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Bruce Ledewitz

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The Role of Religiously Affiliated Law Schools in the Renewal of American Democracy

Bruce Ledewitz

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ABSTRACT

American Democracy has broken down. This crisis was on dramatic display in the 2016 Presidential Campaign. Americans are resentful, distrustful and pessimistic. We find it easy to blame “the other side” for the deadlock, mendacity and irresponsibility in American public life. By virtue of their public role, American law schools have an obligation to address the breakdown in order to understand and try to ameliorate it. That task is currently unfulfilled by law schools individually and collectively. They are distracted by marketing and pedagogy. Religious law schools, which retain the traits of normative discourse, mission, Truth and tragic limit to a greater extent than do secular schools, could assume responsibility for the health of American democracy. These schools could begin consideration of the spiritual sources of the nihilism in this culture. There are legitimate theological objections to playing this public role in a rapidly secularizing society. But if these objections are overcome, not only might American Democracy be renewed, so might religion itself.

AUTHOR NOTE

Professor of Law, Duquesne University School of Law. Professor Ledewitz is the author of three books: *Church, State, and the Crisis in American Secularism*; *Hallowed Secularism*; and *American Religious Democracy*. This paper was prepared with support from the Duquesne Law School Summer Research Writing Program. A presentation based on this article was delivered at the 2016 Conference of Religiously Affiliated Law Schools hosted by Regent Law School. The author thanks Dean Michael Hernandez and Professor Lynne Kohm for their comments and hospitality.

A number of my colleagues have responded to this article—that is the kind of community we have at Duquesne—but I wish to especially thank Jane Moriarty for her careful reading and suggestions. I have been writing law review articles for many years. I have rarely encountered the serious engagement with ideas that I have experienced with the UMass Law Review. My thanks to the Editor-in-Chief, Ethan Dazelle, for his refreshing enthusiasm.

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I think the dominant theme. . . is what I'm always going to think of as the Duquesne Critique, which is that I subsume the language of morality into the language of law. The critique is that I'm reluctant to use, and Bruce [Ledewitz] even said fearful and insecure with, the language of morality.

I don't think it's an accident that this critique is raised in a Catholic law school, and I think one of the reasons that . . . people are quicker to raise it here than they are elsewhere, is that the moral and religious conversation that can be had by many people here is a much richer one than many other Americans can have, privately, in terms of moral and religious terms. That is, secular Americans can't have the religious conversation at all. The moral discourse, the tools of analysis, the rhetoric that is available for moral discussion, it seems to me, for a lot of people, is much more impoverished than the rhetoric that's available for any discussions in terms of law and the public value.¹

INTRODUCTION

In 1999, then-Stanford Law Professor William Simon participated in a discussion of his book about legal ethics—*The Practice of Justice*²—at Duquesne University School of Law. In the program, Duquesne law professors and others discussed the book and Professor Simon responded to these comments. It was during his response that Professor Simon said that he detected a pattern in these comments—he called it the Duquesne Critique. The critique was that Professor Simon had substituted law for morality in deriving values upon which a normative foundation for legal ethics could be built. Simon admitted, in effect, that he had substituted law for morality, and had done so because, in a secular context, no satisfactory discussion of morals

¹ William H. Simon et al., *The First Annual Thomas W. Henderson Lecture in Legal Ethics at Duquesne University School of Law Presents William H. Simon: Thinking Like A Lawyer-About Ethics*, 38 DUQ. L. REV. 1015, 1048-49 (2000).

² WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (1998).

could take place. At a “Catholic law school” like Duquesne, a conversation based on morality and religion “can be had.”³ For “a lot of” Americans, in contrast, moral conversation is “impoverished” compared to the resources available in a discussion of law and public values.⁴

Professor Simon describes a religious law school as a special place. While American society generally had lost its normative capacity, a religious law school had not. All that secular America can have is a neutral law of public values. Professor Simon is here reminiscent of the public reason of John Rawls.⁵ In contrast, a religious law school retains the capacity for full normative engagement.

It did not occur to Professor Simon that this precious normative resource—“America’s religious law schools”⁶—might be used to renew American public life. Simon accepted the normative division he described, perhaps as the price of secular life. But now that American public life is in terrible disrepair, that complacency is no longer adequate.

The public emergency today is not a confined matter, like the grounding of legal ethics that was at issue in 1999 in my vignette above. Today, the emergency is the breakdown of American Democracy itself. Although, as I will assert later in this article, this breakdown is related to the collapse of shared moral values that Professor Simon described, it is not necessary to my argument that this conclusion be accepted. My main point here is that America’s religious law schools offer the kind of rich space to confront this public emergency that Professor Simon noted in his more limited context. By speaking of what religious law schools can do, I do not mean that such law schools have an institutional voice or message as such. I mean that there is an investigation that such law schools can initiate and support, which cannot readily take place elsewhere. Therefore, although all law schools have an obligation to come to the

³ Simon, *The First Annual Thomas W. Henderson Lecture in Legal Ethics*, *supra* note 1.

⁴ *Id.*

⁵ See Katz, *infra* note 148 and the accompanying text (explaining public reason).

⁶ This is my term instead of religiously-affiliated law school. I wish to include schools founded by religious institutions or persons and still influenced by that tradition, whether actually continuing to be affiliated institutionally.

aid of American Democracy, religious law schools have the greatest capacity today to do so.

To establish this, the first Part of this article sketches broadly the breakdown of American Democracy. This part of the article is impressionistic, mostly because this is not a matter many would contest. Other than breakdown, how can one account for a Presidential election in which substantial numbers of primary voters supported two establishment outsiders—Donald Trump and Bernie Sanders—who argued that America is going in the wrong direction and that, in crucial ways, the game is rigged against ordinary people by powerful, shadowy forces?

But the crisis in American public life is only part of the framework I set forth. In Part II of the article, I argue that America's law schools, and by extension, the legal academy, are failing to acknowledge, let alone carry out, our special responsibility for the maintenance and defense of constitutional democracy. We are not even confronting the crisis.

The third Part of the article echoes Professor Simon's appreciation of the unique character of America's religious law schools. They are still a place where a broader and richer engagement with public life can go forward. Only what can be considered religious traits can address the crisis in American public life. But the purpose of this richer engagement, *pace* Professor Simon, is not simply to enrich the lives of religious believers at these law schools. The purpose must be to renew and transform American society.

The third part of the article also addresses the context that Professor Simon presupposed—the collapse of shared morality in secular society. This is indeed an important aspect of the breakdown of American Democracy, which has become a spiritual crisis. That is another reason that religious law schools have a special role to play in addressing the crisis.

But, are there not good reasons, even theological ones, why this project of democratic renewal should not go forward at religious law schools? Part IV of the article considers the threat to their mission that such a democratic role might entail. I conclude that this democratic role would not undermine the mission of religious law schools. Indeed, this democratic role for religious law schools might actually enhance their mission, by leading to the renewal of religious faith and its secular equivalent.

We live in a time of momentous challenge. We have all been guilty of complacency in the face of that challenge—of assuming that our

governmental institutions are eternal, rather than in deadly peril. It is the same challenge that Abraham Lincoln faced—whether “government of the people, by the people, for the people, shall. . .perish from the earth.”⁷ In the face of that challenge, Lincoln taught that we must think and act anew.⁸ This article is an attempt to begin to do just that.

There is no guarantee of democratic renewal. Martin Heidegger once said,

*A decisive question for me today is how a political system can be assigned to today’s technological age at all, and which political system would that be? I have no answer to this question. I am not convinced that it is democracy.*⁹

I. THE BREAKDOWN OF AMERICAN DEMOCRACY

*“It’s very easy to see this country on a nightmare trajectory.”*¹⁰

Really, the question is not so much whether there is a breakdown of American Democracy, as it is where to start in describing it. A large majority of the American people state in polls that they disagree with the direction in which the country is going;¹¹ they do not trust their

⁷ Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863) (transcript available at <http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm> [<https://perma.cc/778A-AFP2>]). Of course, in the Gettysburg Address, Lincoln was calling on the American people to resolve the question affirmatively.

⁸ “The dogmas of the quiet past are inadequate to the stormy present. The occasion is piled high with difficulty, and we must rise—with the occasion. As our case is new, so we must think anew, and act anew.” Abraham Lincoln Annual Message to Congress—Concluding Remarks (Dec. 1, 1962) (transcript available at <http://www.abrahamlincolnonline.org/lincoln/speeches/congress.htm> [<https://perma.cc/7UC4-PJHL>]).

⁹ Interview by Der Spiegel with Martin Heidegger (1966) (transcript available at <http://web.ics.purdue.edu/~other1/Heidegger%20Der%20Spiegel.pdf> [<https://perma.cc/AVV7-4R5S>]). Heidegger insisted that the interview not be published during his lifetime; it appeared in the magazine on May 31, 1976, five days after Heidegger’s death.

¹⁰ David Brooks, *Are We On the Path To Ruin?*, N.Y. TIMES (July 12, 2016), <https://www.nytimes.com/2016/07/12/opinion/are-we-on-the-path-to-national-ruin.html> [<https://perma.cc/SR6M-8FVU>].

¹¹ The Rasmussen Report from July 3, 5-7, 2016 states that 26% of Americans feel that the country is going in the right direction, whereas 68% feel the country is

leaders or major institutions and they are dissatisfied with their major political party choices in the most recent presidential campaign: Donald Trump and Hillary Clinton.¹² At the beginning of the 2016 Presidential election campaign, for many Americans, the major party choices were between a racist buffoon, utterly without qualifications or temperament to be President and an ambitious, dishonest and corrupt career politician, utterly without meaningful accomplishment, who would be in jail for compromising U.S. classified material if she had been an ordinary citizen and the FBI had conducted an honest investigation.¹³ President Barack Obama looks pretty good at this moment,¹⁴ but only in contrast. And then there was a week in July 2016, in which two African Americans were shot to death by police and five police officers were gunned down by a sniper.¹⁵ America is in a very dark place.

It is not obvious, however, what the underlying source is of America's deep political dissatisfaction. The political left attributes it to inequality and economic stagnation. Noam Chomsky, for example, speaks of the "breakdown" in the following terms:

going in the wrong direction. *Right Direction or Wrong Track*, RASMUSSEN REPORTS (July 7, 2016)

http://www.rasmussenreports.com/public_content/politics/mood_of_america/right_direction_or_wrong_track [<https://perma.cc/X54X-ZZAB>] (last visited Mar. 3, 2017).

¹² An article in the New York Times stated on July 9, 2016 on the front page: "Never have two presidential nominees been as unpopular as Mr. Trump and Mrs. Clinton, and they are not fully trusted by their own sides nor showing significant crossover appeal in polls." Patrick Healy, *Donald Trump and Hillary Clinton Struggle to Be Unifying Voice for Nation*, N.Y. TIMES (July 9, 2016), <https://www.nytimes.com/2016/07/10/us/politics/donald-trump-hillary-clinton.html> [<https://perma.cc/K4FL-M7V5>].

