

THE PROPER ROLE OF RELIGIOUS CONVICTION
IN MORAL-POLITICAL DISCOURSE

A Thesis

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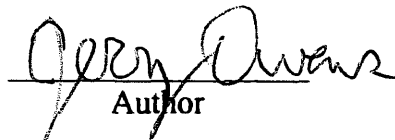
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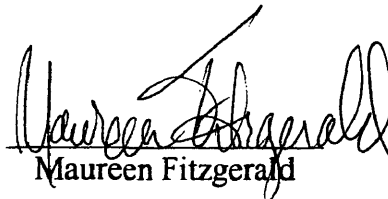
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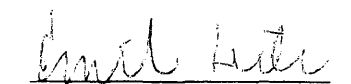

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ABSTRACT

The purpose of this study is to explore the divergent views concerning the proper role of religious convictions in moral-political justification. The basic question that guides this research is how far are American citizens, religious leaders, and elected officials properly guided in political choices based on religious convictions before they are acting unconstitutionally?

Selected writings of John Locke, John Stuart Mill, and John Dewey served to capture three moments in American intellectual history prior to World War Two. This was followed by the consideration of the divergent views of moral-political philosophers expressed in the last twenty years.

The most important resource used to explore this issue was contained in the Supreme Court records involving obscenity law jurisprudence. The question was raised: did religious convictions influence or inform the judge's decisions?

The results suggest there exists a great diversity of opinion among moral-political philosophers and judges concerning the proper role of religious convictions in moral-political justification.

THE PROPER ROLE OF RELIGIOUS CONVICTION
IN MORAL-POLITICAL DISCOURSE

Introduction

This paper will explore divergent views concerning the proper role of religious convictions in moral-political justification. The basic question that guides this exposition is how far are American citizens, religious leaders, and elected officials properly guided in political choices based on religious convictions before they are acting unconstitutionally? Or, to borrow the words of Michael Perry¹, I will discuss “the proper relation of a person’s moral beliefs [based on religious convictions] to her political choices, and especially, to her public deliberation about her justification of political choices (3).” Put specifically, in a liberal democracy, is it proper to politically enforce (by law) a person’s moral beliefs about what constitutes right action if those moral beliefs are based primarily upon religious convictions? And I raise this question inside the context of American history and culture, our laws, our institutions, our communities, and our form of government. How have Americans grappled with this question? What has this meant in political philosophy, moral philosophy, in the laws of the land, and in the institutions that engender values and give meaning to life? This question brings together several academic fields such as government, law, philosophy, and American intellectual history. It is only one question among many that can be raised and explored inside the classical ethical question: how ought we to order our lives together, a question too

¹ Michael Perry recently served as Professor of Law at the Northwestern University School of Law and is author of *Love and Power: The Role of Religion and Morality in America* (1991). His book defends a place for religious conviction in moral-political discourse.

expansive for the scope of this paper. In order to provide focus and tie several themes together into a manageable and coherent thesis, I choose to focus on the proper role of religious conviction in the formation of law. This is an admittedly narrow window to gain some insight into the larger question: how ought we to order our lives together.

The organization of the paper begins with selected writings from John Locke, John Stuart Mill, and John Dewey. I choose them to represent views that characterize three moments in moral and political thought in American intellectual history before World War Two. They will also serve to lay a foundation for turning to more recent writings by moral and political philosophers. In chapter two I will consider the writings of John Rawls, Bruce Ackerman, Robert Audi, David Richards, Phillip Hammond and Thomas Nagel. They will serve as a reference point for the family of liberal positions expressed in the last thirty years. I borrow the term “family of liberal positions” from Nicholas Wolterstorff who introduces it as a means of recognizing that the liberal position is reflective of a great range of perspectives and differences. For the purpose of this paper, the defining characteristic of the liberal position as it pertains to moral-political discourse is the belief that religious convictions as a justification for coercive legislation should properly be constrained, to varying degrees, from strict exclusion to inclusion within narrow and specific qualifications. In chapter three I will explore those authors who advocate a less constrained role for religious convictions in moral-political discourse. I will discuss the arguments of Michael Perry, Kent Greenawalt, William Galston, Nicholas Wolterstorff, and Michael Carter where they challenge the liberal position. And finally, in chapter four I will turn to selected court cases involving obscenity laws to ascertain, both implicitly and explicitly, the justification employed by judges to support

or deny the constitutionality of obscenity laws. I will raise the question: did religious convictions about how we ought to live together influence or inform the judges' decisions?

This approach makes an assumption about the role of the Supreme Court in American moral-political discourse. I assume to some degree that laws reveal conflicts in society and are indicative of tension rather than an expression of commonly shared values and beliefs. Alisdair MacIntyre² argues that the “function of the Supreme Court must be to keep peace between rival social groups adhering to rival and incompatible principles of justice by displaying a fairness which consists in even-handedness in its adjudications (253).” He further states, “The nature of any society... is not deciphered from its laws alone, but from those understood as an index of its conflicts (254).” I believe the court cases involving obscenity laws will serve as a window to explore the conflict in American culture, the diversity of opinion surrounding the proper role of religious convictions in making laws, and an even greater diversity when raising the larger ethical question: how ought we to order our lives in society.

² Alisdair MacIntyre was Professor of Philosophy at Vanderbilt University when *After Virtue* was published in 1981. His book challenged the thesis that modernity possesses a commonly accepted ethical paradigm “thick” enough to resolve tough moral-political issues. He later served as Professor of Philosophy at Notre Dame and at Duke University.

Early Foundations in Moral-Political Philosophy

John Locke, John Stuart Mill, and John Dewey made important contributions to the historical development of American intellectual, moral, and political history. I highlight several themes in their writings, themes that focus on those fermenting principles of liberalism that bear directly on the proper role of religious convictions in moral-political discourse as follows: (1) the tension between protection of individual freedom and community welfare, (2) the lexical priority of individual rights set against community interests, (3) separation of church and state, (4) the argument for state neutrality on conceptions and pursuit of the good, (5) scientific naturalism or rationalism defended as the common language and authority of public discourse, (6) coercive law justified on the basis of physical harm to others, and (7) morality severed from religious authority.

In his classic *On Liberty*, J.S. Mill³ writes about “the nature and limits of the power which can be legitimately exercised by society over the individual,” that is, the tension between liberty and law, the need for effective government control contrasted with the need to protect individuals against the tyranny of political rulers (5). He acknowledges this inherent tension when he writes, “Some rules of conduct, therefore, must be imposed, by law in the first place, and by opinion on many things which are not fit subjects for the operation of law (9).” John Locke⁴ also recognizes this tension when he persuasively defends comprehensive individual freedom and equality in his *Second Treatise on*

³ John Stuart Mill (1806-1873), published *On Liberty in 1859*, a classic text in the history of political thought and the subject of sustained debate.

⁴ John Locke (1632-1704) represents the great heritage of Enlightenment political philosophers who elevated the value of human individuality and influenced the establishment of American Democracy.

Government. He argues that the legitimacy of government is grounded upon the consent of the governed. Locke writes:

Men being... by nature, all free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another, without his consent. The only way whereby any one divests himself of this natural liberty... is by agreeing with other men to join and unite in community for their comfortable, safe, and peaceable living one amongst another (Locke *Second Treatise* 52)

And yet, even as he defends individual freedom and the consent of the governed, he attempts to balance individual interests with community interests. He argues that “no opinions contrary to human society, or to those moral rules necessary to the preservation of civil society, are to be tolerated by the magistrate... such things as undermine the foundations of society, and are therefore condemned by the judgment of all mankind (Locke *Toleration* 61).” John Dewey also sets parameters around individual freedom of action. He writes, “all men require moral sanctions in their conduct; the consent of their kind... No man ever lived with the exclusive approval of his own conscience (76).” Locke, Mill, and Dewey are great defenders of individual freedom of thought and action, yet they each recognize an inherent tension between the limits of individual freedom and community welfare.

Mill attempts to resolve this tension in two ways. First, he defends the lexical priority of individual rights. And second, he appeals to the utilitarian “harm principle” as a rational resolution to conflicting individual and community interests. He writes:

The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty and action of any of their number, is *self-protection*. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant... to justify [coercion], the conduct from which it is desired to deter him, must be calculated to produce evil *to*

someone else.... Over himself, over his own body and mind, the individual is sovereign (13).” Emphasis mine.

Mill argues for the lexical priority of individual choice on matters of conscience and conduct. He defends this position on the utilitarian principle: “I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being (14).” Mill believes that the greatest depth of personal happiness and fulfillment is achieved through the exercise of personal liberty and freedom, to choose for one’s self on issues of belief, conduct, conscience, and on concepts of the goal and purpose of life. He defends the protection of personal liberty as that which leads to the greatest aggregate happiness.

According to Mill, problems arise because of “the feeling in each person’s mind that everybody should be required to act as he, and those with whom he sympathizes, would like to act (9).” He argues that rules of conduct must appeal to some reason accepted by others. Personal preference and the “similar opinion of others like minds” is not sufficient justification (10). Mill argues that human liberty comprises:

First, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense, absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral or theological.... Secondly, the principle [of liberty] requires liberty of tastes and pursuits; of framing the plan of life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong (15).

Mill is concerned that majority opinion might usurp the freedom of thought and action of the individual. The following quote expresses this concern, a concern consistent with the liberal position today:

Protection, therefore, against the tyranny of the magistrate is not enough: there needs protection also against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them; to fetter the development, and, if possible, prevent the formation of individuality not in harmony with its ways, and compel all character to fashion themselves upon the model of its own. There is a limit to the legitimate interference of collective opinion with individual independence. And to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs, as protection against political despotism... (8-9)”

Mill articulates in this statement a deep concern for the protection of individual autonomy against the imposed will of the majority, the lexical priority of individual rights set against a majoritarian imposition of the common good.

This same concern is absent in the writings of Locke, who seems amenable to a community moral consensus, that is, rules of conduct established by the majority. When Locke defends freedom of conscience, freedom of religion, and the separation of church and state, he does not prescribe the same protection for freedom of action. As already stated, he contends that “no opinions contrary to human society, or to those moral rules necessary to the preservation of civil society, are to be tolerated by the magistrate... such things as undermine the foundations of society, and are therefore condemned by the judgment of all mankind (Locke *Toleration* 61).” He argues:

A good life in which consists not the least of religion and true piety, concerns also the civil government; and in it lies the safety both of men’s souls and the common wealth. Moral *actions* belong therefore to the jurisdiction both of the outward and inward court; both of the civil and domestic governor; I mean, both of the magistrate and the conscience (Locke *Toleration* 56).

Locke defends the rule of the majority as a solution to the tension between individual and community interest, a principle disputed by Mill. Locke states, “Whosoever therefore out of the state of nature unite into a community, must be understood to give up all power,

necessary to the management of the community, unless they expressly agreed in any number greater than the majority (Locke *Toleration* 53).” This principle supports a communitarian justification for legislation that is “for the good of the community,” a position explicitly stated by some Supreme Court judges in the court cases we will be considering later in this paper. In this context, the good of the community is defined by the majority opinion through a democratic voting process of a given community, a principle imminently detestable to Mill.

