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RELIGION AND THE SEARCH FOR A PRINCIPLED MIDDLE GROUND ON ABORTION

*Michael W. McConnell**

THE POLITICS OF VIRTUE: IS ABORTION DEBATABLE? By *Elizabeth Mensch* and *Alan Freeman*. Durham: Duke University Press. 1993. Pp. x, 268. Cloth, \$39.95; paper, \$14.95.

I

Religious arguments and movements have been central to virtually every important public debate in American history from independence and abolition to civil rights and the nuclear freeze. Nonetheless, many legal theorists claim that this involvement of religion with politics presents a problem for our constitutional order. Recently, religious voices have played a prominent role in the controversy over abortion — especially, though not exclusively, on the anti-abortion side. This has generated a surge of new writing about the role of religion in public life. In the most serious entry in the field, John Rawls maintains that a society may justly base its laws only on a “reasonable” political conception of justice, meaning a conception that is, or can be, “shared by citizens regarded as free and equal” and that does not presuppose any particular “comprehensive doctrine,” of which religious doctrine is a prime example.¹ Applying this idea to the abortion issue, Rawls concludes (without much discussion) that “any comprehensive doctrine that leads to a balance of political values excluding” the right to an abortion by a “mature adult” woman in the first trimester “is to that extent unreasonable,” because the “political value of the equality of women is overriding.”² This means, apparently, that the contrary balance — treating the life of the unborn as the “overriding value” — is not just wrong but beyond the boundaries of reasonable argument, in part because it rests on a “comprehensive doctrine” (though why respect for unborn life rests on a comprehensive doctrine while respect for the equality of women does not is something of a mystery).³

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1. JOHN RAWLS, *POLITICAL LIBERALISM* 176 (1993) (reviewed in this issue by Professor Joshua Cohen — Ed.).

2. *Id.* at 243 n.32.

3. Admittedly, Rawls’s book is not about abortion, and his comments on the issue are confined to a lengthy footnote. Presumably he would have more to say if he chose to say it. This,

In a more rhetorical vein, Ronald Dworkin, having concluded that opposition to abortion has “at least a quasi-religious nature,” goes on to tell us that “it is no part of the proper business of government” to enforce laws based on such premises.⁴ “[I]t is a terrible form of tyranny, destructive of moral responsibility, for the community to impose tenets of spiritual faith or conviction on individuals.”⁵ Note that this position does not depend on the character of the rules regulating abortion; judgments based on “tenets of spiritual faith” are simply excluded from public discourse. Anthony Lewis, a respected *New York Times* columnist, has written that the “essential truth about most anti-abortion activists” is that they are “religious fanatics, who want to impose their version of God’s word on the rest of us.”⁶ This puts them outside the bounds of “our form of democracy, which requires compromise and does not work when there are ideological certainties.”⁷ Again, one might ask: How willing are advocates of the opposite side to compromise? Are there not “ideological certainties” in secular political discourse? Nor are arguments of this sort confined to writers and academics. Popular pro-choice rhetoric commonly brands religious thought about abortion intolerant, extremist, and illegitimate.⁸ In the language of street protests: “Keep your rosaries out of our ovaries!”

Come now Elizabeth Mensch and Alan Freeman, professors of law at SUNY-Buffalo and close students of the religious debate over abortion in the United States in the past forty years. No one will accuse Mensch and Freeman of being members of the religious right. As feminists and early enthusiasts of the critical legal studies movement, with backgrounds in left Protestantism (Mensch) and Judaism (Freeman), they would seem unlikely voices to rise in defense of religious discourse about abortion and other contentious issues of public morality and policy. The book is all the more striking for their disclosure in the introduction that each of them has had “more than one firsthand experience of abortion” (p. 3). This experience they describe as “almost perfect irresponsibility, of the kind that absolutely precludes self-righteousness” (p. 3). These authors have produced a book that is by far

however, makes the comments all the more perplexing, for Rawls — an apparently careful and open-minded scholar — is willing to dismiss the opinions of a quarter of the population as beyond the pale of reason on the strength of nothing more than a few conclusory sentences in a footnote.

4. RONALD DWORGIN, *LIFE’S DOMINION* 15 (1993) (reviewed in this issue by Professor Alexander Capron — Ed.).

5. *Id.*

6. Anthony Lewis, *Abroad at Home: Right to Life*, N.Y. TIMES, Mar. 12, 1993, at A29.

7. *Id.*

8. For numerous examples of such comments, as well as epithets flowing in the opposite direction, see JAMES D. HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* 143-56 (1991). See also STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* (1993) (reviewed in this issue by Professor Sanford Levinson — Ed.).

the most comprehensive yet concise, sympathetic yet critical, account of theological thought on the issue of abortion.