¹³ Nick Gass, "Lock her up" Chant Rules Republican Convention, POLITICO (July 20, 2016), <http://www.politico.com/story/2016/07/rnc-2016-lock-her-up-chant-hillary-clinton-225916> [<https://perma.cc/GXC5-5RVN>].

¹⁴ Mid-July approval rating for President Obama is 51%, versus a Presidential average from 1938 to the present of 53% in a comparative point in the Presidency. *Presidential Approval Ratings*, GALLUP, <http://www.gallup.com/poll/116479/barack-obama-presidential-job-approval.aspx> [<https://perma.cc/ARB5-W9GM>] (last visited Feb. 14, 2017).

¹⁵ Faith Karimi, Catherine E. Shoichet & Ralph Ellis, *Dallas Sniper Attack: 5 Officers Killed, Suspect Identified*, CNN (July 9, 2016), <http://www.cnn.com/2016/07/08/us/philando-castile-alton-sterling-protests/> [<https://perma.cc/3GUS-S2HL>]; *Two Police Shootings, Two Videos, Two Black Men Dead*, CNN (July 7, 2016), <http://www.cnn.com/2016/07/07/us/shootings-alton-sterling-philando-castile/> [<https://perma.cc/W2BX-ET68>].

*The state-corporate programs of the past 35 or so years have had devastating effects on the majority of the population, with stagnation, decline and sharply enhanced inequality being the most direct outcomes. This has created fear and has left people feeling isolated, helpless, victims of powerful forces they can neither understand or influence.*¹⁶

The description of the breakdown of American Democracy on the political right, and the prescription for its treatment, is more mixed, with some references to the moral direction of the country.¹⁷ But, largely, the diagnosis of the right is similar to that of the left: economic stagnation is the problem. The difference is that for the right, the prescription is faster economic growth to be accomplished through deregulation and tax cuts.¹⁸

Whatever the source, the intensity of the popular dissatisfaction is striking. American politics today is characterized by anger and resentment. On the right, this is described as the phenomenon of the angry white voter.¹⁹ This account suggests that the white majority is

¹⁶ C.J. Polychroniou, *Noam Chomsky on the Breakdown of American Society and a World in Transition*, TRUTHOUT, (June 12, 2016), <http://www.truth-out.org/opinion/item/36394-noam-chomsky-on-the-breakdown-of-american-society-and-a-world-in-transition> [<https://perma.cc/6BJX-XW97>].

¹⁷ The ambivalence on the political right is illustrated in the reaction to J.D. Vance's book, *Hillbilly Elegy: A Memoir of a Family and Culture in Crisis* (2016), about the travail of the white working class. Alexandra Wolfe summed up the book's message in the *Wall Street Journal* as follows: "[Vance] hopes that his experiences and path upward with the help of religion, discipline and family will inspire communities to promote those values." Akexabdra Wolfe, *J.D. Vance and the Anger of the White Working Class*, WALL ST. J. (July 29, 2016), <http://www.wsj.com/articles/j-d-vance-and-the-anger-of-the-white-working-class-1469813974> [<https://perma.cc/FP6S-CDEL>].

¹⁸ See Stephen Moore, *The Late, Great Democratic Party*, WASH. TIMES (July 24, 2016), <http://www.washingtontimes.com/news/2016/jul/24/economic-growth-has-stagnated-under-obama/> [<https://perma.cc/Z3KM-M9BS>]. Moore is identified as a senior economic adviser to the Donald Trump campaign.

¹⁹ Sometimes termed the "angry white male," as in Thomas L. Friedman's op-ed in the *New York Times* on July 13, 2016 referring to part of the current GOP base: "angry white males who fear they are becoming a minority in their own country and hate trade. . . ." Thomas L. Friedman, *The (GOP) Party's Over*, N.Y. TIMES (July 13, 2016), http://www.nytimes.com/2016/07/13/opinion/the-gop-partys-over.html?_r=0 [<https://perma.cc/W8HV-LHRM>].

being rapidly eclipsed, demographically, politically and culturally, and that the former, prevalent, white privilege is under siege.²⁰

On the left, there is also anger and resentment—toward the perceived influence of the wealthy and powerful.²¹ Both sides, actually nearly everyone in political life, rejects the establishment, however they define that establishment. Everyone, it seems, speaks of a needed “revolution.”²²

The fruit of this deep dissatisfaction is a high degree of political polarization and scapegoating, which is only likely to worsen since revolutionary change is neither happening nor is especially likely to happen. Who believes that this most recent Presidential campaign will deliver radical change? Without real change, the anger that is already present in American politics will just fester, robbing the system of perhaps its most valuable resources, political willpower and an opportunity for reform.

The excessive degree of partisanship today is the dominant attribute of American Democracy. Not only do the two Parties not work together toward compromise in Washington, individual voters are not open to persuasion. Michael Tomasky estimates that, in a

²⁰ See description by my colleague Joseph Sabino Mistick of Trump on July 10, 2016 in a column in the Pittsburgh Tribune Review: “Unmerited hostility towards the weak, poor and those who are different in any way easily generates resentment and is sure to garner the support of those who believe that their place in America has been unfairly diminished. But it is dangerous talk.” Joseph Mistick, *Donald Trump’s Continuing Attack on Civility*, TRIB LIVE (July 9, 2016 9:00PM), <http://triblive.com/opinion/josephmistick/10747836-74/trump-political-civility> [https://perma.cc/28Q4-B85K].

²¹ Caroline Bankoff, *Leonardo DiCaprio, a Dinosaur, and Thousands of Others at the People’s Climate March*, N.Y. MAG. (Sept. 21, 2014), <http://nymag.com/daily/intelligencer/2014/09/thousands-participate-in-nyc-climate-march.html> [https://perma.cc/5U36-5Q7X] (indicating that famously liberal Hollywood personalities along with 310,000 others marched for climate change but, even more broadly, for various levels of systemic change); Lisa W. Foderaro, *Taking a Call for Climate Change to the Streets*, N.Y. TIMES (Sept. 21, 2014), https://www.nytimes.com/2014/09/22/nyregion/new-york-city-climate-change-march.html?_r=1# [https://perma.cc/TBL6-4BN4] (discussing the Climate March as a massively attended event organized by a wide coalition of traditionally left groups including dozens of environmental, labor and social justice groups).

²² Even in endorsing Hillary Clinton, Bernie Sanders cited the “political revolution” he and his supporters have created in the Sanders campaign. Bernie Sanders, *Forever Forward*, READER SUPPORTED NEWS (July 12, 2016), <http://readersupportednews.org/opinion2/277-75/37964-focus-forever-forward> [https://perma.cc/M8WS-9ND7].

national election today, “[v]irtually any reasonably qualified Democrat would get 45 percent of the vote, as would any reasonably qualified Republican. . . .”²³

By itself, this kind of polarization could reflect reasonable democratic decision-making. If a voter judges global warming to be a threat to humanity, for example, that person must vote for the Democratic Party Presidential candidate. Not only are the two major Party candidates likely to differ on the issue, but the coalitions that make up the Parties have vastly different commitments and viewpoints concerning climate change.²⁴ The same thing would be true, in the opposite direction, on issues like abortion and gun rights.²⁵

But the polarization goes deeper than such rational calculations. Americans now differ not just on what it is best to do, but on the “facts” themselves. So, global warming is not happening. Or the fetus is not an independent human being. Or the facts are simply left open—did NAFTA cost American jobs or not? Both sides just keep repeating their versions of reality.²⁶ This lack of political discipline—the discipline of the facts—inhibits serious debate. Disagreements on the facts happens because, increasingly, Americans receive their news from like-minded sources.²⁷ There is no longer any widely trusted source in American public life, à la Walter Cronkite of a previous era.

²³ Michael Tomasky, *Can the Monster Be Elected?*, N.Y. REV. OF BOOKS (July 14, 2016), <http://www.nybooks.com/articles/2016/07/14/can-the-monster-be-elected/> [<https://perma.cc/YM9Y-QP7S>].

²⁴ Jonathan D. Salant, *10 Huge Differences Between Democratic and Republican Platforms*, N. J. ON-LINE (July 28, 2016, 10:20 am), http://www.nj.com/politics/index.ssf/2016/07/dnc_2016_10_big_ways_the_democratic_platform_diffe.html [<https://perma.cc/53JE-GGD9>].

²⁵ Will Drabold, *Read What the Democratic Platform Says About Guns, Abortion, and Immigration*, TIME (July 25, 2016), <http://time.com/4422862/democratic-platform-guns-abortion-immigration/> [<https://perma.cc/426W-JW8R>].

²⁶ To see the intractability of the dispute over NAFTA and jobs, see the conclusion that both critics and defenders lack the ability to sustain their claims at John Gallagher, *Donald Trump Fact-check: NAFTA's Impact on Automotive Jobs*, DETROIT FREE PRESS (Aug. 19, 2016, 11:36 P.M.) <http://www.freep.com/story/news/politics/2016/08/19/donald-trump-nafta-automotive-jobs/88954724/> [<https://perma.cc/67PQ-ML4Z>].

²⁷ In 2014, the Pew Research Center reported that “[w]hen it comes to getting news about politics and government, liberals and conservatives inhabit different worlds. There is little overlap in the news sources they turn to and trust.” Amy Mitchell, Jeffrey Gottfried, Jocelyn Kiley, & Katerina Eva Matsa, *Political Polarization & Media Habits*, PEW RESEARCH CENTER (Oct. 21, 2014),

Republicans and Democrats do not trust each other even to try to do the right thing. In other words, Americans do not just disagree about policies and facts, they disagree about motives. They do not attribute good faith to their political opponents. For example, Democrats believe the Republican Party to be populated by the wealthy to a vastly greater degree than is the case.²⁸ Because of this mutual distrust, the potential for cooperation to solve America's problems is remote.

Of course, partisanship has been a part of American politics since America disappointed the hopes of the framers and turned to political parties as the organizational structure of democracy.²⁹ But even the high level of partisanship during the Bill Clinton presidency—Clinton's *first* budget received not a single Republican vote³⁰—did not prevent the country from impressively closing ranks after the attacks of 9/11. Today, even that expression of national unity is resented, as the prelude to the discredited invasion of Iraq.

Along with this polarization, there is scapegoating. For Donald Trump, America's problems can be traced to a phantasm of foreigners: Muslims, Mexicans and trade partners. For Bernie Sanders, America's

<http://www.journalism.org/2014/10/21/political-polarization-media-habits/>
[<https://perma.cc/MJ9F-9LQ8>].