It can be argued that Locke’s conception of a common good, interpreted in the context of eighteenth century American culture, is greatly influenced by a religious worldview, specifically, a Protestant worldview. This Mill finds unnecessarily oppressive and constraining. Mill advocates a strong separation between religious conviction and state coercion, believing religion is one of the most powerful elements “which have entered into the formation of moral feeling, having almost always been governed either by the ambition of hierarchy, seeking control over every department of human conduct, or by the spirit of Puritanism (16-17).” He argues persuasively from history that laws based on religious conviction have been used to justify and violate individual rights in matters of conscience and action. Mill certainly challenges a Christian notion of morality as a basis for justification in moral-political discourse, “That mankind owe a great deal to this morality, and to its early teachers, I should be the last person to deny; but I do not scruple to say of it, that it is, in many important points, incomplete and one-sided, and that unless ideas and feelings, not sanctioned by it, had contributed to the formation of European life and character, human affairs would have been in a worse condition than they are now (50).” This quote is in the context of an argument for freedom of thought and speech in

which Mill challenges those who believe religious morality in general, and Christianity in particular, is the whole truth for social norms and dissent is not to be tolerated on the basis of the common good for society.

John Dewey⁵ introduces a separate argument to resolve the tension between individual and community interests when he lays down some ethical principles in his essay on *Art, Science and Moral Progress*. Consistent with Kantian thought, Dewey contends that individuals should not be used as means to an end. They should not be sacrificed for the good of society. Instead, he believes democracy should create a social culture that enables individuals to fully realize their “own personality” and potential in the state. He defends the principle of state neutrality on competing conceptions of the good. He further believes that morality must be freed from absolute concepts of the good and transcendent authority. Morality should submit to scientific methodology and social experiment in which the right is defined as that which “works best” for individuals and society, the “ought” defined instrumental and pragmatic and not as a means to one great *telos*. The following quote from Dewey captures the essence of this paradigm shift:

From this point of view there is no separate body of moral rules; no separate system of moral powers; no separate subject matter of moral knowledge, and hence no such thing as isolated ethical science. If the business of morals is not to speculate upon man’s final end, and upon the ultimate standards of right, it is to utilize physiology, anthropology, and psychology to discover all that can be discovered of man, his organic powers and propensities. If its business is not to search for the one separate moral motive, it is to converge all the instrumentalities of the social arts, of law, education, economics and political science upon the construction of intelligent methods of improving the common lot (73-74).

Dewey argues that ethics should be severed from religious authority. He rejects an absolute, transcendent concept of moral good that defines right and wrong. Instead he

⁵ John Dewey (1860-1952) was one of the most influential moral-political philosophers in The United States at the turn of the 20th century and preceding World War Two.

appeals to science as the final arbitrator in moral-political discourse. Human experience and scientific rationality becomes the common “authoritative” language of public discussion and excludes an appeal to religious myth and superstition.

John Locke, John Stuart Mill, and John Dewey were each strong defenders of individual rights, advocating comprehensive freedom of thought, conscience, expression, and behavior for citizens independent of state control and coercion. Yet each recognized an inherent tension between individual freedom and social welfare. Mill defended the lexical priority of individual rights against the tyranny of majority opinion expressed through coercive state mechanism. He certainly challenged the concept of a community common good defined on the basis of religious conviction. Dewey likewise challenged a religious epistemology and argued that the good of society should be defined in the common language of scientific rationalism and ethical pragmatism. The good of individuals and society should be defined simply as that which best allows humanity to flourish and fulfill their own potential. In contrast, Locke’s defense of individual freedom, especially in matters of religious belief, is firmly entrenched in a Protestant morality. His defense of freedom of thought and conscience does not extend to actions that violate a community moral consensus. He does not defend the lexical priority of individual rights over majoritarian conceptions of the good, a good defined in eighteenth century American culture and law by a Protestant majority.

The Family of Liberal Positions

Two of the enduring foundational principles of liberalism are commitments to individual freedom and equality. In liberal thought, only a limited government can be justified; indeed, the basic task of government is to protect the equal liberty of citizens. According to Thomas Nagel⁶, the great challenge for the political theorist, one that has never been sufficiently resolved, is to resolve conflicts between individual autonomy and community responsibility: how to protect individual choice and freedom and at the same time protect community interests (23). The relationship between religious conviction and political choices bears directly on this tension. Robert Audi⁷ writes:

Religion and politics are perennial topics of concern and debate in any free society... especially in the United States. It is inevitable that reflective religious people should discuss religion and that thoughtful citizens should discuss politics. It is perhaps not inevitable, but it is altogether appropriate, for a liberal democracy – a free and democratic society – in which religion is a major cultural force to concern itself with the relationship between religion and politics....It demands a good understanding of the proper balance between, on the one hand, religious commitments that bear on what sort of society we shall have, and on the other hand, political and secular considerations pertinent to the same range objectives (Audi *Religious Commitment* ix)

⁶ Thomas Nagel is a law professor who recently taught at NYU. His book *Equality and Partiality* was published in 1991.

⁷ Robert Audi is Charles J. Mach Distinguished Professor of Philosophy at the University of Nebraska, Lincoln. His books include *The Structure of Justification* (1993) and *Moral Knowledge and Ethical Character* (1997). He has served as editor for the widely acclaimed *Cambridge Dictionary of Philosophy*.

He goes on to argue that one of the current challenges of democracy is “the delicate problem of how a free and democratic society can achieve appropriate harmony between religion and politics (*Audi Religious Commitment* 3).

Nancy Rosenblum⁸ recently served as editor on a book of essays addressing the tentative symbiotic relationship between religion and politics. She argues that the flurry of current debate on this issue centers on three recent changes in our society: “an explosion of religious pluralism; an increase in government activism effecting religious associations – both coercive regulations and subsidies, benefits, and inducements; and the prominence of ‘integralism,’ or the push for a ‘religiously integrated existence’ (4).” She describes the nature of current debate when she writes that “Militant secularists fight to keep religion out of political arenas and public coffers, and believers fight back, both sides firing accusations and both sides claiming vulnerability (4).” John Rawls⁹ acknowledges this conflict between religion and democracy when he writes, “I have been concerned with a torturing question in the contemporary world, namely: can democracy and comprehensive doctrines, religious or nonreligious, be compatible? And if so, how?” (*Rawls Public Reasons* 175)

A central tenet in the liberal position maintains that religious convictions should “properly” be constrained in any attempt to resolve this tension. This chapter will highlight seven key arguments from within the liberal position that seek to resolve the tension between liberty and law while maintaining a “proper” constraint upon religious

⁸ Nancy Rosenblum is Henry Merritt Wriston Professor and Professor of Political Science at Brown University. She is the editor of *Liberation and the Moral Life* and was editor of the book *Obligations of Citizenship and Demands of Faith* (2000).

⁹ John Rawls is an American philosopher and political theorist. He earned his Ph.D. from Princeton and taught at Princeton, Cornell, and MIT before becoming professor of philosophy at Harvard (1962). His book *Theory of Justice* (1971) revived interest in systematic, normative political philosophy.

conviction. It is important to note up front that the liberal position constitutes a range of perspectives. Robert Audi highlights the fact that the liberal position includes both a “strong view” and a “weak view”. He writes, “a strong view requires that those reasons [religious convictions] not be a determining factor at all [in moral political discourse]; a weaker view would simply require that they not be the only determining factor (Audi *Religion in the Public Square* 123).” Audi himself prefers the weaker view:

I propose that (particularly when advocating or supporting laws or public policies that would restrict liberty) conscientious citizens have a prima facie obligation to have and be willing to offer at least one secular reason that is evidentially adequate and motivationally sufficient... there, then, is one liberal position that provides reasons for more space for the operation of religious reasons that one would expect from liberalism... (Audi *Religion in the public Square* 123).

A common premise within the liberal position maintains that the religious diversity of America precludes finding a common ground in moral-political discourse in comprehensive religious doctrines. A second premise posits that a commitment to individual freedom and constitutional integrity requires state neutrality on conceptions of the good, particularly in regard to religious belief. A third premise argues that coercive laws based upon religious convictions violate the establishment clause. This leads to a critical question. If religious convictions cannot provide a common ground or a moral foundation for coercive laws, how does the state legitimize any constraint upon individual freedom and autonomy? Within the liberal positions, four common paradigms are defended as legitimate solutions to the tension between liberty and law. First, there is an attempt to establish a common ground in shared political principles. Second, there is an appeal to a shared moral consensus. Third, some derivative of Mill’s

harm principle is advocated. And fourth, there is an appeal to a common rationality and reasons accessible to all.

Consistent with the family of liberal positions, John Rawls believes that the great religious and philosophical diversity of American culture precludes a justificatory role in moral-political debate for religion or other comprehensive doctrines. He states:

The political culture of a democratic society is always marked by a diversity of opposing and irreconcilable religious, philosophical, and moral doctrines. Some of them are perfectly reasonable, and this diversity among reasonable doctrines political liberalism sees as the inevitable long-run result of powers of human reason at work within the background of enduring free institutions (Rawls *Political Liberalism* 3-4).

Because of the diverse and irreconcilable religious, philosophical, and moral doctrines, Rawls argues that a comprehensive doctrine cannot “secure the basis of social unity, nor can it provide the context of public reason on fundamental political questions (*Political Liberalism* 134).”

Thomas Nagel presents a similar argument in his book, *Equality and Partiality*¹⁰. He argues that moral-political theory must seek a common ground distinct and separate from religious belief because of the great religious diversity of America. He writes, “the pure ideal of political legitimacy is that the use of state power should be capable of being authorized by each citizen... through acceptance of the principles, institutions, and the procedures of how that power will be used (8)”. Like Rawls, Nagle maintains that religious belief cannot establish a comprehensive moral system adequate to resolve the disputes of law and society on how we ought to order our lives together. According to Nagle, religious belief certainly cannot establish rules and principles for coercive laws endorsed by all.

¹⁰ *Equality and Partiality* was published in 1991

David Richards¹¹ also defends this same position in his book *Toleration and the Constitution*. He maintains that religious convictions must be separated from ethics in moral-political debate. Like Rawls and Nagle, he argues that the religious diversity of America makes this a necessity (127). Because of religious diversity, there is a need for “a common ethical basis... an ethics of equal respect centering on all purpose general goods (128).” He further states, “others should not exercise illegitimate control over or compromise the ultimate responsibility of the persons for forming, expressing, and revising personal conscience (133).” Richards’ advocates a conception of universal toleration that “must encompass all belief systems, religious and nonreligious, expressive of moral powers of rationality and reasonableness.” He writes, “Our heritage of both utilitarian and Kantian ethics maintains that our moral powers acknowledge uncompromising ethical obligations independent of God’s will (138).”

This leads to another important premise, state neutrality on conceptions of the good. Moral political theorist Bruce Ackerman¹² strongly defends the principle of state neutrality in his book *Social Justice in the Liberal State*. He argues that moral-political debate should exclude all beliefs about the good, the right, and the fitting way to live life that are not shared in common, a common ground established through a sifting process of public debate. If individuals have different perceptions of good and right, neither perception can be justified as intrinsically superior to another, by the simple process of elimination, only commonly shared moral premises are left standing. Ackerman argues,

¹¹ David Richards is a law professor who recently taught at the New York University School of Law. He is a career legal academic and author of *Toleration and the Constitution* (1986).

¹² Bruce Ackerman is currently Sterling Professor of Law at Yale University. Previously he was Charles Keller Beekman Professor of Law and Philosophy, Columbia (1982-87). His area of expertise includes Constitutional law and political/legal philosophy. *Social Justice in the Liberal State* was published in 1980.