Their heterodoxical conclusion is that religious thinking about abortion — which was interrupted by the constitutional close out of *Roe v. Wade*⁹ — was more nuanced, less absolutist, more tolerant of good-faith disagreement, more closely attuned to the moral perceptions of the people, and more conducive to compromise than the secular constitutional discourse that replaced it. But this conclusion is not, like most theorizing on the subject, based on a priori conceptions. The book is not really an argument at all, but simply a description of the debate as it unfolded in the churches and synagogues of America between the end of World War II and the decision in *Roe*. Far from being divorced from public values, this discourse, according to Mensch and Freeman, was the prime forum for deliberation about public values. The book thus transcends the specific issue of abortion and addresses the process of forming moral judgments in our pluralistic democracy. “The larger question,” the authors say, “is whether we can recover a meaningful public moral vocabulary” (p. 5). The “alchemical fantasy of liberalism — that process can turn itself into substance — is belied by the reality of conflict” (p. 5; footnote omitted). Their book, *The Politics of Virtue: Is Abortion Debatable?*, poses the question: “Can a revival of theological traditions . . . serve such an enterprise?” (p. 5).

If Mensch and Freeman were to engage Rawls in conversation, I think they would agree with his first criterion of reasonableness (that public debate must be based on conceptions that are, or can be, “shared by citizens regarded as free and equal”¹⁰), but they would maintain that one is most, not least, likely to find such discussion in theological circles. The various communities of faith have been engaged in discourse about morality and public justice for centuries and have produced most of the bedrock of modern ethics — even ethics that appears, on the surface, strictly secular. As the authors point out, the secular systems of Hume and Kant presupposed the survival of Calvinist (Hume) or Lutheran (Kant) substantive ethics, even as they undermined the epistemological basis of the religious world view (p. 153). Moreover, there is something odd about Rawls’s argument in a nation in which religion is so important to so many people. Three-fourths of American women and a lesser proportion of American men, the authors point out, “report that they consider religious faith the most important influence on their lives” (p. 4). Can we honestly regard our fellow citizens as “free and equal” if we rule out-of-bounds the reasons they conscientiously adopt as a ground for their thinking about public issues?

9. 410 U.S. 113 (1973).

10. RAWLS, *supra* note 1, at 176.

The moral teachings of the major religions of America are starting points for serious deliberation in which any person — believer and nonbeliever alike — can engage. By contrast, the authors observe, most secular discussion of abortion since *Roe* has been strident, acrimonious, and largely unilluminating. Rawls's own dismissal of the pro-life position as "unreasonable" and not requiring further discussion is a sobering example of a secular "close out" — not different, in principle, from those who say, "The Bible says it, I believe it, and that resolves it."

I think, however, that Mensch and Freeman would disagree with Rawls's second criterion (that positions in the debate must not presuppose a particular comprehensive doctrine). It is *only* the traditions built on comprehensive doctrine — secular as well as religious — that have anything useful to say about ultimate questions such as life and death, freedom and obligation, and the proper reaches of justice and compassion. If we do not include comprehensive doctrines in our discussions, we will be left with nothing but sterile proceduralism and moral assertions uprooted from their source and foundation.

Perhaps the most distinctive virtue of religious participation in public life, according to the authors, is that religion places the concerns and the powers of this world in proper perspective — they are important, but not controlling:

Religion in the United States provides both an incentive to act responsibly in the world, and it also offers that "pause" which makes complete allegiance to any political order impossible. This is why religion provides a counterforce to totalizing secular ideologies, whether of the right or left — so long, that is, as churches resist the temptation to identify themselves too fully with the state. [p. 140]

This book should be required reading for anyone who wishes to contend that religious participation in resolving issues of public concern is inconsistent with our national commitment to free, open-minded debate and inquiry.

II

Quite apart from their analysis of the abortion question, Mensch and Freeman have provided an insightful primer into the intellectual history of political theology in postwar America. The authors discuss the natural law tradition that flourished in the aftermath of the Holocaust and Nuremberg but floundered in the conflicts of the 1960s; the ecumenical spirit of the 1950s, with its tendency toward complacency in the public sphere; the profound, but profoundly misunderstood, theology of Barth and Bonhoeffer, which inspired Martin Luther King and led to the social activism of mainstream Protestant churches in the civil rights era; the emergence of fundamentalist Christianity from its pietistic cocoon into a powerful public voice; the secularization of

mainstream Protestantism; and the growing division between conservative and liberal theological movements in the years before and after *Roe*. To anyone unfamiliar with these developments, the book serves as an excellent introduction; but even to those well versed in the period, the book is studded with often surprising insights — especially in drawing connections between theological developments and parallel developments in jurisprudential thought. Much of this interest arises from the authors' own quirky point of view. The overall impression the book conveys is one of great fair-mindedness, but this is accomplished, not by a dispassionate and "objective" recital of the various positions, but rather by a sympathetic engagement with each.

The authors concentrate on four great traditions: natural law (particularly associated with Roman Catholicism but not exclusive to it), Reformed Protestantism (especially as informed by the life and teachings of Barth and Bonhoeffer), Protestant fundamentalism (which shades over into evangelicalism more broadly), and liberal (what they call "secularized") Protestantism. In the final chapters of the book, they describe the way in which these theological traditions interacted in the late 1960s — before *Roe* — to produce a rich and promising discourse about abortion (pp. 98-125). Their treatment of these issues is both thoughtful and well informed. It is, however, uneven. There is no sustained discussion of Jewish thought: some individual Jewish thinkers, such as Edmond Cahn, are included, but not in the context of an account of Jewish theological ethics. Within Christian thought, the discussion of the Protestant tradition is richer and more interesting than that devoted to Roman Catholicism. Oddly, Catholic thinking is most prominently, though not exclusively, represented by philosophers A.P. d'Entrèves and Jacques Maritain and law professor and now appellate judge John Noonan, rather than by ecclesiastics or theologians. There is only limited discussion of official Church pronouncements on the relation between religious teaching and public policy in general, or on abortion in particular.