²⁸ In the May 2016 issue, Harper's reported as follows in the Harper's Index: "Percentage of Republicans who earn more than \$250,000 a year: 2; Whom Democrats estimate earn more than \$250,000 a year: 44." *Harper's Index*, HARPER'S MAG. (May 2016), <http://harpers.org/archive/2016/05/harpers-index-382/> [<https://perma.cc/T5QW-VEN4>].

²⁹ "The Framers abhorred the 'idea of political parties, representing institutionalized divisions of interest.'" Mitchell W. Berger & Gregory A. Haile, *The Constitutional Implications of Government Funding for Florida's Primary Voting Process: Is It Constitutionally Permissible to Publicly Fund the Two Major Parties' Primaries to the Exclusion of All Other Political Parties?*, 33 NOVA L. REV. 1, 11 (2008) (quoting Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2320 (2006)).

³⁰ David Fontana, *The Current Generation of Constitutional Law*, 93 GEO. L.J. 1061, 1088 (2005) (reviewing MARK TUSHNET, *THE CURRENT GENERATION OF CONSTITUTIONAL LAW REVIEW OF THE NEW CONSTITUTIONAL ORDER* (2003)).

problems can be traced to the rich,³¹ whose contributions to American life he essentially ignores.³²

Neither political party is capable of producing a nuanced analysis of our national problems. Neither party is capable of proposing policies that incorporate the best thinking of the other side and which, thus, could serve as a blueprint for dealing productively with those problems. Scapegoating, always partial, inaccurate and inadequate, inevitably leads to political deadlock because it does not deal productively with the issues. The resulting deadlock then inflames political resentments and reinforces political stereotypes.

America's political deadlock has produced a new and dangerous anti-democratic and anti-political spirit. On the left, there is a widespread view that legislative action that deals seriously with the nation's problems is impossible due to the power of the wealthy. Therefore, extra-political action is needed. This conclusion is expressly embraced in the public trust litigation movement dealing with climate change.³³ Some environmentalists now seriously propose to turn climate policy, which is essentially oversight of the entire economy, over to judges.³⁴ The thought that grounds the First Amendment's endorsement of free speech—that truth will emerge from free debate and will ground public action—is no longer an article

³¹ Bernie Sanders, *We Need a Serious Talk*, CNN (Jan. 9, 2017, 4:19 pm), <http://www.cnn.com/2017/01/09/opinion/s/serious-questions-bernie-sanders-opinion/> [<https://perma.cc/3GCC-BFEQ>] (“How do we stop the movement toward oligarchy in our country in which the economic and political life of the United States is increasingly controlled by a handful of billionaires?”).

³² But there is also a phantasm of foreigners on the left. The strikingly unanimous rejection of trade deals in both parties is worryingly isolationist and a repudiation of American self-confidence and benevolence. (“[T]he Trans-Pacific Partnership. . . will be buried with few in either party to mourn it.”). Jackie Calmes, *What Is Lost by Burying the Trans-Pacific Partnership?*, N.Y. TIMES (Nov. 11, 2016), <https://www.nytimes.com/2016/11/12/business/economy/donald-trump-trade-tpp-trans-pacific-partnership.html> [<https://perma.cc/7MJH-KAYK>].

³³ One such American case and its justification “when the political branches abdicate their responsibility” is described in Mark Belleville and Katherine Kennedy, *Cool Lawsuits - Is Climate Change Litigation Dead After Kivalina v. Exxonmobil?*, 7 APPALACHIAN NAT. RES. L.J. 51, 82 (2013).

³⁴ Mary Christina Woods & Charles W. Woodward, *Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition At Last*, 6 WASH. J. ENVT. L. & POL'Y 633, 659 (2016).

of faith, on the left. Now, even in theory, such free debate and resulting transformative action just cannot happen.³⁵

It is too soon to tell whether the Presidential campaign of Bernie Sanders might spark the beginning of a reembrace of politics by the left. It is just as likely that the ultimate nomination of Hillary Clinton will be seen as justifying the conclusion that politics cannot work. In addition, Bernie Sanders describes himself as a kind of antipolitical figure, who speaks of revolution rather than politics.³⁶ Thus, his relative success might not lead a new generation back into normal politics. Sanders' statement in late June that he will "probably vote" for Clinton is not the kind of attitude that encourages his supporters to engage politically.³⁷

On the right, the anti-democratic spirit manifests in the denigration of politics and government. Shutting down the government, repudiating the national debt, "starving the beast," threatening federal law enforcement in seizures of public land are all part of a renunciation of political community. The right glorifies only the individual.

³⁵ Although this is not the forum in which to analyze this critique of politics by the left, I have to mention my rejection of it in the past. See Bruce Ledewitz, *The Threat of Independent Political Spending to Democratic Life—and a Plan to Stop it*, 64 CLEV. ST. L. REV. 133 (2016). Notwithstanding the influence of money in general in a capitalist economy, it is simply not the case that particular political outcomes in America are determined solely by money interests, or even largely by the power of money. The left uses the excuse of money to justify its political failures. The broad decline of Democratic Party representation at the state level, in state legislatures and governorships, during the era of the Obama presidency is a political failure and not a financial one. See also Sheryl Gay Stolberg, Michael D. Shear & Alan Blinder, *In Obama Era, G.O.P. Bolsters Grip in the States*, N.Y. TIMES (Nov. 12, 2015), <http://www.nytimes.com/2015/11/13/us/politics/obama-legacy-in-state-offices-a-shrinking-democratic-share.html> [perma.cc/7JNL-AQ2Y].

³⁶ See Sanders, *supra* note 22. On July 26, 2016, Sanders announced the formation of an ongoing organization to be called Our Revolution. (Announcement in Reader Supported News on file with author).

³⁷ David Wright & Tal Kopan, *Bernie Sanders: I'll Probably Vote for Clinton*, CNN POLITICS (June 24, 2016) <http://www.cnn.com/2016/06/24/politics/bernie-sanders-will-vote-for-hillary-clinton/> [<https://perma.cc/JS8Y-XLAY>] ("I'll probably vote for Clinton." By the time of the Democratic Party Convention, Sanders was taking a different line about how important it was to defeat Donald Trump, but it may have been too late to introduce his supporters to the compromises of ordinary politics.).

Again, Donald Trump's success also might look like a return to politics. But, to even a greater extent than the campaign of Bernie Sanders, Trump campaigned as a wildly antipolitical figure. Trump made promises that do not reflect reality. For example, on one campaign stop in Pittsburgh, Trump promised the revival of the steel and coal industries in very general terms.³⁸ Those jobs are coming back, he said.³⁹ But not only is this unlikely, if not impossible, it is probable that even Trump's supporters do not expect any such result.⁴⁰

And this is also true of other Trump promises, such as building a border wall that Mexico pays for.

Political campaigns often feature unrealizable promises. But, in the past, idealistic crusades have been built on the foundation of at least potentially attainable goals—the end of the gold standard, or the abolition of slavery, or even the attainment of socialism. In contrast, Trump is running a campaign based on bluster and feeling. Trump's support echoes a strong man theory of politics⁴¹—not a healthy commitment to democratic life.

Related to the anti-democratic spirit currently coursing through American politics is an absence of faith in the future. There is nothing currently in our public life that remotely resembles the “morning in America” rhetoric of Ronald Reagan, for example.⁴²

³⁸ Ben Schreckinger, *Steel Certain: Trump Vows to Make Pittsburgh Great Again*, POLITICO (April 13, 2016) <http://www.politico.com/story/2016/04/trump-promises-to-make-pittsburgh-great-again-221925#ixzz4FiEdpncO> [<https://perma.cc/PQ35-EMAB>] (“Donald Trump vowed to bring back Pittsburgh’s once-thriving steel and coal industries at a rally here on Wednesday night.”).

³⁹ *Id.*

⁴⁰ Steven Greenhouse, *Donald Trump’s Appeal to Rust Belt Workers*, N.Y. TIMES (July 2, 2016), <https://www.nytimes.com/2016/07/03/opinion/sunday/donald-trumps-appeal-to-rust-belt-workers.html> [<https://perma.cc/ZLE5-EFUW>] (As one Trump supporter in Pennsylvania later put it, “Trump may be lying about bringing jobs back, but at least he’ll try to.”).

⁴¹ See Omar G. Encarnacion, *American Caudillo, Trump and the Latin-Americanization of U.S. Politics*, FOREIGN AFFAIRS (May 12, 2016), <https://www.foreignaffairs.com/articles/united-states/2016-05-12/american-caudillo> [<https://perma.cc/KW28-XLRJ>].

⁴² Paul Christiansen, *“It’s Morning Again in America”: How the Tuesday Team Revolutionized the Use of Music in Political Ads*, 10 MUSIC & POLITICS 1 (2016), <https://quod.lib.umich.edu/m/mp/9460447.0010.105/—it-s-morning-again-in-america-how-the-tuesday-team?rgn=main;view=fulltext> [<https://perma.cc/DS9S-UHU6>] (The reference is the commonly used title for an ad in President Reagan’s 1984 campaign, with the opening line, “It’s morning again in America.”).

Of course, it might be considered merely realistic to predict that America is going to decline to some extent, since the degree of American dominance in the world since WWII was extraordinary. Yet, looking at matters more broadly than just the place of America, it could also be argued that there is no time in human history that has been better for people than this moment.⁴³ Poverty is low.⁴⁴

Human health is improving.⁴⁵ There is no reason to fear widespread war—the conflicts going on now are local and terrorism is more a deadly nuisance for most people than a genuine threat to anyone’s way of life.⁴⁶ There is no obvious reason for the pessimism that is so pronounced in American politics. That pessimism is an aspect of the overall breakdown. The widespread sense among the public that nothing in public life is working well and that nothing is likely to work well in the future is not justified, but it is still there.

All in all, our situation is reminiscent of what the rabbis taught about the fall of Jerusalem to the Romans. Why did Jerusalem fall? Because of unjustified hatred.⁴⁷ Americans are at each other’s throats,

⁴³ See Charles Kenny, *2015: The Best Year in History for the average Human Being*, THE ATLANTIC (Dec. 18, 2015), <http://www.theatlantic.com/international/archive/2015/12/good-news-in-2015/421200/> [https://perma.cc/82V6-A5PF].

⁴⁴ Press Release, *Remarkable Declines in Global Poverty, But Major Challenges Remain*, THE WORLD BANK (April 17, 2013), <https://www.worldbank.org/en/news/press-release/2013/04/17/remarkable-declines-in-global-poverty-but-major-challenges-remain> [https://perma.cc/9TLV-LNDF].

⁴⁵ Nathanael Johnson, *Good News: Global Health is Actually Improving. Huzzah, Civilization!*, GRIST (Sep. 28, 2015) <http://grist.org/science/good-news-global-health-is-actually-improving-huzzah-civilization/> [https://perma.cc/FUF5-EPEM].