“liberal conversation provides a communal process that deepens each person’s claim to autonomy at the same time it recognizes others as no less worthy of respect (347).” He further argues that “it is the essence of liberalism to deny people the right to declare their particular metaphysics and epistemology contains the truth, the whole truth, and nothing but the truth (357).” He writes:

Nobody has the right to vindicate political authority by asserting a privileged insight into the moral universe which is denied the rest of us. A power structure is illegitimate if it can be justified only through conversation in which some person (or group) must assert he is (or they are) the privileged moral authority.

Neutrality. No reason is a good reason if it requires the power holder to assert:

- a. that his conception of the good is better than that asserted by any of his fellow citizens, or
- b. that, regardless of his conception of the good, he is intrinsically superior to one or more of his fellows (Ackerman 10-11).

Ackerman defends a neutral approach to political debate that begins in silence. He takes as a philosophical starting point “there is no moral meaning hidden in the universe. All there is is you and I struggling in a world that neither we, nor any other thing, created (368).” This is clearly a worldview shaped by evolutionary theory and by naturalistic assumptions about reality, “the way things really are,” a worldview rejected by many American citizens. According to Ackerman, a liberal democracy “offers each citizen the chance to achieve self-understanding without subordinating himself to meanings imposed by others (231).” And the aim of social justice in the liberal state is a community in which “each is guaranteed the right to live his own life regardless of what his neighbors think of him (376).” Any limits to individual freedom are those limits free and equal citizens would agree upon. In Ackerman’s paradigm for moral-political discourse, neutral dialogue provides:

A means by which citizen-statesman can resolve good-faith disagreements without claiming the right to impose their idea of happiness on another... each citizen's judgment is worthy of greater respect than the view of some transcendent being... So long as the rule can be justified through neutral conversation, its legitimacy has been established within a dialogic theory of legitimacy (319).

A third premise in the liberal position maintains that religious conviction as a sole justification for coercive law violates the establishment clause. Richards argues, "others should not exercise illegitimate control over or compromise the ultimate responsibility of the persons for forming, expressing, and revising personal conscience (133)." He defends his thesis based on an expansive definition of the First Amendment religious clauses. He includes freedom of conscience as a protected freedom: "the state must guarantee and secure persons a greatest equal respect for rational and reasonable capacities of persons themselves to originate, exercise, express, and change theories of life and how to live well (136)." To defend his position, he turns to a critical historical judicial decision: the *United States v. Ballard*¹³. In this case the court "rejected the truth of religious belief as a constitutionally valid criteria for state action (Richards 138)." According to Richards, "the moral basis of the free exercise clause, properly understood, is a negative liberty, immunizing from state coercion the exercise of the conceptions of a life well and ethically lived and expressions of mature person's rational and reasonable powers (140)." Richards turns once again to the Supreme Court. He states that there has been a paradigm shift in the courts since World War II, "questioning the constitutionality acceptability of religion as a suitable proxy for the state's promotion of appropriate

¹³ *United States v. Ballard* (1944) was a unique case. The Defendant was charged with mail fraud. Under the guise of religious belief, he solicited money through the mail for the promise of divine healing. The court did not focus on the veracity of his religious beliefs, instead the court focused upon the defendant's willful intent to cheat and defraud others. I think Richards draws the wrong conclusion from this case. In this unique historical situation involving Guy W. Ballard, the court decided the veracity of Ballard's religious beliefs was immaterial to the charge of fraud. Richard's conclusion moves beyond the specific historical situation of this case to a wider application that is certainly debatable.

neutral purposes for public morality...(249).” As a result, in the interpretation of law, the link between religion and morality and religion and ethics has been severed and the courts have shifted to a “neutral conception of enforceable public morality (251),” tied to Mill’s harm criteria and contractarian ideas of democratic theory and practice.

Phillip Hammond¹⁴ in his essay *Can Religion Be Religious in Public* also argues, “The Establishment Clause of the First Amendment prohibits the use of governmental authority to enforce religion’s authority (20).” Based on his interpretation of the First Amendment establishment clause, he argues that religious discourse must relinquish public authority. By this he means that personal convictions based on religious epistemology should not use governmental authority to legislate restrictive behavior. The state should not lend its authority to prefer one conviction over another if that conviction is based on religious authority (22). Central to his thesis, he believes that religious conviction as a source of moral authority for constraining behavior in society connotes an establishment of a state-imposed religious belief, and thereby is a violation of church and state under a broad definition of the establishment clause.

Any acceptance of the three premises presented thus far raises a critical question: if religious convictions cannot provide a common ground or a moral foundation for coercive laws, how does the state legitimize any constraint upon individual freedom and autonomy?

Moral-political philosopher John Rawls seeks a common ground in moral-political justification a step removed from moral premises based upon comprehensive doctrines, religious or nonreligious, and philosophical first principles. He seeks a common ground a

¹⁴ Phillip Hammond is D. Mackenzie Brown Professor of Religious Studies and Sociology at the University of California, Santa Barbara. His books include *With Liberty for All* (1998). He has been editor of the *Journal for the Scientific Study of Religion*.

step removed from questions concerning moral right and wrong and one's understanding of the proper and fitting way to live a good life. He argues that the reasons or the justification for laws that constrain individual autonomy must be directly tied to the values and principles of a liberal democracy and a reasonable conception of political justice. He states:

When may citizens by their vote properly exercise their coercive political power over one another when fundamental questions are at stake? Or in the light of what principles and ideals must we exercise that power if our doing so is to be justifiable to others as free and equal? To this question political liberalism replies: our exercise of political power is proper and hence justifiable only when exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in light of principles and ideas acceptable to them as reasonable and rational. This is the liberal principle of legitimacy. And since the exercise of political power itself must be legitimate, the ideal of citizenship imposes a moral, not a legal, duty – the duty of civility – to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason. This duty also involves a willingness to listen to others in fair mindedness in deciding when accommodations to their views should reasonable be made (*Political Liberalism* 217).

Rawls's conception of a constitutional democracy maintains "citizens in domestic society offer to cooperate on "fair" terms with other citizens (*Public Reasons* 25)." He further expresses his political theory when he describes a constitutional democracy as "a relationship of free and equal citizens who exercise ultimate political power as a collective body (*Public reasons* 136)." He acknowledges that his conception of a constitutional democracy is tied to "contract theory" as defended by such notable political theorist as John Locke and Rousseau (*Public reasons* 13).

In a political system so understood, Rawls endeavors to find a common ground among citizens with very different comprehensive doctrines, religious and nonreligious, that may be irreconcilable. He argues that in a political system where citizens share equally in

political power, each citizen must justify their moral premises in a manner that others can endorse. In other words, in a political system founded upon the consent of the governed, laws that restrain individual liberty must, to some degree, be justified to those so governed, reasons understood and accepted by all.

Rawls argues that one element of “common ground” is the values and principles of a liberal democracy or political values:

Examples of political values include those mentioned in the preamble of the United States Constitution: a more perfect union, justice, domestic tranquility, the common defense, the general welfare, and the blessings of liberty to ourselves and our posterity. These include under them other values: so, for example, under justice we also have equal basic liberties, equality of opportunity, ideals concerning the distribution of wealth (*The Law of Peoples* 144).

The second necessary component in establishing a common ground in public reasons is a reasonable liberal political conception of justice. Rawls favors justice as fairness. I mention only one of the key characteristics in a “reasonable liberal political conception of justice” as used by Rawls: the criterion of reciprocity; “this criterion requires that, when terms are proposed as the most reasonable terms of fair cooperation, those proposing them must think it at least reasonable for others to accept them, as free and equal citizens, and not as dominated or manipulated or under pressure caused by an inferior political or social position (*The Law of Peoples* 14).”

Rawls argues that justification for moral-political discourse, especially laws that constrain individual autonomy, must appeal to a common ground of political values based on a liberal constitutional democracy and a reasonable concept of justice.

Public reasoning aims for public justification. We appeal to political conceptions of justice, and to ascertainable evidence and facts open to public view, in order to reach conclusions about what we think are the most reasonable political institutions and policies. Public reason is not

simply valid reasoning, but argument addressed to others: it proceeds correctly from premises we accept and think others could reasonably accept to conclusions we think they could also reasonably accept (*The Law of Peoples* 155).

Like Rawls, Nagle attempts to establish fair rules and procedures of government for a free and equal people; however, he expands the parameters to include a common ground based on a moral consensus. The paradigm Nagel defends is based upon Kantian unanimity: the right result (in moral-political discourse) is achieved as different persons, reasoning from different perspectives, converge on moral truth (34). His paradigm, unlike Rawls, who seeks a common ground in the shared principles of a liberal democracy and common perceptions of justice, looks for a common ground in shared moral-premises. He develops a paradigm for moral-political discourse that places a priority upon the “impersonal starting point: a starting point independent of who we are (Nagle 10).” According to Nagle:

Ethics and political theory begin when from the impersonal stand point we focus on the raw data provided by individual desires, interests, projects, attachments, allegiances, and plans of life that define the personal points of view of the multitude of distinct individuals, ourselves included... at that point... we recognize some of these things to have impersonal value (11).

In other words, commonly held values and moral-premises emerge from the sifting of individual perspectives. This “common ground” of shared values and perspectives serves to establish unanimity for ethics and political theory and legitimizes a liberal democracy embraced by consenting citizens. According to Nagle, the goal of political theory simply stated is to “justify a political system to everyone who is required to live under it... the search for legitimacy is a search for unanimity – not about everything but with the controlling framework within the more controversial decisions will be made (33).”

Richards defends this same principle of overlapping moral consensus when he writes about “our heritage of both utilitarian and Kantian Ethics... (138). He ties this shared moral consensus specifically to Mill’s harm principle:

(1) Acts may properly be made criminal only if they inflict harm on assigned people. (2) Except to protect children, incompetents, and backward peoples, it is never proper to criminalize an act solely on the ground of protecting harm to an agent. (3) It is never proper to criminalize conduct solely because the mere thought of it gives offense (239).

Although Richards defends the harm principle as a justification for laws that constrain, he rejects this principle based on a utilitarian ethic. He defers to Rawlsian contractarian theory as superior. In contractarian terms:

Enforcement of public morality must thus achieve two ends: first, it should impose common standards of minimal decency necessary to ensure reasonable cooperation among peoples; and second, it should define those standards in a way that respects the inalienable right to moral independence, exercised in commitment to diverse and often competing sub-communities. From this sort of contractarian perspective, an unjust enforcement at large of ethical standards of one sectarian community – infringing on interests central to the just moral independence of others – is not an acceptable policy outcome in a liberal democracy.... Public power must be limited to the pursuit of the general goods that rational and reasonable people would want protected... And when pursuit of such goods abridges essential moral interests (conscience, privacy), such a law must be both necessary and indispensable to secure such goods, and do so in the way least restrictive of such interests (245).

Richards argues that the harm principle should be interpreted in the context of contractarian theory that protects general goods and Rawlsian principles of a liberal democracy such as life, liberty, the pursuit of happiness, equality, and privacy.

Robert Audi defends this same position in a 1993 San Diego Law Review article entitled *The Place of Religious Argument*. Audi argues that before behavior can be constrained by force of law, it must violate the rights of another person. He contends that because a liberal democracy is a sociopolitical system that places high priority on

protecting the autonomy of individuals, it should only pass laws that constrain behavior if there is a clear scientific, empirical, cause and effect relationship between personal behavior and harm to another person (Audi *Religious Argument* 690).

