for others; adherents of minority religious faiths are entitled to cast their lot with whomever they please. Thus, the final response to those of a culturally vulnerable religious faith is that they simply do not have the right to demand that the majority faiths abandon their desire to live in a society that reflects, in its laws and other public domains, the religious faith of the majority. The law has to reflect *someone's* value orientation; America has to mean *something*. The most appropriate place from which to draw these values and meanings is from the historically and culturally dominant beliefs of the people. Tyranny of the minority is also a form of tyranny.

The audience that is likely to respond most negatively to my thesis are those members of the New Class who have embraced the dominant relativist mindset. In a sense, my argument has been addressed primarily to them; I have tried to argue in their language and their terms. Yet, I can have no illusions that the argument will be persuasive to many of this mindset. The thesis I uphold is simply too repugnant to relativist sensibilities. Many believe that abortion is a necessary right and that the rights of women outweigh the rights of the fetus, however defined. They perceive continuing vitality and progress in the great liberal modernist project. They deplore the reentry of Christianity into public life in any form that does not simply affirm the secular liberal agenda; they can understand the continued vitality of theologically conservative Christianity primarily as a reflection of the reactionary, backward nature of American culture. Many would be far more comfortable in a Western European or Scandinavian context, where the beliefs of the people regarding traditional religion and morality are far closer to those of the American New Class. They hope for a maturing of America.

They also may ask: how can we, as nonbelievers, access and use the Judeo-Christian perspective? Even if they accept the Judeo-Christian tradition as *one* legitimate authority in American legal discourse, they may see themselves as profoundly ill-suited to employ that tradition.

Several final points can be addressed to this group. First, the nonbeliever is clearly capable of comprehending the teachings of the Judeo-Christian tradition regarding the nature of God, man, law, and society; the nonbeliever also can comprehend the contrast between the Judeo-Christian teachings, and those of the Enlightenment tradition. One need not accept the truth or validity of a tradition in order to obtain a basic comprehension of that tradition's teachings. Unbelievers

are not, as scholars or attorneys, excluded from legal discourse that employs the perspective of the Judeo-Christian tradition.

Many scholars will not be inclined to employ a tradition they find distasteful. One cannot expect, nor does one want, opponents of a tradition to be its primary interpreters. Nonetheless, one can ask of those opponents, in fairness, a great deal. One can ask them, in view of the historical and cultural importance of the Judeo-Christian tradition, to refrain from what amounts to a silencing or censorship of that tradition in the domain of legal discourse. This censorship takes several forms. First, there is a general denial of the legitimacy of the Judeo-Christian tradition in legal discourse, except perhaps as might occupy the periphery in the form of an occasional seminar or possibly a few specialized journals. Relativists should be willing finally to concede that the so-called neutrality they advocate, which they claim renders authoritative use of the Judeo-Christian materials improper, is in fact advocacy of a specific position or tradition that is competitive with the Judeo-Christian tradition. They may prefer their own relativist method of discourse, and believe the competition to be wrong and dangerous; nonetheless, that does not make the competing form of discourse either intellectually or culturally illegitimate.

Second, one may make a plea for the admission of the opposing camp into the profession. It is ironic, and yet predictable, that despite pleas for intellectual diversity, adherents of the traditional forms of the historically and culturally dominant faiths of the American people are virtually absent from most American law faculties. The accepted voices of faith are generally those who propound a modernist version compatible with the relativist agenda. The censorship of the Judeo-Christian tradition is often accomplished through the exclusion of its more faithful spokesmen.

In surveying the implications of my thesis for various audiences, I must finally return to that small but significant group of Christian scholars with whom I most identify. If my thesis is to have meaning, the work—despite prejudice, despite opposition—must be largely carried out by this group. Too many have been content to relegate their faiths to their private lives, while moving quietly and safely amongst their colleagues. Too many have internalized the message of their colleagues, and swallowed the myth of neutrality.

Professor James Neuchterlein recently published a thoughtful article in *The American Scholar* that recounted his own experiences as a Christian scholar and teacher in the context of discussing the development of Lutheran Valparaiso University. In closing the article, he

wrote:

It is the irony of the situation of those who inhabit the Christian university today that they indulge in such fugitive and idiosyncratic reflections as these in full realization that they are unlikely in the extreme to have any significant effect in the larger culture. It is difficult under conditions of radical cultural pluralism to sustain illusions of a restored intellectual Christendom. I stay at Valparaiso University because I believe in it and I love it . . . not because in remaining here I think I have enlisted on the winning side. But that's not really the point. T.S. Eliot had it right: for us there is only the trying; the rest is not our business.²⁰⁰

Professor Neuchterlein's statement reflects the difficulty of living out a life as a Christian scholar in an age where the term is considered self-contradictory, and where the intellectual enterprise is dominated by a relativist, anti-theistic modernism. As this paper makes clear, I believe that he overstates the cultural pluralism of America. I believe that the defeatism he and many other Christian scholars experience comes from a disconnectedness with the larger world of American history and culture. Christian scholars must remember that they represent a vast throng of people; indeed, believing Christians are probably the most underrepresented group in the academy. Relativist New Class members are historically newcomers and remain numerically a minority; culturally they remain out of step with the people. Immersion in the world of academia, and in the mass culture controlled by the New Class, can blind us to these fundamental facts. We are privileged to have been placed in vocations where we can break the hegemony of the relativist mindset; we are privileged to represent the faithful in these highly influential arenas. The battle will be lost if it is never joined.

On the other hand, I do not want to be critical of Professor Neuchterlein, because he (and T.S. Elliot) did get it essentially right: "[F]or us there is only the trying; the rest is not our business." We are, however, on the winning side: the victory will be accomplished by God in the time, and with the means, that He has appointed.