⁴⁶ John Mueller & Mark Stewart, *Terrorism Poses No Existential Threat to America. We Must Stop Pretending Otherwise*, THE GUARDIAN (Feb. 24, 2015), <https://www.theguardian.com/commentisfree/2015/feb/24/terrorism-poses-no-existential-threat-to-america> [https://perma.cc/5PUB-WYZ3].

⁴⁷ Jeff Goldwasser, *Existential Threats and Free-Flowing Hatred*, REB JEFF (July 25, 2015) <http://www.rebjeff.com/blog/existential-threats-and-free-flowing-hatred> [https://perma.cc/7KQX-8CN9] (This is how Rabbi Jeff Goldwasser tells the story: “In the Talmud, the rabbis ask, ‘Why was the First Temple destroyed?’ And they answer, ‘Because of three things which prevailed there: idolatry, immorality and bloodshed.’ They ask, ‘Why was the Second Temple destroyed, seeing that in its time the Jewish people were studying Torah, performing mitzvot, and giving charity?’ And they answer, ‘Because of free-flowing hatred [of one Jew against another]. This teaches that free-flowing hatred is of the same gravity as the sins of idolatry, immorality and bloodshed combined’ (Babylonian Talmud, Yoma 9b).”).

not over some issue. We are at each other's throats and any issue will do.

Concern in America about the health of American Democracy has been high for a while, but it reached a kind of peak with the historic vote of the British people to leave the European Union (EU) on June 23, 2016.⁴⁸ That vote, called Brexit, represented all of the conflicting trends swirling in democratic politics in the West and showed how hard it is to describe accurately what is going on. In other words, the times are momentous and, as the headline read in the *New York Times* on the following Sunday, “caustic,”⁴⁹ but people disagree as to what is actually happening.

For example, was Brexit democratic or anti-democratic? On the one hand, the vote to leave the EU could easily be described as an attempt to return to democratic government. The EU is not really a representative structure. A large part of the dissatisfaction with the EU in Britain had to do with the complaint about being ruled by a distant, unresponsive bureaucracy in Brussels.⁵⁰ Furthermore, the heart of the defense of continuing EU membership had nothing much to do with defending democracy. The basic Remain argument was economic⁵¹—that Britain going alone would suffer materially because part of its current prosperity was based on its serving as an English language bridge to European markets. That defense could be looked at as a Faustian bargain trading away democracy for jobs. So, the vote to leave the EU could be seen as democratically healthy—a later form of the American Revolution slogan, “No taxation without representation.”

On the other hand, the European Project—the attempt to create a peaceful, prosperous and integrated Europe—went considerably beyond mere economics.⁵² It was an effort to broaden the idea of self-

⁴⁸ Alex Hunt & Brian Wheeler, *Brexit: All You Need to Know About the UK Leaving the EU*, BBC (March 8, 2017) <http://www.bbc.com/news/uk-politics-32810887> [<https://perma.cc/4LX5-FZV7>].

⁴⁹ Jim Yardley, Alison Smale, Jane Perlez & Ben Hubbard, *Caustic Unravelling Roils Postwar Order*, N.Y. TIMES, June 26, 2016, at A1.

⁵⁰ See Hunt & Wheeler, *supra* note 48.

⁵¹ See Jonathan Freedland, *A Howl of Rage*, N.Y. REV. (Aug. 18, 2016). <http://www.nybooks.com/articles/2016/08/18/brexit-howl-of-rage/> [<https://perma.cc/4KJ5-5K98>] (referring to Britain's prosperity as “the Remain campaign's central argument”).

⁵² According to Europa, the official website of the European Union, the original aim of the six founding nations was “a peaceful, united and prosperous Europe.”

government to include the entire continent. The vote to leave the EU was also premised on an anti-immigrant backlash⁵³ and an inter-generational conflict⁵⁴ over the desire to return to an earlier image of Britain populated by “us” versus the “them” who arrived, or were born, later. This sort of turning inward in a nostalgic longing for a mythical past is not genuinely democratic. The revival of the independence movement in Scotland after the vote, and the resentment of the younger generation toward the result, suggest that the decision to leave the EU did not reflect a desire to perfect democracy in Britain.

On the Sunday after the vote, Tony Blair, the former British Prime Minister and an opponent of leaving the EU, tried to make sense of the vote in an op-ed column in the *New York Times*.⁵⁵ Blair had difficulty characterizing the vote. He wrote of a spirit of insurgency on both the left and the right against centrist politics.⁵⁶ Without an express reference, he seemed to be linking the vote in Britain with the most recent American Presidential campaign, with Trump and Sanders representing the insurgencies on the right and left and Hillary Clinton representing the politics of the center. Blair did not call that spirit of insurgency anti-democratic. In fact, Blair memorably wrote that “[f]or a day, the British people were the government....”⁵⁷ But that kind of direct majority rule is not necessarily what democracy is. In America

EUROPEAN UNION, THE FOUNDING FATHERS OF THE EU, (Jan. 5. 2017), https://europa.eu/european-union/about-eu/history_en [<https://perma.cc/2YUD-GZFW>]. Economic integration was never abandoned as a goal, but the EU describes itself as “governed by the principle of representative democracy, with citizens directly represented at Union level in the European Parliament and Member States represented in the European Council and the Council of the EU.”

⁵³ Adam Taylor, *The Uncomfortable Question: Was the Brexit Vote Based on Racism*, WASH. POST (June 25, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/06/25/the-uncomfortable-question-was-the-brexit-vote-based-on-racism/?utm_term=.813e3bf577f1 [<https://perma.cc/J2YW-MAYP>].

⁵⁴ Merrit Kennedy, *Shock, Rage and Gallows Humor: A Brexit Backlash On Social Media*, NPR (June 24, 2016), <http://www.npr.org/sections/thetwo-way/2016/06/24/483356285/shock-rage-and-gallows-humor-a-brexit-backlash-on-social-media> [<https://perma.cc/E7CW-JQXW>] (“On-the-day polls show a strong generational divide on the issue, with at least 73 percent of voters aged 18-24 wanting to remain in the EU. By contrast, only 40 percent of voters over 65 wanted to stay.”).

⁵⁵ Tony Blair, *Brexit's Stunning Coup*, N.Y. TIMES (June 26, 2016), <https://www.nytimes.com/2016/06/26/opinion/tony-blair-brexit-stunning-coup.html> [<https://perma.cc/CFZ7-A9UP>].

⁵⁶ *Id.*

⁵⁷ *Id.*

at least, democracy has always been premised on *representative* government. Congress guarantees the States a Republican form of government under the Constitution, not a directly democratic one.⁵⁸

Blair's suggestion of direct action by the people against the entrenched power of special interests, educated experts and unresponsive bureaucracies, especially public ones, has a name—populism—and that term was used by some in the American political context in light of the Brexit vote. For example, the June 20, 2016 New York Times Book Review asked in a bold front cover, *Why Populism Now?*, with increasingly strong colors of conflagration toward the bottom of the page.⁵⁹ You could describe the current political moment as one of widespread public frustration with elites of all kinds and that is probably what was meant by describing the moment as a populist one.

So, lots of people are concerned about the breakdown of American Democracy. But, even with all this attention, we are still too complacent. The breakdown of American Democracy has not necessarily run its course. As bad as things may seem now, the unthinkable can also happen. Unless America changes course, how many years will it be before an army general decides that the military is the only national institution that can restore a measure of American national unity?⁶⁰

Before leaving this section describing the breakdown of American Democracy, I have to acknowledge the criticism that this section is misnamed—perhaps there has never been yet an American Democracy. There is an important experiment going on now, called The Next System Project that suggests that something very new is

⁵⁸ U.S. CONST. art. IV, § 4.

⁵⁹ The Book Review cover referred to a review by Sam Tanenhaus of several books about the contemporary political crisis. Sam Tanenhaus, *What do this Season's Political Books Tell Us About the Election?*, N.Y. TIMES (June 20, 2016), <https://www.nytimes.com/2016/06/26/books/review/what-do-this-seasons-political-books-tell-us-about-the-election.html> [<https://perma.cc/5GN2-XLHT>].

⁶⁰ Of course, dictators can be elected as well, as in Sinclair Lewis's 1935 novel, *It Can't Happen Here*. The point is, it can happen here and Americans should not be sanguine about our broken democracy. In fact, Mark Movsesian wrote about a study suggesting that 35% of wealthy young Americans "say it would be a 'good' thing for the army to 'take over' the country!" Mark Movsesian, *The End of the Liberal Tradition?*, FIRST THINGS (Aug. 17, 2016) <https://www.firstthings.com/web-exclusives/2016/08/the-end-of-the-liberal-tradition> [<https://perma.cc/9LE3-CDN8>].

needed for future political life.⁶¹ Much of that Project is focused on economic life, but part of the message is that economic decision-making is a part of democracy and not a separate matter. This movement could be viewed as a suggestion that American life is not democratic enough and that, rather than a breakdown of democracy, the current ferment represents genuine democratic stirrings. This movement suggests that America, like Britain under the EU, could be seen as ruled by various forms of bureaucracies rather than any longer an experiment in self-government. This view, whether pro or anti capitalism, is an echo of the old criticism that Americans have become subjects rather than citizens.⁶² Perhaps, then, the answer to our breakdown is a more democratic American economic life.

II. THE PROPER ROLE OF AMERICAN LAW SCHOOLS TODAY

The section above shows that it is difficult to characterize or explain the current, troubled moment. I am going to suggest below that the political crisis is spiritual in nature and that the response must therefore also be spiritual. But, before making that suggestion, I want to make a different point: even if I am wrong about the nature of the political crisis, most people agree that something is currently broken in American Democracy. Therefore, the first question for American law schools must be our role in addressing the crisis. Simply put, do America's law schools have a special responsibility to address the breakdown of American Democracy? If so, how well are America's law schools responding?

I don't actually expect much disagreement with the abstract and idealized vision of American law schools as having an inherently

⁶¹ The Project is described as aiming "to refine and publicize comprehensive alternative political-economic system models that are different in fundamental ways from the failed systems of the past and capable of delivering superior social, economic and ecological outcomes. By defining issues systemically, we believe we can begin to move the political conversation beyond current limits with the aim of catalyzing a substantive debate about the need for a radically different system and how we might go about its construction." *The Next System Project*, DEMOCRACY COLLABORATIVE, <http://democracycollaborative.org/content/next-system-project> [<https://perma.cc/G8TY-BFN8>] (last visited May 1, 2017).