The relationship between evidence and personal harm introduces an additional principle for resolving the tension between liberty and law, a principle that excludes religious conviction as a sole justification for coercive law. A belief in an accepted form of reasoning or public rationality is a common theme in the family of liberal positions. According to Audi, religious convictions as a justification for law do not carry legislative authority because by definition, their appeal to truth does not depend upon rational standards accessible to all without reference to transcendent authority. An appeal to science becomes the “acceptable” authority in moral-political debate:

If I am coerced on grounds that cannot motivate me, as a rational informed person, to do the thing in question, I cannot come to identify with the deed and will tend to resent having to do it. Even if the deed should be my obligation, still where only esoteric knowledge - say, through revelation that only the imitated experience – can show that it is, I will tend to resent coercion. And it is part of the under-lying rationale of liberalism that we should not have to feel this kind of resentment – that we give up autonomy only where, no matter what our specific preferences or particular worldview, we can be expected, given adequate rationality and sufficient information, to see that we would have so acted on our own (Audi *Religious Argument* 690).

Hammond expresses this same belief when he writes, “In the public square, religion must advance its positions on empirical, rational, or logical grounds (30)”. Likewise, Ackerman rejects transcendent belief as a legitimate epistemology; by default, scientific methodology and rationality become the only acceptable “common language” of moral political debate (358).

Both Audi and Hammond argue that moral premises based upon religious convictions are not legitimate in moral-political discourse until those premises are translated into secular purposes, with specific public goods, with falsifiable justifications, and with empirical evidence accessible to all, without an appeal to transcendent authority or religious reasons as the sole basis for coercive law. Then and only then, can religious arguments enter the public square as a justification for a moral premise in the moral-political justificatory process.

Consistent with Audi, Hammond, and Richards, Michael Perry¹⁵ defends as a general rule that moral premises cannot be justified solely on the basis of an appeal to truth or authority that others would reject. To make his point, he quotes J. Bryan Hehir, principle drafter of the U.S. Catholic bishop's 1983 letter on nuclear deterrence:

'Religiously based insights, values and arguments at some point must be rendered persuasive to the wider civic public. There is legitimacy to proposing a sectarian argument within the confines of a religious community, but it does violence to the fabric of pluralism to expect acceptance of such an argument in the wider public arena. When a religious moral claim will affect the wider public, it should be proposed in a fashion which the public can evaluate, accept or reject on its own terms. The [point]... is not to banish religious insight from public life [, but only to] establish a test for the religious communities to meet; to probe our commitments deeply and broadly enough that we can translate their best insights to others' (108).

To argue that child pornography is immoral based upon a religious conviction violates the intent of this principle. To argue that child pornography presents a possible psychological or physiological danger to children, or violates the liberal

¹⁵ Michael Perry recently served as Professor of Law at the Northwestern University School of Law and is author of *Love and Power: The Role of Religion and Morality in America* (1991). His book defends a place for religious conviction in moral-political discourse.

principle of equality, is consistent with this principle of speaking in terms others can evaluate, accept, or reject.

A common premise within the family of liberal positions argues that religious convictions cannot provide a common ground or a moral foundation for coercive laws. Instead, four common paradigms are defended as legitimate solutions to the tension between liberty and law. Rawls appeals to a common ground in shared political principles. Nagle and Ackerman appeal to a shared moral consensus. Richards appeals to a contrarian application of Mill's harm principle. And finally, Audi and Hammonds appeal to scientific naturalism as the common rationality and political authority accessible and acceptable to all.

A Challenge to the Liberal Position

The arguments presented that seek to resolve the tension between individual freedom and legitimate state coercion independent and exclusive of religious conviction are not without their detractors. William A. Galston¹⁶, in his book *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State*, attempts to defend the liberal position, but with a specific nuance. He rejects “a pervasive theoretical understanding of liberalism as neutral regarding human goods” and replaces “it with an alternative understanding of liberalism in which specific goods and virtues figure centrally (42).” He provides a critique of the liberal position without being hostile to the basic tenets of liberalism. He attempts to combine consent of the governed and protection of the widest range of individual freedom and conceptions of the good, with those “virtues” he argues are necessary to allow the liberal state to flourish and survive now and in posterity. He is concerned with the liberal culture in America: the apparent lack of virtue and the signs of social disintegration such as the break up of families, alarming violent crime statistics, drug abuse, greed and the like (6). He argues that the liberal state depends upon cultural capital, that is, the character of its citizens: “liberalism is committed to equality, but it needs excellence. It is committed to freedom, but it needs virtue (11).” He spends an entire chapter of his book advocating specific virtues such as individual responsibility,

¹⁶ William Galston is a professor at the University of Maryland and Institute for Philosophy and Public Policy (College Park, Maryland).

fidelity in family relationships, self-sacrifice, tolerance, respect for diversity; and work place ethics such as initiative, drive, and determination (222-223).

He believes, “Policies that liberals typically defend as neutral are experienced by many religious communities as hostile. Liberals see themselves as defenders of our constitutional faith, while many of the religiously faithful see themselves as the victims of secular aggression (13).” He challenges the belief that an attempt to find common ground in moral-political debate properly excludes a belief in transcendence. He argues that debate on public policy and law should include “certain core notions to which the overwhelming majority of a particular community subscribes and which help constitute its special identity (24-25).”

Galston further argues that diversity does not in fact establish a common ground as Rawls, Nagle and Ackerman anticipate, a common ground flexible enough to shape public policy and a political system. The opposite may be the case. Reasonable people may arrive at different conclusions concerning the fundamental principles of a shared political culture. And reasonable people may possess very different conceptions of social justice. Galston states that liberalism based on neutrality fails because “no society is fully universal; every society picks out some favored goals and ways of life while discouraging or repressing others (30).” He further states, “Morality is in part local, particular, community-based, historical; and reason may not be fully competent to resolve contradictions among considerations relevant to the rational determination of moral judgment (38).” Therefore he concludes, “It is not necessary to (be able to) reduce competing moral considerations to a common measure in order to make publicly defensible choices (41).”

Nicholas Wolterstorff¹⁷ also critiques the family of liberal positions on the basis that there is no commonly accepted or shared political culture. He specifically challenges Rawls as the leading representative of the position that an independent source distinctive from religious and other comprehensive doctrines must be established as a source for moral-political decisions and debate. According to Wolterstorff, the specific independent source Rawls has in mind is public consensus. He writes, “Though he himself does not use the term *consensus populi*, his suggestion, at bottom, is that, in a liberal democracy, the *consensus populi* ought to be used to form the political basis and discussion and decisions of the citizens (91-92).” The common ground for citizens is “the shared political culture of one’s liberal democracy (93).”

Wolterstorff argues that it is unreasonable to expect all citizens to share a common perception of political culture because the political culture of the United States is in fact constitutive of many different views and conflicting strands. Wolterstorff states, “The prospect of extracting, from the political culture, principles of justice that are both shared and appropriate to a liberal democracy, is hopeless (97).” He questions Rawls’s conviction that people share a common form of reasoning leading to shared principles of what constitutes a liberal democracy, irrespective of religious and comprehensive doctrines. He states:

No matter what principles of justice a particular political theorist may propose, the reasonable thing for her to expect, given any plausible understanding whatever of ‘reasonable’ and rational, is not that all reasonable and rational citizens would accept those principles, but rather that not all of them would do so. It would be utterly unreasonable for her to expect of them to accept them (99).

¹⁷ Nicholas Wolterstorff earned an M.A. & Ph.D. from Harvard University in philosophy. He was a professor of philosophy for twenty years at Calvin College. He currently serves as Noah Porter Professor of Philosophical Theology in the Yale Divinity School and is an adjunct professor in the Philosophy and Religious Studies Department.

According to Walterstorff, Rawls concedes that finding a shared principle of justice is untenable. Finding shared principles, as an independent source for moral-political decisions, is an ideal or goal (101-102).

Walterstorff also argues that no independent resource yields principles needed to resolve tough, complex, convoluted moral-political issues. He mirrors the sentiment of Greenawalt who argues in his thesis that principles of a liberal democracy are inconclusive and unable to resolve complex moral issues like abortion and animal rights. The principles of a liberal democracy are irrelevant on critical issues of debate. They cannot resolve critical moral issues like when and should a fetus deserve equal protection under the law, when does it gain viability and the right to life (102)? And finally, he believes it is unfair to ask people who sincerely believe religious convictions *ought* to be a part of their moral-political decisions, to agree that their convictions are something other than politics. For many people of faith, their religious convictions shape and inform their political convictions, the way we ought to order our lives together.

I mentioned earlier in the paper that Richards argues, “Our heritage of both utilitarian and Kantian ethics maintains that our moral powers acknowledge uncompromising ethical obligations independent of God’s will (138).” His statement indicates he believes that the Enlightenment goal of establishing a universally accepted moral-ethical paradigm rationally justified apart from religious truth has been successful. Adrian MacIntyre¹⁸ challenges this premise in his book, *After Virtue*. According to MacIntyre, the common characteristic of contemporary philosophy is disagreement: “there seems to be no rational way of securing moral agreement in our culture (6).” My

¹⁸ Alisdair MacIntyre was a professor of philosophy at Vanderbilt University when *After Virtue* was published in 1981. He later served as Professor of Philosophy at Notre Dame.

point here is simply to highlight the fact that there is no unanimity among contemporary moral philosophers on a commonly accepted rationality, that is, there is no commonly accepted, rational, “objective” method to weigh rival moral-premises embraced by all.

Stephen Carter¹⁹ makes the same argument in his book *The Culture of Unbelief*. He argues that Post-Enlightenment moral philosophy has been unable to establish settled rules to determine truth. He writes, “The principal contribution of the Enlightenment was to introduce rationalism to philosophy, to press the case that human reason, by observing and deducing, could resolve both moral and factual propositions without the need to resort to divine authority (215).” Carter raises the question suggested by philosopher Jeffery Stout: has rationalism been so successful “that not only is God unavailable as a justification for knowledge, nothing else is either?” When it comes to the issue of public morality and laws that constrain, one is left with “an often bewildering variety of approaches to the problem of determining the validity of moral claims (215).” Carter argues that in a morally diverse and pluralistic society, it is a myth to argue our culture shares “common starting points or common forms of reasoning (218).” He challenges scientific methodology as the final arbitrator and only admissible epistemology to determine issues of morality, a methodology that establishes knowledge and truth on the basis of empirical evidence both measurable and testable and thereby falsifiable. Carter contends that scientific naturalism as an epistemology and religious belief as an epistemology are both very much concerned with facts. Carter raises an important question: why reject a religious starting point in public debate, while including others; “moral claims, unlike factual claims, do not rely for their validity on the generation of

¹⁹ Stephen Carter is the William Nelson Cromwell Professor of Law at Yale University and his specialty is constitutional law.

testable hypothesis. A question that has bedeviled Western Philosophy since the Enlightenment is just what moral claims do rely on for validity (225).”