More specifically, the authors neglect any discussion of the important question of authority within the Catholic Church and whether — as critics of the Church maintain — the special claim of the Church hierarchy to teaching authority binding to some extent on the consciences of faithful Catholics is problematic within our constitutional order. Instead, Mensch and Freeman concentrate on the substance of Catholic ethical theology, observing that "[i]f theological argument is to play a valuable role in public debate, it must appeal not to privileged authority but to some version of the common good, as Catholic tradition has in fact recognized" (p. 5). This might seem to beg the question, because "appeals to privileged authority" and "versions of the common good" are not logically exclusive categories. There might, after all, be reasons grounded in the common good for recognizing privileged authority — for example, that of the Constitution

and its Framers, the common law, the long-standing customs and traditions of the people, and so on. But the authors do not pursue the problem.

The authors' analysis of these four traditions exposes a paradox, which I have not seen remarked upon in any of the theoretical discussions of the role of religion in politics. The paradox is this: the most sectarian and nonrationalist of the religious movements — that arising from Barth and Bonhoeffer — is also the most nuanced, uncategory, and nondogmatic on the subject of abortion, as well as the most intellectually compatible with postmodern theory and political praxis. Mensch and Freeman note that "the Catholic natural law tradition has been successfully universalized," losing, as a result, "its distinctly Christian character," and that, by contrast, "the ethics of serious Reformation theology can sound stubbornly sectarian, too peculiarly Christian to have any relevance to the world outside the Christian church" (p. 48).

This observation warrants particular attention, because natural law has been widely misunderstood.¹¹ Natural law, in the Catholic tradition, is a species of divine law — as all law is ultimately divine in its source and authority — but can be discerned through the application of natural reason to the world around us. Natural law stands in contradistinction to revealed law. Even in the Middle Ages, as the authors explain, natural law theorists "did not depend on revelation. . . . Aquinas had carefully stated that the divine law, revealed through grace, perfects, but does not overturn, the human law that is based on natural reason" (p. 35). Thus, while some subjects — the authors give the example of "a proper understanding of the Trinity" (p. 35) — depend on revelation, "for most affairs of the world, natural reason would suffice" (p. 35). A prohibition on genocide, for example, can be "rooted in an understanding of the nature and purpose of humanity that is accessible to natural reason alone" (p. 35).

This distinction is crucial to the question of public discourse, because Christians were not thought to have any privileged position with regard to natural reason; indeed, their great authority on many questions of natural law was the pagan philosopher Aristotle. Natural law thinking is therefore, in Rawls's terminology, something that can be "shared by citizens regarded as free and equal."¹² That does not mean, of course, that everyone will *agree* with the premises of natural law thinking. Much of modern positivist ethics is based on the cate-

11. For example, during the debates over the nomination of Judge Clarence Thomas to the Supreme Court, many politicians and some scholars professed to find the idea of natural law troubling, apparently confusing natural law with specifically religious teachings. See, for example, Laurence H. Tribe, "Natural Law" and the Nominee, N.Y. TIMES, July 15, 1991, at A15, and my response, Michael W. McConnell, *Trashing Natural Law*, N.Y. TIMES, Aug. 16, 1991, at A23.

12. RAWLS, *supra* note 1, at 176.

gorical denial that the *ought* is inferable from the *is*, and — as will be seen below — an important strain of Reformed Protestantism denies that any inferences about the good can be drawn from the character of a fallen world. But even though not everyone can share its premises, natural law methodology is “accessible” in the sense that the evidence on which it rests is equally discernible, in principle, by all persons without reference to any idiosyncrasies of creed, culture, or perspective.

Catholic teaching on abortion is based squarely on natural law, not on revelation. “Catholic doctrine takes abortion to be a violation of natural law, which means that understanding it to be a wrong should not require Christian faith or church authority” (pp. 35-36). In this sense, the claim in Justice Stevens’s dissenting opinion in *Webster v. Reproductive Health Services*¹³ that anti-abortion laws are “theological” is based on a mistaken understanding of Catholic teaching. “En-soulment” is just a way of talking about humanity, and in its reliance on Aristotelian biology, the Church was not being “theological” but simply incorporating into its ethics the best science of its day. That is why, with the nineteenth-century advances in knowledge of human embryology, the Church intensified its opposition to abortions of pre-quickenening fetuses.