⁶² ANTONIN SCALIA ET AL., *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 113-14 (1997) ("Tyranny, as Tocqueville warned, need not announce itself with guns and trumpets. It may come softly—so softly that we will barely notice when we become one of those countries where there are no citizens but only subjects.").

public role.⁶³ As de Tocqueville famously wrote in 1835, “Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.”⁶⁴ The passage of time has only reinforced the public nature of law in America. Phil Neal would add 130 years later, that the observation, perhaps an exaggeration then, “is nearer the truth today than when De Tocqueville wrote.”⁶⁵ Even nearer today.

Indeed, the quote understates the public role of law. De Toqueville’s next sentence traced law’s influence beyond court cases into the very language of American politics. Because political issues end up in court, “all parties are obliged to borrow, in their daily controversies, the ideas, and even the language, peculiar to judicial proceedings.”⁶⁶ In America, the language of politics is, to a great extent, the language of law. And, of course, that public and political language is taught in its most concentrated form in law school.

This public role of law school is cemented in popular understanding. The late John E. Murray, Jr., an important figure in American contract law in the twentieth century,⁶⁷ and personally an imposing personality, served as President of Duquesne University from 1988-2001 and then returned to teach at the Law School until his death in 2015. Over the course of that 37-year period, I heard John address law students at Orientation and Graduation, the two poles of legal education, on dozens of occasions. Without fail, John would end his remarks with a reference to Edmund Burke’s speech to Parliament on Conciliation with the Colonies in 1775.⁶⁸ Americans, John would

⁶³ STEPHEN GOTTLIEB, UNFIT FOR DEMOCRACY: THE ROBERTS COURT AND THE BREAKDOWN OF AMERICAN POLITICS 238 (2016) (criticizing the Roberts Court for failing to consider the maintenance and promotion of democracy a part of its constitutional responsibility).

⁶⁴ ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 280 (Phillips Bradley ed., Henry Reeve et al. trans., Alfred A. Knopf, Inc., 1945) (1838).

⁶⁵ Phil C. Neal, *De Tocqueville and the Role of the Lawyer in Society*, 50 MARQ. L.REV. 607, 609 (1967).

⁶⁶ DE TOCQUEVILLE, *supra* note 64.

⁶⁷ JOHN EDWARD MURRAY JR., MURRAY ON CONTRACTS (5th ed., 2011) (showing generations of law students have studied his treatise).

⁶⁸ Edmund Burke, *Speech on Conciliation with the Colonies*, FUNDAMENTAL DOCUMENTS 1, 3-7 (1987), <http://press-pubs.uchicago.edu/founders/documents/v1ch1s2.html> [<https://perma.cc/V42T-N6D8>].

say, have “a love of freedom” and they “snuff the approach of tyranny in every tainted breeze.”⁶⁹

Now, why mention that on these occasions? After all, Burke was not talking about American lawyers. In a talk to law students, why not emphasize dispute resolution or deal making or improving economic efficiency or responsibilities to clients, or any of the myriad, important topics of a law school education? Yet, in all the years I heard this talk, I never heard anyone ask why the quote was relevant. And I am sure that my readers have had similar experiences at public occasions at other law schools. Many of us intuitively feel that law in America has a special relationship to democratic life and that law school is the place uniquely suited to preparation for leadership in public life.

The special role of law in American Democratic life has been the main theme in the lifetime work of numerous legal thinkers. It was that for my teacher, Charles Black, most particularly in his formative book, *The People and the Court*⁷⁰ and for his colleague, Alex Bickel, though from a very different perspective, in *The Least Dangerous Branch*.⁷¹ It was the core theme of Justice John Marshall Harlan II, especially in his view of the unfolding of the jurisprudence of due process.⁷² And, in a very different voice, promoting the role of law in designing experiments and alternatives in political/economic arrangements was the earnest proposal of Roberto Unger in, especially, his book, *What Should Legal Analysis Become?*⁷³

Nor is this a new, twentieth century self-conception of the role of law in America. Rachel Moran, the former dean of the UCLA School of Law, describes the founding of Indiana Law School in the 1840s in similar public terms.

To remedy concerns about poorly trained lawyers, Indiana University pressed to establish a law school beginning in the mid-1830s. Only in 1842 did the campus succeed when David McDonald, a circuit court judge and Bloomington resident, became a professor of law. In Judge McDonald’s inaugural address, he clearly linked formal legal education to the foundations of a healthy democracy:

⁶⁹ *Id.*

⁷⁰ CHARLES L. BLACK JR., *THE PEOPLE AND THE COURT* (1960).

⁷¹ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

⁷² See Bruce Ledewitz, *Justice Harlan’s Law and Democracy*, 20 J.L. & POL. 373 (2004).

⁷³ ROBERTO MANGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* 1 (1996).

*Other calamities may [befall] a nation, and it may survive them; . . . but when the laws, by which the people are governed and protected, have fallen into disrepute, revolution or ruin is the inevitable consequence. . . . To study our jurisprudence as a science, and to be thoroughly learned in its precepts, are . . . not only honorable to us [as lawyers] and necessary to a wise administration of justice, but of the highest moment to the permanence of our political institutions.*⁷⁴

For Dean Moran, the public law school has an especially important role in “law and politics”⁷⁵ that is now under attack as visions of the public sector shrink in preference to market-based decision-making, which had been the preferred domain of private law schools. She sees an ideological dispute over the extent to which Americans want “public law schools train[ing] citizen-lawyers to preserve a healthy body politic.”⁷⁶

But this difference between public and private law schools is really an in-house dispute—an exaggerated distinction. Market-based reforms to solve social problems is a way of doing politics, not an elimination of politics. That is why Ronald Reagan was elected President of the United States and not appointed CEO. So, even in an era of deregulation spearheaded by lawyers, the shape of that very deregulation is a matter of politics to be addressed in law schools. One must still decide how much public regulation and how much private autonomy is warranted in different areas.

In other words, although there might be skepticism when someone says, “I am from the government and I’m here to help,”⁷⁷ that is still what the marshal says to the settler. This is not a role a Ronald Reagan would have denigrated.⁷⁸

⁷⁴ Rachel F. Moran, *Clark Kerr and Me: The Future of the Public Law School*, 88 IND. L.J. 1021, 1024 (2013).

⁷⁵ *Id.* at 1027.

⁷⁶ *Id.* at 1030.

⁷⁷ Ronald Reagan, The President’s News Conference (Aug. 12, 1986) (transcript available at <http://www.presidency.ucsb.edu/ws/?pid=37733>) (This was a quote famously attributed to President Reagan: “[T]he [nine] most terrifying words in the English language are: I’m from the Government, and I’m here to help.”).

⁷⁸ LAW AND ORDER (Universal International Pictures 1953) (It was a role he played in this film.).

Once the public/private law school issue is transcended, Dean Moran's lesson for law school education boils down to this—just as medical schools train doctors to heal the human body, law schools need to train lawyers to heal the body politic. While there would be controversies over how one should go about that and what a healed body politic would look like—a dispute medical schools don't have to worry about to the same extent—there might well be widespread agreement with Dean Moran that this is what law schools are supposed to aim at.

This understanding of the public nature of legal education is not surprising. American public life functions around a Constitution as its fundamental law. Once the Supreme Court held in *Marbury v. Madison* that the Constitution could be enforced in ordinary lawsuits in court,⁷⁹ it was probably inevitable that the legal profession would assume a public role as the protector of American Democracy. Lawyers would be bringing and defending cases that would define our rights as citizens and specify the details of the structure of American government—and lawyers as judges would be deciding these cases.

In recent years, a great deal about American Democracy has been decided by the Supreme Court. Obviously this is true in the law of elections, including the constitutionality of campaign finance laws⁸⁰ and political gerrymanders,⁸¹ to cite only two of the most controversial areas. But it is true even of more mundane issues, such as legislative apportionment and the constitutionality of direct democracy reforms—referenda, recalls and the like⁸²—and issues of residency.⁸³

As influential as the Supreme Court has been through election law cases, the Court has had much more of an impact on American Democracy than just in these specific areas. Democracy does of course concern matters such as how office holders are selected and what they do. But democracy is also a spirit of inquiry, as John Dewey emphasized.⁸⁴ So, insofar as the Supreme Court helps keep Americans

⁷⁹ *Marbury v. Madison*, 5 U.S. 137, 173-74 (1803).

⁸⁰ *See e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 10 (1976).

⁸¹ *See e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004).

⁸² *Baker v. Carr*, 369 U.S. 186, 197 (1962) (The Supreme Court split, holding that apportionment issues do not present a nonjusticiable political question.); *Pacific States Tel. & T. Co. v. Oregon*, 223 U.S. 118, 149-50 (1912) (The constitutionality of popular initiatives did present a political question.).

⁸³ *See e.g.*, *Dunn v. Blumstein*, 405 U.S. 330, 331 (1972) (invalidating durational residency requirement for voting).

⁸⁴ *See also* *Whitney v. California*, 274 U.S. 357, 377 (1927).

free, and public debate open, the Court is contributing to the growth and maintenance of democracy.⁸⁵ And this judicial product is a function of the work of lawyers, who are trained in that work in law schools.

If law schools inherently have this democratic role, the more provocative question is, how well are America's law schools performing? In terms of the theme of this article, how well are law schools addressing the breakdown of American Democracy?

The answer is, not well at all. In fact, the issue has not even really come up. Rather than attempt to show this globally, I will demonstrate the failure with two illustrations: the overall response of law schools to the economic downturn of 2008 and the recent theme of the January 2017 Annual Meeting of the American Association of Law Schools—the AALS—*Why Law Matters*.

It is no secret that American Law Schools today are under enormous pressure. Since the 2008 recession, the number of students taking the LSAT, a rough measure of the potential law student market, has dropped by around 40%.⁸⁶ At the same time, and obviously related, the number of good-paying jobs in the legal profession has also declined.⁸⁷ These factors have led to a decline in the credentials of entering law students.⁸⁸

The effect of all these changes is that a larger percentage of graduating law students will not pass the bar exam or, if they do, will not find a job in the legal profession, or if they do, will not earn enough to comfortably pay back their student loans. These facts have

⁸⁵ *Id.* at 375 (“Those who won our independence believed. . .that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth. . .”); see GOTTLIEB, *supra* note 63 at 238 (arguing that the Roberts Court is failing in this responsibility).

⁸⁶ *Total LSATs Administered-Counts & Percent Increases By Admin & Year*, LSAC, <http://www.lsac.org/lscresources/data/lstats-administered> [<https://perma.cc/8AKH-CBDU>] (last visited May 1, 2017) (According to the LSAC website, in the year 2009-2010, 171,514 such tests were administered, versus 101,689 in the year 2014-2015.).

⁸⁷ Steven J. Harper, *Too Many Law Students, Too Few Legal Jobs*, N.Y. TIMES (Aug. 25, 2015), <https://www.nytimes.com/2015/08/25/opinion/too-many-law-students-too-few-legal-jobs.html> [<https://perma.cc/AD79-G9B2>].