A challenge is also raised to the belief the state must remain neutral on concepts of the good. Galston writes, “No form of government can be justified without some view of what is good for individuals (79).” According to Galston, the proponents of political liberalism maintain that the state should be neutral on conceptions of the good because: first, they hold there is no rational basis for choosing the best good among many; second, to do so would violate individual freedom – to force a good – on individuals; and third, diversity is a fact of modernity. He faults these premises because they assume moral skepticism and a lexical priority of individual interests over community interests. He denies, “The non-coerced pursuit of the bad enjoys priority in principle – that is –in every case – over the coerced pursuit of the good (87).” As an example, coercive laws that prohibit an individual’s right to discriminate in housing or labor practices are legitimate. The coerced pursuit of “fair” housing and labor laws is a good that deserves lexical priority to an individual’s right to discriminate. He rejects the lexical priority of negative freedom and argues that the liberal commitment to negative freedom is not unlimited and unbounded (89). In fairness to the authors discussed thus far, no one has advocated unlimited and unbounded freedom. At the very least, there is a common appeal to some derivative of Mill’s harm principle. Personal freedom is constrained by the principle of harm to others in society. It is the difficulty of finding a common consensus on the definition of what constitutes harm that embitters public debate on so many key issues even within the family of liberal positions.

Galston denies that a commitment to liberalism implies a commitment to relativism on concepts of the good— all good is equal. He holds instead, liberalism is a commitment to a conception of the good that places value on equality, liberty, negative freedom, individuality, respect, and toleration. These principles of liberalism have “intrinsic worth” which elevates them to first principles and “highest order interests (91).” According to Galston, “the theory of good presupposed by Rawls, Ackerman, and Nagle, is the theory of rationalist humanism... liberal humanism is not only a substantive theory of the good but an eminently contestable theory (92).” He even argues that the liberal commitment to moral rationality is coercive and pervasive when it is taught in public schools and questions if this concept of the good is hospitable to all ways of life (95). He believes liberal humanism is a distinct worldview imposed by a commitment to a rational, scientific discourse that excludes religious epistemology. Galston believes that moral-political theorists like Rawls, Ackerman, and Richards defend secular scientific humanism and rationalism as authoritative and normative for the way society “ought to be” and thereby rightfully coerced by the state. Anything “religious” must be converted into terms and rationales consistent with a scientific methodology of observable facts, testable hypothesis and reasons accessible to all.

Galston contends that neutrality is not possible in idea or as a fact (97). Neutrality is not neutral because it gives preference to civil considerations when religious practices come into conflict. Galston quotes theologian Jon Gunneman to illustrate his point:

‘The liberal state, like any state, is not and cannot be fully legitimate. The liberal state in particular is illegitimate insofar as it insists on seeing my beliefs as my own individual preferences rather than as public truth-claims about the world, truth-claims deeply embedded in a social tradition that gives those of us it our primary identity and limits all other claims of authority. What will you do with us?’ (117)

Galston asserts that liberal theory relies on three important conceptions of the good: “the worth of human existence, the value of the fulfillment of human purposes, and the commitment to rationality as the chief guide” in human endeavor (143-144). He argues this is a restrictive theory of the good.

He specifically challenges Ackerman’s belief that there should be constraints upon reasons that justify public policy by appealing to a superior way of life or concept of the good. He challenges Ackerman on three points. First, public debate does not always (even often) reach consensus, especially on particulars. Second, an appeal to rational argument is itself not neutral; it favors one epistemological approach over others. And third, any neutral dialogue must begin with some concept of the good. (106-109).

Kent Greenawalt²⁰ is another author addressing the complicated relationship between the church and state in American society and the proper role of religious convictions in moral-political discourse. He stands in opposition to political theorist Ackerman, Richards, and Rawls who posit that religious convictions constitute an illegitimate basis for moral-political justification in a liberal democracy until translated into reasons accessible and acceptable to all. He believes that a basic tenant of political liberalism is the right to hold and express personal opinions and beliefs, religious or nonreligious; excluding religious convictions as a general rule in moral political debate violates the basic foundations of liberalism, equality, freedom of thought, and freedom of expression. He further argues that religious convictions are “proper” in moral-political justification

²⁰ Kent Greenawalt studied political philosophy at Oxford and law at Columbia. He has spent his career as a legal academic and served as editor-in-chief of the *Columbia Law Review* before joining the Columbia faculty in 1965. He served as Law clerk to Supreme Court Justice John Harlan. His area of interest includes constitutional law and jurisprudence, with special emphasis on church and state.

when shared premises and reasons accessible to all have proved to be inconclusive and inadequate to resolve issues of fact and value (231).

Greenawalt challenges two tenants of liberalism: individualism and rationalism. He writes:

Approval of liberal democracy does imply acceptance of a degree of individualism; a liberal democracy rejects compulsion of beliefs and patterns of life and regards individuals as a vital protection of a fair political process. But a liberal democrat need not deny that human beings are social creatures, that human character is socially formed, that the arrival of partial truth is achieved by a process of community dialogue, and that some of the most fulfilling aspects of human existence involve organic social units that have a kind of priority over the individuals within them. [He also argues that] unstinting rationalism is no more a required component of a justification for liberal democracy than unstinting individualism... Acceptance of liberal democracy may presuppose an ability of people to work out most practical conflicts by some sort of reasoned process, but liberal democrats' belief in rational capacities can fall far short of any assumption that all or most fundamental human problems have correct answers at which people arrive by rational deliberation (22-23).

This challenge by Greenawalt to these assumed characteristics of political liberalism becomes crucial to his later argument for the inclusion of religious convictions in moral-political debate: "The argument against reliance on religious convictions often comes down to an argument *for* reliance on premises that are deemed rational in some way that excludes religious convictions (23)." He posits, "though a liberal democracy involves a limited commitment to public accessible reasons for decisions, it does not entail for the political realm either exclusive reliance on such reasons or an unqualified acceptance of a narrow form of rationalism (25)." He believes that in American society, religious convictions inform or influence many citizens' ethical choices, including moral-political judgments (30). He argues against any principle in a liberal democracy that excludes moral premises solely on the basis that they are religious convictions. Those who

advocate this principle fail to recognize how difficult it is for the average citizen to separate those views shaped by religious convictions and those based on rational criteria (44). Greenawalt writes, “theories that exclude many nonreligious premises as well as religious convictions do not leave ample grounds for citizens to resolve many political issues.” And again he writes, “that no adequate reason exists for preferring all nonreligious premises to religious convictions as bases for political judgments (49).”

Michael Perry in his book *Love and Power* makes some of the same arguments as Greenawalt when he argues for a less constrained role for religious convictions in moral-political discourse. Perry seeks to establish a place at the public table for religious discourse, and specifically, rules for religious justification for political choices. He declares in his introduction, “This book is about the proper relation of morality to politics in a morally pluralistic society like the United States. More precisely, it is about the proper relation of a person’s moral beliefs to her political choices, and especially, to her public deliberation about her public justification of political choices (3).” His intent is to answer the following question: “If religious-moral discourse should not be excluded from the public square, how should it be included? In particular, how should discourse be brought to bear in the practice of political justification (5)?” He seeks to find a middle ground between those with a moral-political philosophy that would divest religious-moral discourse of its political authority and “those who would bring religious-moral discourse to bear in a sectarian, divisive way (5).”

Perry challenges the viewpoints of three prominent political philosophers-theorists: Bruce Ackerman, Thomas Nagel, and John Rawls. He critiques their understanding of the proper relationship between religious discourse, morality, and law. He posits that

even though they may offer a variety of viewpoints and perspectives, they hold in common the controlling theme that “disputed beliefs... about human good should play no or at most a marginal role in political justification (9).” The disputed beliefs the above mentioned authors have in mind usually involve beliefs about human good informed by religious convictions, and specifically, religious convictions that are based on an epistemology that embraces a belief in the priority of transcendent truth or specific revelation such as that contained in a sacred text.

Perry critiques Ackerman’s contention that the sole legitimate basis for coercive law is overlapping moral consensus, that is, moral premises shared by all are the only proper justifications for law that constrain individual liberty. Perry argues that finding shared normative premises may be extremely difficult, if not impossible, because America is a morally pluralistic society with many different ideas of what constitutes the good and fitting way to live human life. Second, even if common ground is found, this does not necessarily mean that moral-ethical issues will be resolved as a point of law. Third, by including only those moral premises that individuals hold in common and excluding others that are disputed, certain moral premises become privileged. Perry echoes the sentiment of Greenawalt in this last premise (9).

Perry contends that an individual may be forced to delegitimize very important core convictions and beliefs because they are not shared by another individual, for instance, beliefs informed by an epistemology based on “special revelation.” In contrast, another individual may find they are able to retain most, if not all, of their core beliefs because they are common ground beliefs. Common ground beliefs become “privileged” beliefs that can serve as a justification for moral-political decisions, while “disputed” beliefs are

divested of any authority in public discourse. Perry argues that disputed moral premises should not be banned from public debate just because they are disputed beliefs. If public debate and compromise revolve only around “common ground” moral premises, there is less room for compromise. If disputed beliefs are excluded from the debate as a rule, then the bracketing and exclusion of core moral premises becomes the price of admission to moral-political discourse for some individuals. This creates a situation that may sow seeds of resentment and discontent in a liberal democracy, a political process that should be open to the discussion of diverse ideas and positions.

Perry also critiques Thomas Nagel and his moral-political paradigm that asks each individual to locate a moral starting point that is independent of “who we are”. In other words, one is asked to distance themselves from their presuppositions, their core values, their history and experiences. The common denominator in moral-political justification in Nagel’s approach becomes “common critical rationality” and “evidence that can be shared” (12). Perry critiques Nagel by raising two questions: what evidence does Nagel believe can be shared, and what does Nagel mean by common critical rationality? Perry argues that the ground one person accepts or rejects as rational or reasonable is tied to one’s own understanding of truth and reality within their own belief system. He challenges Nagel on the basis of epistemology. In a pluralistic society, Perry argues that not everyone is going to find a common ground in defining critical rationality and evidence that can be shared by all.

Perry also critiques John Rawls although he favors the neutral or common ground paradigm advocated by Rawls. Perry believes it is superior to Ackerman and Nagel because, in his opinion, Rawls does not make the mistake of “privileging” common

premises while rejecting unshared premises (23). According to Perry, Rawls seeks a common ground among several different religious and philosophical doctrines in which none are rejected or accepted outright. He seeks a point of contravention, a common ground of shared moral premises, a common consensus that becomes authoritative in terms of defining the common good because they work to meet human needs.

Perry's critique of Rawls' common ground approach to moral-political justification centers on this issue: although Perry acknowledges that broad general principles do emerge in a form of consensus, that people generally agree one should not murder, steal, rape, bear false witness against their neighbor, it is in the particulars where Rawls's approach becomes problematic. In a pluralistic society like the United States, competing views of truth and human good create a moral-political atmosphere in which it is extremely difficult to find consensus on particulars. It is the details of common life and law that deflate the common ground hypothesis.

Perry's critique of the common ground or neutral ground paradigm for moral-political justification centers on two crucial concepts. First, a paradigm that proposes to be neutral and impartial in fact is neither; it favors common ground beliefs over disputed beliefs. Second, the exclusion of disputed moral premises is unnecessarily restrictive. In the words of Perry:

A practice of political justification from which disputed beliefs about human good are excluded lacks the normative resources required for addressing our most fundamental political-moral questions Only a politics in which beliefs about human good, including disputed beliefs, have a central place is capable of addressing such issues (42).