Having made that point, the authors do not pause to wonder: If Catholic natural law thinking is entirely based on natural reason, what does this have to say about the value of religious participation in public policy? Does this not suggest that, even within the Church, serious ethical philosophers consider it necessary to divorce themselves from the distinctively religious aspect of knowledge — that is, revelation — and to rely on that aspect of knowledge in which the Christian, the Jew, and the infidel stand on an equal footing? In their defense of religious participation in public deliberation, have not the authors inadvertently denigrated the importance of theology? One might conclude that while natural law is a permissible basis for public deliberation, sacred writings and spiritual associations have nothing distinctive to contribute. Perhaps the richness of ethical deliberation within the various religious communities is a product, not of their character as religious, but of their character as ethical communities — communities that devote themselves to ethical questions, that have a certain, albeit incomplete, insulation from passing fads and earthly authorities, and that take seriously both the claims of the past and their obligations to the future. Perhaps God has nothing to do with it.

This question arises again — though without explicit commentary from the authors — in the chapter on Protestant fundamentalists and evangelicals.¹⁴ This is a remarkable chapter in its ability to see the

13. 492 U.S. 490, 568 (1989) (Stevens, J., concurring in part and dissenting in part).

14. Pp. 74-82. The authors use the term *fundamentalist* to describe a movement within

world from the perspective of a group that is almost completely unrepresented and frequently derided in academic circles. In elite circles, fundamentalists are generally thought to be ignorant, irrational, emotional, and lacking in independence. In a revealing incident last year, the *Washington Post* stated in a front-page news story that fundamentalists “are largely poor, uneducated and easy to command” — an offensive generalization that it retracted the next day.¹⁵ In fact, fundamentalism is highly rationalistic, individualistic, and distrustful of emotion as a guide to right conduct. As Mensch and Freeman note, “[d]espite common misconception, biblical inerrancy, or fundamentalism, does *not* represent a retreat from science to blind irrationalism” (p. 78). The goal of fundamentalist theology, they say, quoting Princeton theologian Charles Hodge, is to “gain the ‘assent to the truth, or the persuasion of the mind.’”¹⁶ They quote J. Gresham Machen, the Presbyterian theologian expelled from Princeton after the victory of liberal theology:

“Theology . . . is just as much a science as is chemistry . . . [T]he two sciences, it is true, differ widely in their subject matter; they differ widely in the character of the evidence upon which these conclusions are based; in particular they differ widely in the qualifications required of the investigator: but they are both sciences, because they are both concerned with the acquisition and orderly arrangement of a body of truth.”¹⁷

The implications of this Bible-centered world view are individualistic, because no human agent may come between the believer and the Word — thus resulting in a theological egalitarianism — and rationalistic, because the believer must apply the rational faculty of reading and understanding to gain access to the perfect Word of God and must distrust his own emotion and instinct, which are products of a fallen nature. As a historical matter, one can see the liberal democratic order as a product of this Protestant doctrine — democracy being the “priesthood of all believers” in the political sphere.

Unlike natural law, the fundamentalist world view is based on revelation as the only entirely reliable source of knowledge, coupled with

Protestant Christianity that, under their definition, embraces most evangelicals as well. Both fundamentalists and evangelicals are inerrantists, meaning that they accept absolutely the truth of the Bible as it came from God. Evangelicals, however, are not committed to a literalist hermeneutic. For convenience’ sake, I will adopt the authors’ practice of using the term *fundamentalist* to embrace both, but with some trepidation, for the term *fundamentalist* is often used as a term of opprobrium. I do not mean it as such, and neither (I think) do Mensch and Freeman.

15. Michael Weisskopf, *Energized by Pulpit of Passion, the Public Is Calling: “Gospel Grapevine” Displays Strength in Controversy over Military Gay Ban*, WASH. POST, Feb. 1, 1993, at A1, A10. The next day, the newspaper admitted that “[t]here is no factual basis for that statement.” *Corrections*, WASH. POST, Feb. 2, 1993, at A3. In the retraction, the paper reported that, according to a nationwide poll, 38% of Americans identifying themselves as “Evangelical-Born Again” Christians had some college education, as compared to 45% of all Americans. *Id.*

16. P. 78 (quoting Forrest M. Baird, *Shaeffer’s Intellectual Roots*, in REFLECTIONS ON FRANCIS SCHAEFFER 45, 47 (Ronald W. Ruesegger ed., 1986) (quoting Charles Hodge)).

17. Pp. 78-79 (quoting Baird, *supra* note 16, at 53 (quoting J. Gresham Machen)).

empirical observations about the world, in the tradition of Scottish "Common Sense" philosophy. Fundamentalism thus raises two interesting and important questions that the authors do not address. First is a question of interpretation: To what extent is fundamentalist teaching against abortion based on revelation? From an internal perspective, the answer is that it is entirely based on revelation, but this may be because of the powerful way in which students of a particular text are able to use it to illuminate the world. In fact, the authors point out that the scriptural texts cited in support of the pro-life position are less than determinate (p. 17). From a Biblical perspective, it is difficult to see the abortion question "as one of private rights alone" (p. 17), but that does not obviate discussion of the content of the answer (what are the roles of excuse, justification, enforceability, and prudence?). In other words, those who take the Bible's injunctions regarding the value of life seriously will be unlikely to buy the privacy argument (that abortion does not present a question of public justice) but need not necessarily insist on criminal prohibitions in all cases from the moment of conception, any more than they must oppose capital punishment or favor extensive welfare programs. It may well be that fundamentalists derive their normative premises from Scripture but their empirical and prudential data from elsewhere.