⁸⁸ Elizabeth Olson, *Study Cites Lower Standards in Law School Admissions*, N.Y. TIMES (Oct. 26 2015), <https://www.nytimes.com/2015/10/27/business/dealbook/study-cites-lower-standards-in-law-school-admissions.html> [<https://perma.cc/KYP2-5J9J>].

been widely reported in the media,⁸⁹ undoubtedly leading to further declines in the number of law school applicants. Some law schools are affected less by these factors and some more, but all but the leading schools are substantially changed since 2008.⁹⁰ These pressures on law schools have recently begun to ameliorate, but still mostly remain in place.⁹¹

It is a little surprising that this crisis led to questioning the methods and purpose of legal education. After all, the crisis could be described as a simple drop in demand, which could then be assuaged by a simple reduction in the supply of law school graduates. Earlier declines in the demand for dentists, for example, with similar impact on dental schools enrollments, did not change very much the ways dentists were trained.⁹²

Yet, this is not the case with law schools. In responding to the changes in demand, law schools are engaging in substantive changes in legal education. Despite the lack of evidence that law school graduates lacked legal skills in the past, law schools, under pressure from the American Bar Association, are providing more experiential learning and more skills-oriented courses.⁹³ From the perspective of

⁸⁹ See, e.g., Tim Grant, *Path to Law Career Not Always Straight*, PITTSBURGH POST-GAZETTE (July 10, 2016), at A1.

⁹⁰ *2015 Standard 509 Information Report Data Now Available*, ABA (2015) http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2015_fall_enrollment_announcement.authcheckdam.pdf [<https://perma.cc/GE9U-HRC6>] (indicating that in 2015, total national J.D. applicant enrollment declined to 113,900, from a peak in 2010 of 147,525); Mark Hansen, *As Law School Enrollment Drops, Experts Disagree on Whether the Bottom is in Sight*, ABA J. (March 1, 2015), http://www.abajournal.com/magazine/article/as_law_school_enrollment_drops_experts_disagree_on_whether_the_bottom [<https://perma.cc/63ZM-5MAS>].

⁹¹ In the year 2015-2016, the number of LSAT's administered had recovered 4.1%, to 105,883. *Total LSATs Administered-Counts & Percent Increases By Admin & Year*, *supra* note 86.

⁹² See Eric Solomon, *The Future of Dental Practice – Dental Education*, DENTAL ECON. (Jan. 27, 2015), <http://www.dentaleconomics.com/articles/print/volume-105/issue-1/macroeconomics/the-future-of-dental-practice-dental-education.html> [<https://perma.cc/Y9BR-H6UH>].

⁹³ See Managing Director's Guidance Memo on Standards 303(a)(3), 303(b), and 304, ABA Section of Legal Education and Admission to the Bar (March 2015), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2015_standards_303_304_experiential_course_requirement_.authcheckdam.pdf. [<https://perma.cc/DY9Z-STGH>].

this paper, this changed orientation is a distraction from the role of law schools in the study of, and commitment to, American Democracy.⁹⁴

It should now even be possible to demonstrate that distraction from a concern for American Democracy, because of another ABA-mandated response to the crisis in law schools: the requirement of learning outcomes assessments. The ABA is beginning to require specified learning outcomes and attempted assessment of the attainment of these outcomes, at both the institutional and individual course levels.⁹⁵

The specification of learning outcomes in law school classes need not degenerate into simplistic, easily measurable skills, as some fear.⁹⁶ Specification of proposed outcomes merely requires a law school to specify, in effect, what it is attempting to teach its students, in general and in particular courses. In other words, the outcomes/assessment movement is not theoretically attempting to move legal education away from the thinking that characterizes a serious academic discipline, into a specified skill set more appropriate for a craft endeavor. Learning outcomes can address the goals of legal education in any context.⁹⁷ The specificity of assessing such outcomes then allows a judgment as to what a law school considers the goals of legal education to be.

To judge whether law schools consider the flourishing of American Democracy to be a primary responsibility, and the need to equip students to contribute to that flourishing a primary goal, one can then just look at the institutional learning outcomes a law school

⁹⁴ Granted, there is no absolute tension between educating lawyers with excellent specific legal skills and preparation in dealing with clients, on the one hand, who are also trained in, and responsive to, the needs of democratic life, on the other.

⁹⁵ See Managing Director's Guidance Memo, *supra* note 93.

⁹⁶ For illustration of general concern with proposals making law school more practical and efficient, see Richard E. Redding, *The Legal Academy Under Erasure*, 64 CATH. U. L. REV. 359, 371 (2015) ("This Article discusses proposals that would effectively put the legal academy under erasure by making it vocationally, rather than academically, oriented, an anti-intellectual approach. . ."). In contrast, most academic writing wholly praises the new pedagogical regime and attributes any opposition to nostalgia and apathy. See e.g., Sarah Valentine, *Flourish or Founder: The New Regulatory Regime in Legal Education*, 44 J.L. & EDUC. 473, 490 (2015) ("[L]aw school faculty remain, by and large, wedded to the past, merely replicating the way they were taught.").

⁹⁷ For one creative effort to use assessment criteria in ethical formation, see Neil Hamilton, *Assessing Professionalism: Measuring Progress in the Formation of an Ethical Professional Identity*, 5 U. ST. THOMAS L.J. 470 (2008).

specifies. Helpfully, one widely used guide on the subject includes examples of overall institutional outcomes from five American Law Schools.⁹⁸ While all five law schools promote ethical conduct, service to the community and moral values, none of the schools list perfecting American Democracy as among their institutional goals. Nor do they suggest such a concern in other terms. Of course, five schools is only a tiny sample, but the presence of these five examples in a Guide presented by national experts presumably in workshops across the country as a helpful starting point for designing institutional learning outcomes, at least suggests that nothing genuinely necessary has been consistently left out.⁹⁹ If a study were made of all law school institutional outcomes, I am afraid that the result would be the same. Democracy is not our theme.

While the new emphasis on skills and the absence of stated concern for the flourishing of American Democracy in institutional learning outcomes among law schools are troubling, the concerns suggested by the choice of theme for the 2017 Annual Meeting of the

⁹⁸ LORI E. SHAW & VICTORIA L. VANZANDT, STUDENT LEARNING OUTCOMES AND LAW SCHOOL ASSESSMENT: A PRACTICAL GUIDE TO MEASURING INSTITUTIONAL EFFECTIVENESS 193 (2015) <http://www.cap-press.com/pdf/9781611632668.pdf>. [<https://perma.cc/CGL3-MBQD>].

⁹⁹ As a contrast, I have offered the following proposed institutional learning outcomes to the faculty at my law school to emphasize the law school's role in American Democracy:

Outcome: Students will graduate from Duquesne Law School with **values, knowledge** and **skills** to help solve the crisis in American public life.

Values: Students will exhibit civility; commitment to the rule of law; a greater commitment to the welfare of the people; responsibility for self-directed, open inquiry; respect for rational analysis and dedication to a life of service to the public good at the different levels of client, legal system, nation and humanity.

Knowledge: Students will gain familiarity with the vocabulary, substance, processes and methods of American law; the principles of institution building; mediation and conflict resolution; and, most importantly, the science of human flourishing, including the spiritual life of humanity and the role of humanity in the natural world.

Skills: Students will be competent in both the adversarial system and forms of mediation and will develop the capacity to judge when and to what extent each is needed to promote the public good in all of its levels. Students will be able to craft transactional devices needed to operationalize legal rights and duties. Students will have simulated or actual experience in navigating the legal system, structures of government and private economic and social organizations.

American Association of Law Schools—*Why Law Matters*¹⁰⁰ — is mystifying, given the current crisis in American public life. Surely the theme for the 2017 Meeting should have been something like, *What is Wrong with American Democracy?*¹⁰¹

Aside from not meeting the needs of the hour, the AALS theme is both embarrassing—imagine a national group of physicists meeting around the theme, *Why Physics Matters*—and obvious—law recently imposed gay marriage on the whole country,¹⁰² for example, so obviously law matters. In fact, most Americans probably feel that law and lawyers already matter too much.

It may be that what Dean Testy intended in this theme was actually something else—not *Why Law Matters*, but *Why the Rule of Law Matters*. Here is what she said in announcing the theme:

*[W]e need to make the case now for why law matters and the academy's vital role in advancing respect for and understanding of the rule of law.*¹⁰³

If this is the meaning of the theme, the question is whether it is needed. Is there a crisis today over public acceptance of the rule of law? Certainly not in theory. To the extent that the public rejects controversial decisions by the Supreme Court—cases like *Obergefell*¹⁰⁴ and *Citizens United*¹⁰⁵—critics would probably assert that the decisions are without adequate justification. In other words, the criticism would be that the Justices are not following the rule of law, but are imposing their own value judgments on the country.

In practice, however, the intense political struggle over the replacement for the late Justice Antonin Scalia demonstrates that the Supreme Court has in fact become a government of men and not of law. The future direction of the Court depends to a very great extent—

¹⁰⁰ 2017 Annual Meeting, ASS'N OF AM. L. SCHOOLS (Jan. 2017), <http://www.aals.org/am2017/> [<https://perma.cc/4UDF-FWP8>].

¹⁰¹ To be fair, this theme was announced by AALS President Kellye Testy, Dean of the University of Washington School of Law, in her Presidential Address delivered at the 2016 Annual Meeting of the House of Representatives. See Kellye Y. Testy, “*Why Law Matters*” at the Second Meeting of the AALS House of Representatives, 2016 Annual Meeting, ASS'N OF AM. L. SCHOOLS (Jan. 9, 2016), <http://www.aals.org/about/publications/newsletters/aals-news-february-2016/presidential-address/> [<https://perma.cc/7U5M-KYLK>].

¹⁰² *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584, 2588 (2015).

¹⁰³ Testy, *supra* note 101.

¹⁰⁴ See *Obergefell*, 576 U.S. ___, 135 S. Ct. at 2584.

¹⁰⁵ *Citizens United v. FEC*, 588 U.S. 310, 311 (2010).

and is publically perceived as depending—on the ideology of this replacement Justice on an ideologically divided Court. So, one could say that a renewed commitment to the rule of law is absolutely needed today. And the actual achievement of a rule of law versus subjectively defined legal values, might then be part of a needed response to the breakdown of American Democracy.