Perry argues therefore; an individual's most compelling beliefs, those core values that define the ultimate meanings of life and give import to how one defines the good and

fitting life, may in fact reside in the sphere of disputed beliefs. To exclude these disputed beliefs as a general principle is an unconscionable burden on any citizen, certainly a citizen in a liberal democracy, a political system that defends an individual's right to pursue life, liberty, and happiness, and defends such rights as freedom of speech, freedom of assembly, and freedom of religion. As did Galston, Perry argues that there is a presumed ontology in secularism that leads to a conclusion about "the good and fitting life". To accept one conception of the good while rejecting another in fact violates the liberal principle of state neutrality on conceptions of the good.

Like Perry, Greenawalt also challenges "the thesis that political decisions should be made on naturalistic, nonreligious publicly accessible grounds." He specifically castigates Ackerman for his "less than enthusiastic sympathy with religious perspectives." He argues that a liberal democracy should not tell citizens how or on what basis moral premises should be informed. In other words, how I get to my moral premises is my business and a product of individual freedom not to be restricted by well meaning moral-political philosophers (55).

Greenawalt argues that many moral-political issues are complex and defy resolution by shared common premises and publicly accessible reasons, especially in light of the growing diversity of American society. In those instances Greenawalt posits:

A good argument exists that a person's reliance on religious grounds should be regarded as appropriate if everyone must inevitably use "nonpublic" reasons of some sort or other. I do not rely on any claim that depriving public decisions of religiously based understanding will result in bad laws and policies, impoverished political dialogue, or undermine the stability of law and government. Rather my argument is based on simple notions of fairness and tolerance of diverse beliefs ... If all people must draw from their personal experiences and commitments of values to some degree, people whose experience leads them to religious convictions

should not have to disregard what they consider the critical insights about value that their convictions provide (144-145).

Greenawalt raises three possible critiques of his premise raised by opponents to his position. The first critique simply contends that rational arguments always have something to say in moral-political debate; rational arguments are not inconclusive in moral-political debate. Greenawalt responds to this critique in a straightforward manner. Although publicly accessible reasons may have something to say about all moral premises, it does not necessarily follow that those contributions are conclusive. As an example, how does one answer the question: do worms have a higher moral status than dolphins in animal rights issues? It is Greenawalt's sense that scientific naturalism can be inconclusive (146-147). A second critique makes the point: a comprehensive ethical paradigm such as utilitarianism can be used to resolve the issues when public accessible reasons are inconclusive and prove to be inadequate to resolve specific moral-political issues. Greenawalt responds, in a culture as diverse and pluralistic as American society, people don't agree on any one ethical paradigm. A third critique argues that religious based grounds are distinguishable from other personal based grounds and religious convictions are improper while other personal based grounds are not improper. According to Greenawalt, this critique fails to appreciate the difficulty of separating individual beliefs informed by religious convictions and beliefs informed by other personal beliefs. He writes:

To demand that many devout Catholics, Protestants, and Jews pluck out their religious convictions is to ask them how they would think about a critical moral problem if they started from scratch, disregarding what they presently take as basic premises of moral thought. Asking that people perform this exercise is not only unrealistic in the sense impossible; the implicit demand that people compartmentalize beliefs that constitute some kind of unity in their approach to life is positively objectionable (155).

I believe this explicit demand is objectionable to Greenawalt because in a very real sense this imposition on one's ethical paradigm is intolerant of individual autonomy. This imposition violates a sacred tenant of political liberalism.

There is an apparent contradiction in the arguments of Perry and Greenawalt. They both validate the necessity of translating religious based moral beliefs into a commonly understood terminology. Greenawalt writes, "The common currency of political discourse is nonreligious argument about human welfare. Public discourse about political issues with those who do not share religious premises should be cast in other than religious terms (217)." Perry likewise argues, for a religious argument to be legitimate in moral-political justification, it must find a common ground of authoritative truth amenable to all audiences and identify a public purpose or public good. Perry advocates a common ground between people with different beliefs, values, and concepts of the common good. The moral-political discourse should focus on those behaviors that private and community experience indicate make a human grow and mature and flourish (111). I am not sure how they differentiate the necessity of a nonreligious argument from Ackerman's "neutral dialogue", or Nagel's and Richards' overlapping moral consensus, or Audis' reasons accepted by all. They seem to be saying the very same thing. Regardless of a person's starting point for moral premises, religious or otherwise, public debate concerning the justification for coercive law must be grounded on reasons accepted and accessible to all. Rawls, Ackerman, Nagle, and Richards have consistently argued this very point.

Perry also responds to the argument raised earlier in this paper by Hammond and Richards. They argued that a moral-political paradigm that includes religious convictions

as a justification for legislation violates the establishment clause of the First Amendment. Perry contends that there is a difference between forcing people to adapt a religious faith system and justifying moral premises as a justification for law upon religious arguments. Religious arguments and justification for law that meet the criteria for admission to the public debate would not make them unconstitutional anymore than any moral premise would be unconstitutional because of its source. Perry argues that in regard to the establishment clause, courts have interpreted the establishment clause to mean simply that laws must have a secular purpose. His point, “Coercive legislation is virtually always based (in part, at least) on a belief that the prohibited way of acting or living involves either physical or psychological harm (or both), whether to persons who live or act the prohibited way, to other persons or entities, or to both (115).” As has already been stated, the embittered nature of moral-political debate often centers upon divergent interpretations of what constitutes “physical harm” or “psychological harm.”

The bottom line according to Perry, laws based on any rationale, religious or otherwise, that fail to meet the standard of “physical harm” or “psychological harm”, are equally invalid. In other words, religious-moral premises that meet the criteria of providing publicly intelligible and accessible reasons would in fact establish secular reasons for legislation that courts have recognized as valid and Constitutional; therefore, an interpretation of the First Amendment establishment clause does not proscribe religious based moral premises as a justification for legislation as long the religious premise is not the sole justification; it would even allow the religious premise to be the primary justification.

In a similar vein, Greenawalt argues that religious convictions as a justification for moral premises should be included along with other personal methods and ethical paradigms in the public debate. To exclude religious convictions as a general principle is both intolerant and illiberal in a moral and ethically diverse society. The specific conditions that constitute a proper role for religious convictions in moral-political discourse arise when common premises and accessible forms of reasoning prove to be inconclusive in the resolution of value judgments as they affect laws and public policy. He concludes, “Even though a model of our liberal democracy includes a limited commitment to shared bases of evaluation, it leaves considerable room for religious citizens to rely on religious grounds for moral judgments that affect law and public policy (216).”

Perry, Greenawalt, and Walterstorff clearly are at odds with the “strong view” as defined by Audi, but share much in common with the views of Audi, Hammond, Richards, and even Rawls as defined by the “weaker view”. They agree that a person’s religious, and non-religious convictions, can properly inform political choices, but maintain that there is a responsibility in a liberal democracy to appeal to some common ground moral premise, or at the very least, to some derivative of Mill’s harm principle. Some constraints upon religious convictions as a justification for coercive law is a commonly accepted premise. The debate centers upon the extent and nature of such constraints.

Court Cases on Obscenity Law Jurisprudence

Up to this point, I have discussed the proper role of religious convictions as a theoretical question, the domain of the moral-political philosopher. I will now consider the same question inside a concrete moment of American history. I turn to four important court cases involving obscenity laws. These will serve as the primary resource for exploring the proper role of religious convictions in moral-political discourse, with application to the wider question of ethics: how ought we to order our lives together. They are as follows: *Roth v. United States* 354 U.S. 476 (1957), *Memoirs v. Massachusetts* 383 U.S. 413 (1966), *Miller v. California* 413 U.S. 15 (1973), and *Paris Adult Theatre* 413 U.S. 49 (1973).

These court cases turn on three crucial questions: (1) can the state and federal government legislate coercive restraints upon access and distribution of material deemed obscene (and to what degree)? (2) Does any such constraint violate the First and Fourteenth Amendment rights to free speech and freedom of press? (3) What objective standard or criteria can be applied to evaluate what constitutes obscene material? To these three questions, an additional question has been raised as part of a feminist argument: do some forms of obscenity subordinate women and therefore provide a foundation for legal restrictions based on issues of equality?²¹

²¹ See Catharine A. MacKinnon, *Toward a Feminist Theory of State*.

Questions that guided my research included: how did the judges explicitly justify their decisions? What are the possible implicit justifications? What principles of liberal democracy guided their decisions? Were religious convictions explicitly excluded? Were the decisions reflective of conflict and compromise or of unanimity?

I begin with *Roth v. United States* 354 U.S. 476 (1957). This case also involved *Albert v. United States*. The Supreme Court argued and decided these two cases together. The central issue in both cases focused on “the constitutionality of a criminal obscenity statute (*Roth* 479).” Private citizens in both cases challenged the obscenity statute on the basis of the First Amendment rights of free speech and freedom of the press. For the purpose of my research, I am concerned only with the judge’s explicit and implicit justifications for their decisions. I do not intend to provide any detailed discussion on the resolution of the cases.

The *Roth* decision is a benchmark in obscenity case jurisprudence because it articulates a definition of obscenity and establishes three criteria to guide court decisions. Justice Brennan provides this definition of obscenity: material is lewd and obscene if “to the average person, applying contemporary community standards, the dominant theme of material taken as a whole appeals to prurient interest (*Roth* 489).” Under this definition, as elaborated in subsequent cases since *Roth*, three elements must coalesce to determine if materials are deemed obscene. These are as follows:

- (1) The dominant theme of the material taken as a whole appeals to prurient interests.
- (2) The material is patently offensive because it affronts contemporary standards relating to the description or representation of sexual matters.
- (3) The material is utterly without redeeming social value (*Memoirs* 418).

The majority opinion, delivered by Justice Brennan, defends the states right to enact obscenity laws, deciding that the First Amendment protection of free speech does not extend to material deemed to be obscene. The arguments justifying coercive obscenity laws in the majority opinion follow four main contours: (1) historical precedent, (2) harm to social fabric, (3) harm to other individuals, and (4) appeal to community moral consensus. I will consider each argument in order along with the dissenting view.

Justice Brennan, writing the majority opinion, argues from a historical precedent as reflected in “the universal judgment that obscenity should be restrained, reflected in the international agreement of over fifty nations, in the obscenity laws of all of the forty-eight states, and in the 20 obscenity laws enacted by Congress from 1842 to 1956 (Roth 485).” Justice Warren concurs when he writes: “there is a social problem” reflected in the laws enacted in forty-eight states as well as Congress (Roth 495). He adds a word of caution when he acknowledges that there have been historical mistakes that improperly encroached on free speech. Because of past mistakes, he believes the court should decide with humility and legal restraint; just because there is a problem does not justify any or all measures to rectify.

Justice Harlan in dissent states, “In the final analysis, the problem presented by these cases is how far, and on what terms, the state and federal government have power to punish individuals for disseminating books considered to be undesirable because of their nature or supposed deleterious effect upon human conduct (Roth 496-497).” He argues that any constraint upon particular material is an individual matter not to be decided by the courts. Justice Harlan’s initial response to the majority opinion simply articulates a

deeply held liberal principle and tradition traced through Locke and Mill: the right for each individual to choose in matters of conscience.