My own impression of evangelical thinking about abortion is that, for most, abortion presents a quite simple and straightforward question of justice, much like infanticide, and that evangelicals tend to assume that the denial by pro-choice advocates of what appear to be obvious facts of life is attributable to pride and selfishness rather than to any conscientious doubt that an unborn child is a child. This means that the contribution of evangelicals to the pro-life movement has been more in their commitment and determination than in their ability to communicate and convince outsiders.

The second question is whether the reliance by some citizens on revelation is problematic within our constitutional order. As on the issue of authority within the Catholic tradition, the authors have surprisingly little to say about the question of revelation within Protestantism — perhaps because, in their judgment, most religious deliberation is less reliant on mere authority or revelation than it may appear. At first blush, an appeal to revealed truth may appear to be less "universalistic" — less "accessible" — than reliance on natural law, because not everyone accepts the Bible as the source of revealed truth. The fundamentalist, however, has a powerful response. The fundamentalist would point out that God's revelation through the Bible is to all persons and not to a select subset of the population and that there are good reasons why all rational persons, if fully informed and able to evaluate the matter dispassionately — that is to say, free of the blinders of sin — could and should accept the Bible as truth. That some persons do not presently *agree* with the premise of the funda-

mentalist argument does not make the argument any less universal or accessible. If we waited for a set of premises to which everyone could agree, we would be waiting forever. Indeed, many rational individuals deny the essential premise of natural law — that nature is normative. Does that mean that natural law is not accessible to all?

In any event, it is striking that the more rationalistic strains of Christianity have tended to take the hardest line against abortion. This is not true of the modern Reformed tradition, most powerfully represented by Karl Barth and Dietrich Bonhoeffer. This tradition, as the authors point out, is “peculiarly Christian” and “stubbornly sectarian” (p. 48), yet more equivocal on the issue of abortion. The great Barmen Declaration of the German Confessing Church, drafted by Barth, “repudiates” the idea that citizens can and should base their judgments about questions of justice on something other than the comprehensive doctrines they deem to be true: “We repudiate the false teaching that there are areas of our life in which we belong not to Jesus Christ but another Lord, areas in which we do not need justification and sanctification through him.”¹⁸ Barth strenuously criticizes the very idea of natural law: How can observation of the characteristics of a fallen world tell us anything about the will of a perfect God? Even more than fundamentalism, which tends to assume that God’s revelation through Scripture is ultimately identical to His revelation through the natural world, Barth’s radical Protestantism posits a disjunction between revelation and natural reason.

Much of the impulse behind the postwar natural law movement was the brush with a universal evil and the recognition (at Nuremberg and elsewhere) of the limits of positive law. It is therefore something of a shock to learn that “the only serious institutional Christian opposition to Hitler in Germany arose, not on the basis of natural law, but rather quite explicitly and emphatically in the context of *rejecting* natural law” (pp. 46-47). At a time when mainstream German Protestantism, invoking natural law, was reconciled to Hitler, Barth was banished and Bonhoeffer executed for their theologically uncompromising opposition to the Nazi regime. As Mensch and Freeman explain, Barth recognized that “if church and culture were too bound together by the link of a natural law theology, then contingent human projects (politics, science, cultural traditions) could claim the status of ontological reality, not subject to God’s revealed word” (p. 55).

In other words, the very willingness of German Protestants to assimilate their ethics into the overlapping consensus of German culture deprived them of their vantage point for desecrating the coming evil of

18. P. 49 (quoting EDWIN H. ROBERTSON, *THE SHAME AND THE SACRIFICE: THE LIFE AND TEACHING OF DIETRICH BONHOEFFER* 117 (1988) (quoting *THE BARMEN THEOLOGICAL DECLARATION* (1934), reprinted in EBERHARD JÜNGEL, *CHRIST, JUSTICE AND PEACE* at xxi (D. Bruce Hamill & Alan J. Torrance trans., T.&T. Clark 1992) (*DECLARATION* translated by Douglas S. Bax))).

Nazism. By the same token, the sectarianism of Barth and Bonhoeffer insulated them and their fellow radical Christians from being co-opted. The radically unsecular character of Barthian thought is captured in this excellent summary:

Could one reject abstract normative categories, whether derived from natural law or the secularized rationalism of Kant, and nevertheless fashion an ethics that would require responsible action in the world? The answer for both Barth and Bonhoeffer lay not in ethics itself (based on a supposed knowledge of the world and the operation of human reason), but in theology — in the dialectical process of looking first “upward,” as it were, to the command of God, which is a divinely initiated and revealed claim, the call to the covenant “I-Thou” relationship, and *then* downward, to a particular person in a particular context. The content of the command is known only by virtue of another dialectic — that of incarnation and redemption — so that the (impossible) command is always accompanied by the promise of grace . . . [pp. 56-57]