But if this is the point that Dean Testy was making, the most recent Annual Meeting of the AALS will have proven most revolutionary indeed. For, as Steven Smith pointed out in his very important 2004 book, *Law's Quandary*,¹⁰⁶ it is the relativistic and nihilistic rhetoric and understanding of lawyers, including law professors, that is no longer consistent with a rule of law. Smith hopes that we do not mean what we say, and that lawyers actually, though tacitly, remain committed to the rule of law—but Smith offers little support for that hope.¹⁰⁷ Contrary to Dean Testy's statement, it is not the public that needs to be shown the importance of the rule of law. Indeed, the public probably assumes what she states the public must be shown, namely that law professors advance the rule of law and believe in it. It is actually law professors who need to be persuaded that the rule of law is even possible.

And without a commitment to the rule of law, law professors become just another part of the breakdown in American public life. We are also partisan and partial. Our legal discussions too often are just politics in another form. We debate cases as if we were judges and overstate our positions as if we were advocates. Like everyone else, law professors fail to seek common ground and fail to think in the longer term for the good of all.

If I am right, even in part, then the AALS theme defending the rule of law could have been crucial. But there is no indication that the 2017 Annual Meeting actually began to grapple with the unpleasant truth that one important impediment to the rule of law is the legal academy itself.

The breakdown of faith in the possibility of a rule of law suggests the spiritual nature of the breakdown of American Democracy. But that conclusion must await further development below. Here, I only mean to suggest that law schools are not currently engaged in a serious

¹⁰⁶ STEVEN D. SMITH, *LAW'S QUANDARY* (2004).

¹⁰⁷ See my treatment of Professor Smith's book in Bruce Ledewitz, *The Five Days in June When Values Died in American Law*, 49 AKRON L. REV. 115, 154-55 (2015) [hereinafter Ledewitz, *Five Days*].

investigation of the causes, implications and possible responses to, the breakdown of American Democracy. This failure by the legal academy defines a legitimate and necessary role for religious law schools. Religious law schools could become a model in the study of, and care for, American Democracy.

III. WHY AMERICA'S RELIGIOUS LAW SCHOOLS ARE AN APPROPRIATE PLACE TO BEGIN

It could be argued that religiously-affiliated law schools are not the ideal place to begin in addressing the breakdown of American Democracy. Dean Moran, for example, can be read as suggesting that the proper place to begin would be America's public law schools.¹⁰⁸

Public law schools have a natural connection to political life that religious law schools traditionally lack. Plus, public law schools in theory reflect the entire community in a way that religious law schools do not.

While all this is true, public law schools have not taken up this democratic role. In addition, religious law schools have certain advantages in the midst of the breakdown, just because they are religiously oriented.

A. Religious Traits Are Needed Now in Law Schools

Certain institutional traits are necessary to sustain reflection upon the health and future of democracy. I am labelling these traits religious not because only religious people have them, but because religious law schools have been slower than their secular counterparts to lose them in the general decline America has been experiencing.

The first trait is mission. As suggested above, many law schools today are just trying to stay open. Because of the downturn in applications, law schools are lowering the standards for students' entering credentials. In addition, law schools are doing whatever they can to attract students. All of this has the effect of turning legal education into a consumer-driven enterprise. Law schools are also getting smaller, cutting costs and receiving subsidies from the central University. No one wants to be the first to close a law school.¹⁰⁹

¹⁰⁸ See Moran, *supra* note 74, and accompanying text.

¹⁰⁹ Paul Caron, *Chronicle: Highly Ranked Law Schools Like Minnesota, Washington & Lee Cut Enrollments, Costs To Survive*, TYPEPAD: TAXPROF (July 2, 2016), http://taxprof.typepad.com/taxprof_blog/2016/07/chroniclelaw-schools-like-

Religious law schools are not immune to these pressures. They also must pay their bills. But there is among these schools a countervailing force opposed to consumer demand. If the only way for a religious law school to remain open were to compromise its religious mission, there would be a greater willingness to consider closing the school than there would be at a nonreligious law school.

The countervailing force of a religious mission also means that religious law schools tend to be open to a bigger picture of the study of law than are nonreligious schools. The current crisis in legal education might prevent a nonreligious law school from considering its responsibility for the health of American Democracy. I can imagine the dean at most law schools arguing that this is just not the time for anything but a pragmatic emphasis on skills training and jobs after graduation. But a religious law school cannot really surrender to such a view.

Again, there will be temptations to give in to these concerns at religious law schools, too. But such temptations will not be the only factors considered. And there will always be voices among the faculty and the Administration calling a religious institution toward a different direction.

The second religious trait that renders religious law schools potentially appropriate for thinking about the breakdown of American Democracy is a commitment to Truth. I have to be clear about what I mean by Truth. Of course, I don't mean that nonreligious people, of which I am one, are dishonest. By Truth, I am referring to the current cultural certainty that there is no ultimate Truth about the way things are—no ordering intelligence and no fundamental goodness in reality. Human life is an accident and has no transcendent aspect. Or, as Pontius Pilate put it: “What is truth?”¹¹⁰ This denial of Truth has become the starting point for American secularism as well as for many RINO's—religious in name only.¹¹¹

The way that C.S. Lewis described the commitment to Truth—although he did not limit this belief to religious people but included classic philosophy—is that under a theory of objective value, there is “the belief that certain attitudes are really true, and others really false,

minnesota-washington-lee-cut-enrollments-costs-to-survive-tough-financial-.html
[<https://perma.cc/34VJ-9FQH>].

¹¹⁰ *John* 18:38.

¹¹¹ A small joke played off of the phrase, Republican in name only by right-wing critics of establishment Republicans.

to the kind of thing the universe is and the kind of things we are. . . .”¹¹² The attitude that Lewis was describing greatly aids the study of democratic breakdown because, at least in theory, if there is a truth about human flourishing, then people’s appropriate needs, and the appropriate response to those needs, can be figured out. Law then can really be dedicated to human flourishing in a scientific sense. Without the commitment to Truth, law can only be an arena of power struggle, which is what it has become.

It is not an insult to nonreligious people to observe that Truth is under challenge in large parts of secular society.¹¹³ Indeed, I have written that this is precisely the crisis in secularism today.¹¹⁴

This challenge to Truth is a part of the breakdown of democracy because, for politics to work, there must be some sense that not everything is a zero sum game in which my gain is your loss. Both sides have to share a faith that there is a Truth about reality that allows everyone to benefit. Without that commitment, there literally cannot be a common good.

This commitment to Truth is very close to what Professor Simon noted years ago, above, as lacking in the general society, but still at least potentially present in a religious law school. Religious law schools constitute a forum in which discussion about morality can still credibly go on as more than an exchange of irreconcilable opinions. Obviously, religious people and religious traditions, disagree, sometimes vociferously, about some of the content of Truth. But they don’t disagree that there is a basic Truth about human flourishing, and by extension, about the way democracy could contribute to human flourishing, that could be investigated in a productive and organized way.¹¹⁵

¹¹² Bruce Ledewitz, *The New New Secularism and the End of the Law of Separation of Church and State*, 28 BUFF. PUB. INT. L.J. 1 (2009-2010) (quoting C.S. Lewis, *The Abolition of Man*; or, *Reflections on Education with Special Reference to the Teaching of English in the Upper Forms of Schools* 12 (1947)) [hereinafter Ledewitz, *New Secularism*].

¹¹³ See my treatment of the breakdown of values in Ledewitz, *Five Days*, *supra* note 107.

¹¹⁴ See BRUCE LEDEWITZ, *CHURCH, STATE AND THE CRISIS IN AMERICAN SECULARISM* (2011).

¹¹⁵ When I make this contrast between a religious orientation and some secular ones explicit, as I have done here, I am challenged by fellow secularists as if I am mischaracterizing them. But this is very strange. I would be delighted if it were the case that American secularism had come to endorse truth. I am afraid that the

The final religious trait that renders religious law schools an appropriate starting point will sound strange even to the ears of some religious believers. By any standard, American society is in a mess right now in terms of human solidarity. We don't trust each other. From a secular perspective, that kind of condition has to be someone's fault—of course usually one's political opponent. We act as if there must be a villain.

In traditional Judeo-Christian thought, however, that kind of human agency is not assumed. From that religious perspective, there does not have to be a human cause in order for bad things to keep happening. The traditional term for a kind of social impasse in which progress is frustrated is the "principalities and powers." In his magisterial, three volume work on the Powers,¹¹⁶ Walter Wink debunks the notion that this term at origin referred to spiritual entities, like a literal Satan. Rather we can think of the principalities and powers as the institutional aspects of evil, or, if that term is religiously loaded, even just the institutional aspects of breakdown.¹¹⁷ The point is, there can be headwinds against social health. I would say there are such headwinds now. And the first step away from scapegoating is the simple acknowledgment that not every problem or incapacity is the fault of some human being.

We can think about this as a phenomenon of history. It is possible to be living within a historical moment in which there just are no good options.¹¹⁸ Human beings are not always and in every way the masters of their fate. Thinking about impasse in this way is alien to the secular, individualistic, material, modern and post-modern consciousness. But thinking in a context of impasse may be the only kind of thinking that is realistic.

If in these three ways, religious law schools are an appropriate place to start thinking seriously about the breakdown of American Democracy, it must also be acknowledged that there is a

fundamental commitment of secularism is that people define truth for themselves and endow themselves with significance.

¹¹⁶ WALTER WINK, *ENGAGING THE POWERS: DISCERNMENT AND RESISTANCE IN A WORLD OF DOMINATION* (1992); *UNMASKING THE POWERS: THE INVISIBLE FORCES THAT DETERMINE HUMAN EXISTENCE* (1986); *NAMING THE POWERS THE LANGUAGE OF POWER IN THE NEW TESTAMENT* (1984).

¹¹⁷ BERNARD LONERGAN, *INSIGHT: A STUDY OF HUMAN UNDERSTANDING* 228-29 (1958).

¹¹⁸ As Lonergan explains, there is a momentum to decline, as there is to progress: "the social situation deteriorates cumulatively." *Id.* at 299.

corresponding problem of bias affecting religious law schools in these matters. For institutional reasons, must religious law schools not ultimately regard religion as a necessary component of any healthy society? But does that not mean that the answer to the question of what is wrong with American Democracy, is already known? The answer religious law schools must give, at least as an institutional judgment, is that America has turned its back on God, and on the commitments of that particular law school's religious institutional sponsor, and that is why society has gone so wrong.

This objection has some validity. But, let me respond in two ways. First, I am speaking here of a place to begin thinking about American Democracy. There is no place to begin that is value neutral and without prior commitments. If religious law schools have a bias about the necessary role of religion, it will be corrected as the conversation they begin spreads out to other portions of the community; first in nonreligious law schools and then in the American society generally.

Perhaps more significant, though, than correction from the outside, is the role of radical critique within the religious traditions. In the same way that the separation of church and state was first a theological commitment¹¹⁹ and only later became a legal principle, religious law schools are far more able to identify their own prejudices than are most other legal institutions.