Justice Brennan, speaking for the majority, appeals to a historical precedent both internationally and in the United States, in short, past national and international consensus implies a current justification for obscenity laws. In context, no rationale is provided for past precedence in obscenity law. Certainly in his appeal to historical precedent, Justice Brennan makes no explicit appeal or reference to religious convictions as a basis for past obscenity laws, but it is fair to raise the question: were past obscenity laws justified in part based upon religious convictions? I only suggest it would be difficult to separate moral premises based upon religious convictions from moral premises based on reasons accessible to all, certainly in the context of judicial history. Robert Audi raises this as an issue in his article "*The Place of Religious Argument in a Free and Democratic Society*". In his definition of a religious argument, he includes those moral premises that can be traced back to a historical link that is religious in nature (Audi *Religious Arguments* 683). In this light, the appeal Justice Brennan and Justice Warren make to historical precedence could result in a connection between coercive law and religious conviction, although this is certainly not their intent.

A second argument advanced by Justice Brennan concerns the moral fabric of society and supports a communitarian argument. He quotes the judgment expressed in *Chaplinski v. New Hampshire*, 315 U.S. 568, 5-1—572, "It has been observed that such utterances [lewd and obscene]... are of such slight social value... any benefit that may be derived from them *is clearly outweighed by the social interest in order and morality* (Roth 485)." Emphasis mine. Chief Justice Warren echoes this same sentiment when he

agrees with the California courts that obscenity has a substantial tendency to corrupt (Roth 494).

It is interesting to note that although Justice Harlan dissented in the Roth decision, he concurred in the Albert decision. In the second case, Harlan agreed that the state could enforce obscenity laws that involved unsolicited distribution of material deemed obscene. He writes, “the state had a legitimate interest in protecting the privacy of the home against an invasion of unsolicited obscenity (Roth 502). What I find to be of particular interest is a statement that seems inconsistent with his earlier comment defending individual liberty of conscience from state intrusion. He writes:

It seems to me clear that it is not irrational, in our present state of knowledge, to consider that pornography can induce a type of sexual conduct which a state may deem obnoxious to the moral fabric of society.... The state can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards (Roth 501).

In fairness to Justice Harlan, I want to place this quotation within context. He is not defending the right of the state to decide what is lewd and obscene to individuals. He believes this to be a matter of personal conscience. Instead, he defends the state’s right to constrain unsolicited distribution of questionable material. Though he recognizes there may be a public harm such as an erosion of moral standards, he does not consider this sufficient justification for coercive constraints upon individual liberty and conscience.

John Locke and John Stuart Mill would disagree on this same point. Locke argues that “no opinions contrary to human society, or to those moral rules necessary to the preservation of civil society, are to be tolerated by the magistrate... such things as undermine the foundations of society, and are therefore condemned by the judgment of

all mankind (Locke *Toleration* 61).” Mill argues, in contrast to Locke, that liberty comprises:

First, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense, absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral or theological... Secondly, the principle [of liberty] requires liberty of tastes and pursuits; of framing the plan of life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong (15).

The crucial question raised by the justices in the Roth case and implicit in both Locke and Mill is this: what constitutes harm for others? Certainly Justice Brennan’s argument is consistent with a Lockean understanding of moral-political discourse: moral rules necessary to the preservation of civil society are legitimate concerns of the community and can be enforced by law.

This brings us to a third argument. Justice Brennan explicitly appeals to the harm principle as a justification for obscenity laws; however, he does not believe there must be conclusive evidence of a causal connection between obscenity and harm to others. He writes, “Convictions may be had without proof either that obscene material will perceptibly create a clear and present danger of anti-social behavior (Roth 486).” In other words, convictions alone are sufficient grounds for coercive laws without conclusive demonstrative proof of any perceived harm. I raise the question: what is the basis for such convictions? Can such convictions be based upon religious convictions? And again, how would one separate religious conviction from secular convictions? This is the issue Kent Greenawalt raises in his book *Religious Convictions in Political Choice*.

He argues that it is difficult for the average citizen to separate which of their views are shaped by religious convictions and which are based on rational criteria (44).

Justice Harlan does not challenge the harm principle, that is, harm to others can be constrained by law. He does however disagree with laws grounded in only the perception of social harm: “The assumption seems to be that the distribution of certain types of literature will induce criminal or immoral behavior (Roth 501).” This is an assumption that, according to Justice Harlan, sociologists, psychiatrists and penologists are in sharp disagreement about. Justice Douglas and Justice Black are even more explicit in their dissent on this issue. They believe it is wrong to punish thoughts provoked rather than for overt acts and anti-social behavior. Justice Douglas writes, “to allow the state to step in and punish mere speech or publication that the judge thinks has an undesirable impact on thoughts but that is not shown to be a part of unlawful action is drastically to curtail the First Amendment (Roth 509).” He further writes, “if we were certain that impurity of sexual thoughts impelled to action, we would be on less dangerous ground in punishing the distributors of this sex literature (Roth 510).”

Neither the majority nor dissenting judges disagree on the harm principle. There is general agreement that if the expression of individual thought or action harms another person, and there is conclusive evidence that a causal relationship exists, then law is a legitimate response. The judges disagree on the nature of evidence necessary to justify law. Justice Brennan defends convictions without proof; Justice Douglas defends convictions based upon reasons accessible to all. Both viewpoints implicitly allow religious convictions to serve as a partial justification for law. From Justice Brennan’s viewpoint, the justification for the conviction that obscenity causes a public harm could

be “veiled” religious convictions at the very least. From Justice Douglas’s position, religious conviction could be the most compelling reason in a citizens or judges mind, but other evidence for a public harm would be required. In his view, religious convictions could not stand alone as a justification for law.

Justice Brennan, speaking for the majority, raises another controversial argument to defend the court’s decision. In his definition of obscenity, he alludes to “contemporary community standards.” Quoting the trial lawyer, he writes, “You must ask yourselves does it offend the common conscience of the community by present-day standards”. He further quotes the specific words spoken to the jury by the trial judge: “In this case, ladies and gentlemen of the jury, you and you alone are the exclusive judges of what the common conscience of the community is, and in determining that conscience, you are to consider the community as a whole, young and old, educated and uneducated, the religious and irreligious – men, women, and children (Roth 490).”

In the state case, the jury served as a proxy moral conscience for the entire community, a position that Justice Douglas finds troubling in his dissent. He writes, “any test that turns on what is offensive to the community is too loose, too capricious.” He further writes, “I can understand (and at times even sympathize) with programs of civic groups and church groups to protect and defend existing moral standards of the community... when speech alone is involved... I do not think the government, consistent with the First Amendment, can throw its weight behind one school or another (Roth 512).”

I hear components of both the thought of Mill and Rawls in the reticence of Justice Douglas. In the words of Justice Douglas, I hear the echo of Mill: “there needs protection

also against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them (Mill 8).” I hear also a prophetic anticipation of Rawls’s *Theory of Justice* when he writes about the priority of the individual right of free speech over the priority of the good of the social moral-fabric. He also defends state neutrality between concepts of the good. I realize of course that Justice Douglas is writing in 1957 and Rawls’s *Theory of Justice* is published over fifteen years later. It is clear that conceptions of liberal principles as a priority in justifying law and state neutrality on conceptions of the good life, are embedded in the dissenting opinion of Justice Douglas long before Rawls publishes his seminal work.

The concept of laws based on community moral consensus, certainly raises some critical questions. What are the grounds for community moral consensus? Is community moral consensus tied to religious convictions? I am not far off base when I posit, time and location would greatly influence the answer. There would be a great diversity of opinion among a jury consisting of citizens from Alma, Arkansas (home of my parents); or Salt Lake City, Utah; or Boston, Massachusetts. Justice Harlan recognizes this community and state diversity when he writes: “Congress has no power over sexual morality... [it is] the states, which bear direct responsibility for the protection of the local moral fabric (Roth 504).”

The judges articulate clearly in the court records of *Roth v. United States* a sharp disagreement over the rights and interests of the individual and the community. The court records reflect no explicit appeal to religious convictions as a proper justification for obscenity laws; however, the concepts of judicial precedent, community moral

consensus, and perceived public harm permit an implicit justification for religious convictions to play an active role in shaping and defining individual values and public discourse.

I next consider *Memoirs v. Massachusetts* 383 U.S. 413 (1966). The Supreme Court of Massachusetts concluded that the book *Memoirs of a Woman of Pleasure (Fanny Hill)* was obscene and thereby not protected under the First and Fourteenth Amendments. The United States Supreme Court reversed the state decision. The majority opinion concluded that the State Supreme Court failed to properly interpret the third criteria for defining obscenity as articulated in *Roth v. United States*. The third criterion qualifies material deemed lewd and obscene as “utterly without redeeming social value (*Memoirs* 418).”

This case takes on added significance because of a view expressed by Justice Clark. He argued in the dissent that the phrase “utterly without redeeming social value” opened a Pandora’s box for obscenity legislation because any material could be thinly veiled as art, history, or literature. He argued for a standard that was subsequently established in *Miller v. United States*.

In *Miller* the third criteria defining obscene material was changed from “utterly without redeeming social value” to “whether the work, taken as a whole, lacks serious literary, artistic, political, or social value (*Miller* 39).” The book in question described the life of a woman trapped in a life of prostitution until, at the end of the book, she escapes prostitution and marries her true love. The great body of the text is a drama of descriptive sexual expression considered by many to be deviant and obscene. According to Justice Brennan, the sole issue before the court was, “whether *Memoirs* satisfies the

test of obscenity established in *Roth v. United States* (Memoirs 418).” He believed that sufficient expert witness had argued that the book in question did have literary merit and historical value. The book could not be deemed obscene and censored under Massachusetts law because it was not utterly without redeeming social value (Memoirs 422-423).

Justice Douglas, concurred with the majority opinion, but he did so on the basis of arguments he advanced in *Roth v. United States*. He writes, “I base my vote to reverse on my view that the first Amendment does not permit the censorship of expression not brigaded with illegal action (Memoirs 426).” Douglas believes censorship to be the most notorious violation of free speech because “it substitutes majority rule where minority tastes or viewpoints were to be tolerated (Memoirs 427).” Douglas defends his position on a liberal principle that greatly values the protection of individual thought and expression in matters of conscience. He vehemently challenges the communitarian argument that obscenity should be censored to protect community interests. He writes, “publications and utterances were made immune from majoritarian control by the First Amendment, applicable to the states by reason of the Fourteenth. No exceptions were made, not even for obscenity (Memoirs 428).” He further adds, “The censor is always quick to justify his action in terms that are protective of society” and believes the argument that obscenity results in anti-social behavior is inconclusive (Memoirs 431).

Justice Clark offers an interesting point in dissent, “to say that social value may ‘redeem’ implies that courts must balance alleged esthetic merit against harmful consequences that may flow from pornography (Memoirs 451).” He argues, though there is a diversity of opinion among experts, there are strong voices suggesting a correlation

between criminal, anti-social behavior and pornography. Such danger of harm constitutes a rationale for laws to constrain the proliferation of obscene material (Memoirs 452). He writes, "Congress and legislatures of every state have enacted measures to restrict the distribution of erotic and pornographic material, justifying these controls by reference to evidence that anti-social behavior may result in part from reading obscenity (Memoirs 453)." He cites several court cases in which free speech was limited based upon public welfare: *Schneider v. State*, 308 United States U.S. 147; *Scheneck v. United States* 249 U.S. 47,52; *United States v. Dennis*, 183 F. 2d 201,201; just to name a few. Justice Clark believes states should retain flexibility in determining matters of obscenity as it relates to matters of public welfare (Memoirs 458).