In Barthian theology, there is no danger of becoming so universalized that God ceases to be of importance. According to the authors' exegesis of Barth, “only God, not ‘natural’ human beings, made the correct operation of reason in nature possible” (p. 55). In Barth's words, quoted by the authors, “[R]eason, if left entirely without grace, is incurably sick and incapable of any serious theological activity. Only when it has been illumined, or at least provisionally shone upon by faith, can it produce statements of truth about the human and natural world”¹⁹ In Barth's hand this is not an attack on science but rather a sophisticated epistemology strikingly akin to modern, nonpositivistic philosophy of science.²⁰ The authors comment: “Modern science does, in fact, resemble sophisticated theology more than it resembles the elaborate claims of certainty that are more typical of Newtonian physics, and too often, ironically, of social science as well” (p. 54). In Barth's view, “*all* scientific knowledge is necessarily contingent, with its particular methodology suited to its own specific object of study,” and “all science is rooted in a faith that the object of study will reveal itself, at least provisionally, through the method fashioned by scientists within their traditions” (pp. 53-54). According to Barth, theology “knows itself to rest on sheer contingency”²¹ — but in this it is no different from any other field of knowledge. Positivism is erroneous in both theology and science.

Fundamentalism and Barthian neo-orthodoxy thus start from similar premises about the primacy of revelation and have similar aspira-

19. Pp. 55-56 (quoting KARL BARTH, *No! Answer to Emil Brunner* (1934), reprinted in *NATURAL THEOLOGY* 65, 96 (Peter Fraenkel trans., photo. reprint 1962) (1946)).

20. See p. 54.

21. P. 54 (quoting Harold Nebelsick, *Karl Barth's Understanding of Science*, in *THEOLOGY BEYOND CHRISTENDOM: ESSAYS ON THE CENTENARY OF THE BIRTH OF KARL BARTH, MAY 10, 1886*, at 165, 182 (John Thompson ed., 1986) (quoting Karl Barth)).

tions to a "scientific" quality, but there the resemblance ends. Fundamentalism, with its Common Sense philosophy, resembles positivist science in its pursuit of objective truth. Neo-orthodoxy, with its antifoundationalist epistemology, lives comfortably in a postmodern intellectual universe.

Barth rejects the casuistical method of natural lawyers. It is not possible, according to Barth, to move from particular texts, norms, or objective categories to universal rules that could govern the "plenitude of conditions and possibilities."²² Indeed, not only is this "logically impossible," but it leads both to "unwarranted arrogance" — to set oneself up as the judge of good and evil in the place of God — and to the destruction of human freedom (p. 58). The "casuist ethics" of the natural lawyers "calls a person away from real responsibility" (p. 58). For Barth and Bonhoeffer, "the gospel" — not natural reason — "was the core of ethics — the command that is fulfilled by the life lived wholly for the neighbor" (p. 57). This ethics cannot be worked out in rules or confined to regulations; it requires a kind of selflessness that is possible only through the joyous submission of the believer to the will of God. In Bonhoeffer's words, "[i]t is evident that the only appropriate conduct of men before God is the doing of His will."²³ Our "relation to God is a new life in 'existence for others,' through participation in the being of Jesus. The transcendental is not infinite and unattainable tasks, but the neighbor who is within reach in any given situation."²⁴

Although they give other perspectives respectful consideration, Mensch and Freeman are apparently most impressed with the possibilities of Reformed Protestantism as a basis for moral deliberation. This tradition, they find, is best able to "reject the pressure to conform to the rest of culture or to produce false moral universals" and to "concentrate instead on a thick description of its own tradition" (pp. 145-46). In this theology they find it possible to avoid the "stark choice" between "ecumenical 'publicness,' on the one hand, and sectarian 'privateness,' on the other" (p. 145). Paradoxically, the least universal and accessible theology produces the most open and productive political theology.

III

The implications of this school of thought for the question of abor-

22. P. 57 (quoting 3 KARL BARTH, *CHURCH DOGMATICS* pt. 4, § 52, at 9-10 (G.W. Bromitey & T.F. Torrance eds. & A.T. Mackey et al. trans., T.&T. Clark 1961) (1951)).

23. P. 62 (quoting DIETRICH BONHOEFFER, *ETHICS* 166 (Eberhard Bethge ed. & Neville H. Smith trans., SCM Press 1955) (1949)).

24. Pp. 62-63 (quoting Dietrich Bonhoeffer, *Outline for a Book, in LETTERS AND PAPERS FROM PRISON* 210, 210 (Eberhard Bethge ed. & Reginald Fuller et al. trans., SCM Press, 3d ed. rev. & enl. 1967) (1964)).

tion are not obvious. As the authors point out, neither Barth nor Bonhoeffer “offered a clear-cut ethical rule” governing the subject (p. 63). Their position might, however, be described as “anti-choice,” though not “pro-life.”²⁵

The pro-choice celebration of the autonomous self is plainly antithetical to the ethics of Reformed Protestantism. It is in this sense that I call them “anti-choice.” Celebration of the self and its independence of any obligation not voluntarily assumed elevates the human being to the place of God at the center of the normative universe and epitomizes the alienation from God’s will that is the essence of sin. As the authors explain, quoting Barth, “[T]he command of God is an appeal to freedom — not a freedom of ‘choice, preference, or selection’ but (again paradoxically) the freedom of obedience.”²⁶ In this Bonhoeffer, like Barth, could sound very much like his Calvinist intellectual forebears:

[T]he only appropriate conduct of men before God is the doing of His will. The sermon on the mount is there for the purpose of being done. Only in doing can there be submission to the will of God. In doing God’s will, man renounces every right and every justification of his own²⁷

One might therefore expect Reformed Protestant ethicists to join with natural lawyers and fundamentalists in forthright opposition to abortion. An ethics of subordination of the self and service to the other — an ethics of self-sacrifice in imitation of the suffering of Christ on the cross — should, one would think, see nothing but negation and alienation in the practice of abortion.²⁸ This is especially true because, in the crucible of Nazism, this school of thought came to recognize the grave dangers of categorical relegation of some biological humans to the ranks of the less-than-fully human. As Barth stated, “[E]veryone should treat his existence and that of every other human being with respect. For it belongs to God. It is His loan and blessing.”²⁹ Somewhat surprisingly, however, Barth and Bonhoeffer drew back from a categorical condemnation of what Barth called “the wicked violation

25. This is my characterization, not the authors’.

26. P. 58 (quoting 3 BARTH, *supra* note 22, pt. 4, § 52, at 13).

27. P. 62 (quoting BONHOEFFER, *supra* note 23, at 166).

28. One could imagine a Reformed Protestant ethic in combination with a libertarian view of government, producing the view that abortion is wrong but that government should do nothing about it. The possibility of a libertarian political theology is not explored in *The Politics of Virtue*. In the case of Reformed Protestantism as it has developed from Calvin through Barth and Bonhoeffer, it would be entirely out of place, for this tradition has always seen the government as a powerful instrument for the achievement of social justice. The selective libertarianism of pro-choice Protestant denominations seems merely expedient, as they appear to have a perfectionist view of politics in every area but this. Those who would use government coercion to eradicate racism, selfishness, and other sinful attitudes and behaviors have a difficult time explaining why the treatment of the unborn is a private matter.

29. P. 63 (quoting 3 BARTH, *supra* note 22, pt. 4, § 55, at 340).

of the sanctity of human life which is always seriously at issue in abortion."³⁰ Barth called the absolute condemnation of abortion "horribly respectable" and "[n]ever sparing in its extreme demands on women."³¹ As Mensch and Freeman put it, "God's commandment with respect to abortion is, for Barth, a resolute 'No,' [but] it is a 'No' to be engaged dialectically by human freedom and conscience" (p. 64). In his posthumously published *Ethics*, Bonhoeffer described abortion as "nothing but murder"; for a "nascent human being has been deliberately deprived of his life."³² But, he adds, "[a] great many different motives may lead to an action of this kind; indeed in cases where it is an act of despair, performed in circumstances of extreme human or economic destitution and misery, the guilt may often lie rather with the community than with the individual."³³

Mensch and Freeman obviously believe that the theological ethics of Barth and Bonhoeffer offers the most promising avenue toward a principled middle-ground resolution of the abortion question. Despite their sometimes arcane exposition and starkly theocentric world view, these theologians suggest a posture toward abortion strikingly congruent with popular opinion: most people consider abortion the taking of a human life — often embracing even the term *murder* — but also believe that there are circumstances serious enough to justify or at least excuse it.³⁴ From either the pro-choice or the pro-life perspective, this seems hopelessly muddled and contradictory. There may, however, be wisdom in it. From the Reformed Protestant perspective, there is no escaping the fallen human condition. Mensch and Freeman explain, quoting Barth and Bonhoeffer, that

"[a]n ethics cannot be a book in which there is set out how everything in the world actually ought to be but unfortunately is not," for it is the "unfortunately is not" which is the whole point. It is precisely in the real, creaturely world, the world as it is, a fallen world, that decisions must be made.³⁵

We must never, never treat the taking of human life — even nascent human life — as a "private" matter of no concern to the just society;

30. P. 64 (quoting 3 BARTH, *supra* note 22, pt. 4, § 55, at 417).

31. *Id.* (quoting 3 BARTH, *supra* note 22, pt. 4, § 55, at 417).

32. *Id.* (quoting BONHOEFFER, *supra* note 23, at 131).

33. *Id.* (quoting BONHOEFFER, *supra* note 23, at 131).

34. An intensive investigation of public attitudes toward abortion and related issues conducted by the Gallup Organization under the direction of sociologist James Davison Hunter on behalf of Americans United for Life found that forty-nine percent of respondents consider abortion "murder" and another twenty-eight percent consider it "the taking of human life." See 2 THE GALLUP ORG., INC., GALLUP ORGANIZATION SURVEY ON THE ABORTION CONTROVERSY IN AMERICA tbl. 29 (Summer 1990). On the other hand, polls consistently show that about three-quarters of the population would allow abortions in at least some serious situations in addition to cases involving threats to the life of the mother.

35. P. 57 (quoting 3 BARTH, *supra* note 22, pt. 4, § 52, at 10 (quoting BONHOEFFER, *supra* note 23, at 236)) (footnote omitted).

nor may we whitewash the reality of abortion with euphemisms about "tissue" and the "woman's own body." Abortion is an evil, all too frequently and casually employed for the destruction of life. But the pregnant woman in distress is one's neighbor, too. Elimination of abortion may be the goal, but criminal punishment need not necessarily be the means.