Once again in *Memoirs v. Massachusetts*, there is no explicit reference to religious convictions as a basis for obscenity laws. The conflict continues to emerge between the interests of individual rights and community welfare. Justice Douglas is a strong proponent of an absolute right to free speech. In contrast, Justice Clarke is concerned with community welfare. The dispute centers on each judge's concept of the harm principle. Does pornographic material constitute a harm to other individuals and society, or is it just a personal matter of choice with no inherent dangers? A strong proponent of absolute right to free speech would decry any effort to limit freedom of expression that appeals to a public harm, especially if such harm is tied to a majoritarian religious conviction. A strong proponent of the community right to protect the moral fabric of society could appeal to the perceived harm of pornography, a perception that may in fact be informed by religious moral premises.

Next I consider *Miller v. California* 413 U.S. 15 (1973). As mentioned earlier, this case establishes a new standard for evaluating obscenity cases because it rejects “utterly without redeeming social value” as a constitutional standard for defining obscenity. The United States Supreme Court upheld a California decision that the appellant could be convicted for mailing unsolicited sexually explicit material in violation of California obscenity laws. The California statute was based upon the obscenity test articulated in *Memoirs v. Massachusetts* in the plurality opinion. Unique to this case, sexually explicit materials were aggressively thrust upon unwilling recipients through the mail (Miller 18).

The Miller decision established three key principles that serve as criteria in obscenity case jurisprudence: (1) the application of contemporary community standards; (2) material must be patently offensive in depicting sexual act; and (3) must, as a whole, lack serious literary, artistic, political, or scientific value (Miller 39).

Chief Justice Burger, writing the majority opinion, acknowledges, “No majority of the court has at any given time been able to determine what constitutes obscene, pornographic material subject to regulation under the States police power (Miller 22).” He does believe however that the following two principles have been categorically settled by the courts: (1) obscene material is not protected by the First Amendment, and (2) the First and Fourteenth Amendments have never been treated as absolutes (Miller 23).” Chief Justice Burger offers a contrasting opinion to the view articulated by Douglas in *Memoirs*. He does not interpret the free exercise clause as an absolute freedom as stated by Douglas: “publications and utterances were made immune from majoritarian control by the First Amendment, applicable to the states by reason of the Fourteenth. No exceptions were made, not even for obscenity (Memoirs 428).”

Chief Justice Burger, writing the majority opinion, attempts to establish a more concrete and detailed definition of obscene material by citing specific examples of inappropriate material. The majority opinion defines obscene material as “patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated (Miller 25).” They take one additional step, attempting to articulate “concrete guidelines to isolate ‘hardcore’ pornography from expression protected by the First Amendment (Miller 29).”

The court also affirmed the judicial precedent established in *Roth* and *Memoirs* agreeing that the application of “contemporary standards of the state of California... is constitutionally adequate” to provide a community definition of obscene material (Miller 34). Justice Burger responds to the dissenting contention that there should be a national standard defining obscenity. Instead, he argues that each society has the right to decide on a community definition of obscenity instead of a nationally imposed standard (Miller 33-34). It is important to notice, the court affirms the concept of a community standard of obscenity in contrast to a purely individual standard. This seems to violate a cherished principle of the family of liberal positions as articulated by Mill and Rawls, the right for the individual to decide in matters of morals and conscience and the rejection of a coercive majoritarian community standard.

Notably absent in *Miller* is a discussion of the harm principle. Neither the majority nor the dissenting opinion attempt to justify or challenge coercive laws on the basis of the Mill’s harm principle. The central issue argued is simply the constitutional right of the community to establish some minimal moral standards enforced by law, a Lockean and communitarian argument.

The summary of the majority opinion follows: “we (a) reaffirm the Roth holding that obscene material is not protected by the First Amendment; (b) hold that such material can be regulated by the states... without showing that the material is ‘utterly without redeeming social value’; and (c) hold that obscenity is to be determined by ‘applying contemporary community standards... not national standards’ (Miller 37).”

Justice Douglas, writing in dissent, is offended by what he considers the new and changing standards used to define obscenity:

Today we would add a new three-pronged test: (a) whether the average person, applying contemporary community standards would find the work, taken as a whole, appeals to prurient interests,... (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. These are standards we ourselves have written into the constitution (Miller 39).

He further states, “The idea that the First Amendment permits the government to ban publications that are ‘offensive’ to some people puts an ominous gloss on freedom of the press ... to give the power to censor, as we do today, is to make a sharp and radical break with the traditions of a free society (Miller 44).”

Once again the court makes no explicit appeal to religious moral-premises as a justification for coercive laws. I believe this to be a consistent confirmation that, in American legal culture, at least since World War Two, an explicit appeal to religious conviction is improper as a sole justification for law. However, I still raise the question: how does society shape and develop a contemporary community standard? For some individuals, their conception of moral standards on matters of conscience will be informed by religious belief and convictions, convictions difficult to separate into religious and secular.

I consider another important case concerned with obscenity laws, *Paris Adult Theatre v. Slanton* 413 U.S. 49 (1973). The Petitioners sued the respondents under Georgia civil law, challenging the showing of two adult movies considered by the petitioners to be obscene. The United States Supreme Court upheld the Georgia state law, which set constraints upon the public viewing of “hard core” pornography.

Justice Burger wrote the majority opinion. His argument follows five contours that I will briefly trace. The majority opinion once again affirms that pornography is not protected under the First Amendment because the constitution does not grant unlimited freedom to “consenting adults”. The second argument appeals to a concern for community welfare. Justice Burger writes, “we hold that there are legitimate state interests at stake in stemming the tide of commercial obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and passerby (*Paris* 57-58).” He further argues that the interest of the public “in the quality of life and total community, the tone of commerce in the great city centers, and, possibly, the public safety itself” justifies constraints upon the public viewing of pornography (*Paris* 58). He quotes expert witness, Professor Bickel, who testified “what is commonly read and seen and heard and done intrudes upon us all, want it, or not (*Paris* 59).”

A third argument contends legislators are not required to justify coercive laws on undisputed scientific data. Justice Burger writes, “Although there is no conclusive proof of a connection between anti-social behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist (*Paris* 61).” He argues that, in fact, such assumptions underlie much lawful state regulation.

He next challenges a strong, “absolutist” conception of a constitutional right to untrammelled freedom of action. He writes, “Most exercises of individual free choice – those in public politics, religion, and expression of ideas – are explicitly protected by the Constitution. Totally unlimited play for free will, however, is not allowed in our or any other society (Paris 64)”. With this statement, he acknowledges the inherent tension between liberty and law, individual rights and community interests.

Justice Burger next responds to the contention that the right to privacy entails protected access to obscene material by consenting adults. He simply writes that the private home is not the same as the public square and that “the issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as ‘wrong’ or ‘sinful’. The States have the power to make a morally neutral judgment that public exhibition of obscene material, has a tendency to injure the community as a whole, to endanger the public safety (Paris 64).”

This last argument deserves closer scrutiny because it raises some issues not discussed thus far. His statement seems to imply that the concept of wrong or sinful in the minds of some is disputed ground as a justification for constraint. Justice Burger further speaks of a morally neutral judgment, Morally neutral in what sense? I believe he is expressing the principle of state neutrality on conceptions of the good. Instead of defending a particular conception of right or wrong, he justifies obscenity law based upon the harm principle. Behavior may be constrained if it is deemed injurious to the community and may endanger public safety.

Justice Douglas, once again writing in dissent, affirms the liberal principle of individual autonomy in all matters of opinion and conscience:

When man was first in the jungle he took care of himself. When he entered a societal group, controls were necessarily imposed. But our society, unlike most in the world – presupposes that freedom and liberty are a frame of reference that makes the individual, not the government, the keeper of the tastes, beliefs, and ideas. That is the philosophy of the First Amendment; it is the article of faith that sets us apart from most nations in the world (Paris 73).

His basic argument is twofold: (1) there is no clear, consensual conception defining obscenity, and (2) obscenity laws are arbitrary encroachments on free speech and thought; therefore, there is “no definable class of sexually oriented expression that may be totally suppressed by the Federal and State Government (Paris 103).”

It is consistent with the decisions of the judges in the court cases I considered to conclude that moral-political discourse in America excludes explicit religious convictions as the sole justification for coercive law. The justification for obscenity laws, without exception, appealed to the concept of a “public harm” and a “community moral consensus” independent of religious based moral-premises. Now comes the difficulty, for some citizens, an understanding of public harm and community moral consensus may very well be closely tied to religious convictions. Separating religious convictions from secular convictions may be impossible; and, even if this separation could be accomplished, should this be a requirement of voting citizens in a liberal democracy? The proper role of religious convictions in moral-political discourse is not so easily settled; I believe current political-culture reflects disagreement rather than unanimity.

Conclusion

It is time to draw some conclusions concerning the proper role of religious convictions as a justification for coercive laws in American society. The issue I have raised reflects several areas of disagreement in American culture as follows: (1) there is disagreement on if and how religious convictions should enter the arena of public debate and justification for law; (2) The Enlightenment goal of establishing a conclusive rational foundation for morality apart from an appeal to higher authority is far from resolved for many American citizens; (3) citizens, philosophers, politicians, and judges disagree on the meaning and application of Mill's harm principle to law; (4) contemporary American social and political culture maintains a high commitment to individual freedom and a wariness of any state or majoritarian violation of autonomy, still, there is an unresolved tension between individual rights and community interests

I conclude with an assertion made by Alisdair MacIntyre: laws reveal conflicts in society and are indicative of unresolved and conflicted interests rather than an expression of commonly shared values and beliefs. He argues that the "function of the Supreme Court must be to keep peace between rival social groups adhering to rival and incompatible principles of justice by displaying a fairness which consists in even-handedness in its adjudications (253)." He further states, "The nature of any society... is not deciphered from its laws alone, but from those understood as an index of its conflicts (254). Academic debate, public discourse, public policy makers, and judges will

continue to grapple with the complex relationship between church and state, specifically, the proper role of religious conviction in shaping and informing individual choices and public policy as it pertains to coercive laws. America continues to be a nation in which a great number of its citizens express a belief in God²² and maintain that the great ethical question, how should we order our lives together, cannot be divorced from a belief in “divine truth,” although there is a reticence to imposing such beliefs on other citizens by force of law. At the same time, there remains a strong “secular” current in society that defends a strong separation between church and state and maintains that public debate and public policy should exclude, as a general principle, religious belief and conviction. Religion should be regulated to private life and practice. In a liberal democracy that attempts (certainly imperfectly) to give each citizen a voice, a policy of compromise between the more radical positions on this issue is the most likely outcome. Citizens with strong religious convictions about the way life should be ordered in our society will continue a heated debate with those citizens who hold strong secular convictions about the way life should be ordered. Each will claim victim status and appeal to the courts to resolve complicated issues involving church and state relationships. I believe the courts will remain busy interpreting and applying the religious clauses of the First Amendment to issues of contemporary public debate.

²² Alan Wolfe in his essay, *Civil Religion Revisited: Quiet Faith in Middle-Class America*, comments that although 94 percent of Americans express a belief in God, they are reticent to impose their own beliefs about right and wrong on others. Tolerance of other points of view is a commonly embraced value in middle-class America (57). Wolfe is Professor of Sociology and political-Science at Boston University.

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