It would have been helpful, at this juncture, for the authors to be more specific about the possibilities for principled compromise. The Reformed Protestant position, with its paradoxes and dialectics, does not translate easily into public policy. Barth and Bonhoeffer addressed the abortion question in the context of personal ethics and pastoral guidance, where individual, case-by-case examinations of circumstances, motivations, and sincerity are both possible and inevitable. The law necessarily must be more categorical — more "legalistic" and "casuistical." Barth and Bonhoeffer were concerned with sin, forgiveness, and grace, while the law is concerned, first and foremost, with justice.

Mensch and Freeman are a compelling voice for a principled middle way on an issue for which such voices are few in number. The American people, despite decades of largely absolutist rhetoric from both sides, continue to cleave to the middle ground on abortion, yet virtually no figure in public life has sought to define and clarify that middle ground or to provide leadership to get there. President Clinton has stated that he wants abortion to be "safe, legal and rare,"³⁶ but all he has done is make it cheaper and more respectable. With one and one-half million abortions per year — many of them not "chosen" by the woman but forced on her by circumstances beyond her control and lack of knowledge about alternatives — there would seem to be plenty of room for action that would help to make abortions more "rare."

Unfortunately, in the absence of such actions, the rights rhetoric of the pro-choice movement serves only to place a collective stamp of approval on what should be understood as a great social injustice to the unborn, as well as an avoidable tragedy to the mothers who have had abortions.³⁷ The sanctification of abortion as a constitutional right has contributed to the perception that abortion is a morally and socially appropriate form of birth control. This is intolerable. The first object of social policy in this area should be to reduce the number of abortions chosen by women: not to eliminate their choice, but to

36. See Kevin Sack, *Protester Thrusts Fetus at a Surprised Clinton*, N.Y. TIMES, July 15, 1992, at A11.

37. Anyone who doubts that abortion is a tragedy for the mother — putting aside the interests of the child — should consult MAGDA DENES, *IN NECESSITY AND SORROW* (1976); KATHLEEN McDONNELL, *NOT AN EASY CHOICE* (1984); or MARY K. ZIMMERMAN, *PASSAGE THROUGH ABORTION: THE PERSONAL AND SOCIAL REALITY OF WOMEN'S EXPERIENCES* (1977). All of these books are pro-choice, but they recognize the horror of the experience of taking the life of one's unborn child and its effects on women.

affect what choice they make. Abortion is at least as serious a social problem as tobacco.

There is a serious danger — evident in the pronouncements of the mainline Protestant denominations on the abortion question — that the “compromise” that comes from Reformed Protestant teaching can consist of paying lip service to the sanctity of life while doing nothing about the practice. This is essentially the West European solution (coupled with some more serious protection for fetal life in the later stages of pregnancy than we have here), and it seems to satisfy most people. Let us abolish the “right” of abortion discovered in *Roe*, declare that all life is deserving of protection, and then do nothing about it. Under this approach, the protesters, I predict, would diminish greatly in number; the Supreme Court’s docket would be cleared of these contentious cases; politicians would be off the hook; but the number of abortions would stay the same. If there is a principled middle-ground position, it must lie in a noncoercive pro-life policy that *works*.

CONCLUSION

The title of this book is *The Politics of Virtue*. This seems to me an almost complete misnomer, for few, if any, of the serious theologians whose ideas inspire the book believe that politics is about virtue or that government can create virtue. Barth and Bonhoeffer speak not of virtue but of sin and grace — of suffering, sacrifice, and redemption, which are very different things than virtue. The only reference to virtue in the text of the book, to my recollection, is in a discussion of Aquinas, and for Aquinas the relation between law (“politics”) and virtue is imperfect at best:

Now human law is laid down for the multitude the major part of which is composed of men not perfected by virtue. Consequently, all and every vice, from which virtuous men abstain, is not prohibited by human law but only the gravest vicious actions, from which it is possible for the major part of the multitude to abstain, and mainly those — like homicide, theft, etc. — which are harmful to others, and without the prohibition of which human society could not be preserved.³⁸

Laws against abortion are designed not to produce virtue but to prevent injustice.

The subtitle of the book, *Is Abortion Debatable?*, is more to the point. By “debatable,” the authors presumably mean that abortion is an issue about which debate is both possible and useful. I do not think that anyone will come away from this book persuaded of any particular thesis or program regarding abortion. I do think, though, that readers will be in a better position to see why even persons who share

38. P. 38 (quoting JACQUES MARITAIN, *MAN AND THE STATE* 168 n.24 (1951) (quoting Thomas Aquinas)).

the authors' liberal-left, feminist world view should understand the abortion issue as a question of justice — not simply of privacy or oppression — and even those of a secular orientation will be able to see how theological voices can contribute to the debate. Perhaps the first step toward having a productive debate — and hence toward finding a peaceful democratic solution — is to listen to one another's arguments and to stop attempting to rule "out-of-bounds" those whose presuppositions are grounded in religious faith.