In any event, if there is a serious problem with my emphasizing the role of religious law schools in revitalizing American Democracy, then let nonreligious law schools take up the matter and demonstrate their open and adventurous approach to thinking about American Democracy.

¹¹⁹ In the theology of Roger William, to protect the Church against interference by the State. See Patrick T. Conley, *Separation in Rhode Island: Church From State and Fact From Fiction*, 62 APR R.I. B.J. 21, 21 (2014): "Roger Williams and Dr. John Clarke sought separation, not to free civil society from religious influences and expressions of religious faith, but to present the state, as it did elsewhere and nearly everywhere, from interfering with a person's private religious belief." The latter Baptist position was closer to a two-way street in which the Church was not to rely on civil authority to influence society—"a free church in a free state. Neither one should control the affairs of the other." Allan W. Vestal, *To Soften Their Obdurate Hearts: The Southern Baptist Convention and Marriage Equality*, 21 TUL. J.L. & SEXUALITY 49, 93 (2012).

B. The Breakdown of American Democracy Has a Spiritual Dimension

Let me remind the reader of what has been argued to this point: if there is a breakdown of American Democracy, law schools have a special responsibility to seek to understand the breakdown and to seek remedies, if there are any; religious law schools are an appropriate place to begin that process, whatever is the source of the breakdown. Indeed, thinking about the source is what the process of responsibility for the health of American Democracy would entail. So, that part of my argument does not depend on what comes next in this section. Whatever the investigation of American Democracy ultimately reveals, that study should have a core place in law schools and religious law schools are a proper place to begin.

Nevertheless, I do have a view of the nature of the breakdown of democracy and it is related to the nature of religious law schools. I anticipated it in my reference above to the absence of a commitment to Truth in the larger, secular society.¹²⁰ Religious law schools are the proper place to begin thinking about the breakdown of American Democracy because that breakdown is in part a spiritual breakdown—a pervasive sense of a lack of meaning. Therefore, the proper response to the breakdown must be a spiritual response. When I say a spiritual response will be necessary, I am not referring to the dogmatic commitments of the religious traditions.¹²¹ But, on the other hand, if the problem in democracy is in any sense spiritual, then discussion about American Democracy cannot really go forward in a place in which consideration of the religious aspect of life is blocked at the start. What precisely a spiritual response can mean in the context of secular society admittedly remains a matter for further thought.

¹²⁰ See *supra* text accompanying note 115.

¹²¹ It is in this way that my approach seems to differ from that of R.R. Reno in his new book. See generally R.R. RENO, RESURRECTING THE IDEA OF A CHRISTIAN SOCIETY (2016). His diagnosis and mine seem broadly similar, particularly regarding the spiritual malaise of the absence of transcendence in society and the related failure of meaning. Yet, clearly, his prescription and mine differ quite a bit. Unlike Reno, I consider the secularization of society to be irreversible under any set of remotely plausible (remotely likely are two adverbs) conditions. *Contra* Mark Movsesian, *Conversations: R.R. Reno*, LAW AND RELIGION FORUM (Aug. 9, 2016), <https://lawandreligionforum.org/2016/08/09/conversations-r-r-reno/> [<https://perma.cc/M496-9LCJ>]. For me, it is not secularism, but the nature of that secularism that must change.

My view about the nature of the breakdown is not idiosyncratic.¹²² The perception that part of the problem in American Democracy is a lack of meaning, is sometimes stated by politicians themselves. Here is a description of the view of Ben Sasse, Republican Senator from Nebraska in a story about the problem Republican leadership has with Donald Trump:

*I asked Sasse if America's fascination with celebrity might help explain the rise of Trump. No, he said. "There is such crisis of shared vision for what America means right now," Sasse, a Harvard-trained former college president and business consultant, said. "People desperately seek shallower pop culture as a form of escape rather than finding actual meaning." For politics to be satisfying, it requires deeper ideals. And to partake of it as just another celebrity snack food leads a citizen to feel, after a while, "like you've eaten a crap-ton of cotton candy."*¹²³

Against this claim about the spiritual nature of the breakdown of American Democracy, there would be an obvious retort from both the political left and right. It would be said that the problems in American Democracy are basically material. And, indeed, the source of the material problem might be agreed upon by both left and right—Americans are angry and resentful because the income and economic prospects of ordinary people are stagnating, if not declining.¹²⁴

The resentment that this causes leads to the democratic pathologies identified above: suspicion, polarization, scapegoating and

¹²² The columnist David Brooks had a broadly similar, anti-materialist, theme in an open letter to Hillary Clinton he published during the Democratic Party National Convention. See David Brooks, *Hillary, This Is Why Democrats Are Still Struggling*, N.Y. TIMES (July 26, 2016), http://www.nytimes.com/2016/07/26/opinion/hillary-this-is-why-democrats-are-still-struggling.html?_r=0 [<https://perma.cc/N2VK-C9J9>]. Recently, Mark Movsesian wrote about a study suggesting that young people in the West are losing their commitment to the basics of liberal democracy. See Movsesian, *supra* note 60.

¹²³ Mark Leibovich, *Will Trump Swallow the G.O.P. Whole?*, N.Y. TIMES MAG. (June 26, 2016), https://www.nytimes.com/2016/06/26/magazine/will-trump-swallow-the-gop-whole.html?_r=0 [<https://perma.cc/7FAT-LRK5>].

¹²⁴ See generally SARAH JAFFE, NECESSARY TROUBLE: AMERICANS IN REVOLT (2016) (linking both the Tea Party and Occupy Wall Street movements to similar economic discontent, for an example of this shared narrative).

so forth. If people feel that they have been taken advantage of, it is hard to work together toward a common good out of which all can benefit.

Although perhaps agreeing on the source of dissatisfaction, the left and the right do differ in their diagnoses of the cause of this economic stagnation. For the left, the ultimate cause is the greed of the top 1%. The wealthy gobble up all of the material gains in society and leave little or nothing for everyone else. Rich individuals and powerful corporations inhibit worker organization, depress wages, ship well-paying jobs overseas, lobby politicians, co-opt regulatory regimes, monopolize the media, corrupt scientific research and ultimately threaten the planet. People are right to feel that the game is rigged and the rich are the people and the interests who do the rigging.

On the right, the understanding of stagnation is different. Government interference keeps talented people from innovating the products and services that would make life better for everyone. This interference can take the form of burdensome and unnecessary regulations that create barriers to entry or high taxes that remove the incentives that encourage innovation and hard work. In addition, the entitlement culture that necessitates such high taxes itself drains the entrepreneurial spirit of the people and undermines the social discipline that material advance requires. The only people who really benefit from all these social programs are the government bureaucrats who run them. Ordinary people are actually hurt, whether they receive benefits from these programs or not.

Perhaps one of these accounts is correct. Or perhaps they are both correct to some extent. Undoubtedly, after eight years of sluggish economic growth following the very deep recession of 2008, the American people are unhappy with their material circumstances. Yet, overall American economic performance has not been that bad, especially compared with the economic performance of the rest of the world. America is not actually worse off economically than in 2007. Some people, like coal workers, are suffering badly. But most people are not.¹²⁵ For all the criticism of the new inequality, average real

¹²⁵ Of course, there is much controversy about this assertion. *But see* Salim Furth, *Stagnant Wages: Fact or Fiction*, THE HERITAGE FOUNDATION (March 11, 2015), <http://www.heritage.org/research/reports/2015/03/stagnant-wages-fact-or-fiction> [<https://perma.cc/4EUE-XZ6R>] (demonstrating modest but continuing real growth in wages during the past eight years). Since this was a report for The Heritage Foundation, which has no political interest in supporting President

wages have not fallen.¹²⁶ Economic conditions do not seem sufficient to explain the current level of political dissatisfaction.

To take a famous historical example, it required earlier hyperinflation and then Depression in 1929, to undermine democracy in Weimar Germany.¹²⁷ If the source of our political impasse were solely material, you would expect much more serious economic conditions than America is experiencing. Undoubtedly, economic stagnation is playing a role. But it is not the whole story.

Not only are material conditions seemingly insufficient as the cause, current material conditions are not consistent with the deadlock we are seeing. Given these economic accounts, what is preventing agreement upon a series of compromises in which the minimum wage is raised, entitlements are scaled back and an easing of regulations on both unions and businesses is granted? The answer is that the spirit of compromise itself is lacking. Americans today are incapable of working together to solve our fundamental problems. Why is that? Neither of these accounts explains why stagnation in wage growth should lead to such a massive and counterproductive reaction.

Nor do these material accounts explain the scapegoating that each account promotes. Are the rich simply parasites? Does the political left deny the role of wealth in promoting innovation? Conversely, are government programs all bad? Does the right deny that there are poor people who need help? The welfare state was created over a long period of time. Why should it be so severely challenged now from both left and right? Economic accounts fail to explain the anger we see in American public life.

The economic accounts leave out the spiritual wasteland that America has become. We are now living with the accumulated impact of secularism on social morale. I have elsewhere called this the crisis in American secularism but I had not linked it before to the breakdown of American Democracy.¹²⁸ The secular chickens are now coming home to roost politically.

Obama's policies, which is made clear in the Report, it is probably a fair barometer of gradual, modest betterment in people's lives.

¹²⁶ *See id.*

¹²⁷ Despite a middle period of "comparative peace and prosperity," from 1924-1929, the hyperinflation of 1919-1923 and the Great Depression from 1930-1933, ensured "that the Weimar regime never really took root." RICHARD L. CARSON, *COMPARATIVE ECONOMIC SYSTEMS: VOL. II, TRANSITION AND CAPITALIST ALTERNATIVES* 399 (2d ed., 1988).

¹²⁸ LEDEWITZ, *CHURCH, STATE*, *supra* note 114, at 171.

It is not just religious critics who understand the potential crisis of meaning in secularism. Of the New Atheists, Philip Kitcher has best described the implications of scientific discovery for ordinary human consciousness.¹²⁹ Kitcher writes about this in the context of evolutionary theory, but his point is just as germane if the starting point were the Big Bang instead:

Christian resistance to Darwin rests on the genuine insight that life without God, in the sense of a Darwinian account of the natural world, really does mean life without God in a far more literal and unnerving sense. Even those who understand, and contribute to, the enlightenment case can find the resultant picture of the world, and our place in it, unbearable.¹³⁰

Kitcher acknowledges that what makes this scientific account¹³¹ of existence unbearable for human beings is that it is no longer obvious “how lives can matter,”¹³² not only in the sense of the absence of a providential deity, but in its endorsement of a universe dominated by accident and chance, in which human significance is an illusion. It is ultimately an accident that we are here and an accident that there even is a here.

This is unbearable because it is in the nature of human beings to seek significance.¹³³ As a character in E.L. Doctorow’s novel *City of God* puts it, humans pursue an ultimate purpose that we do not know

¹²⁹ See Ledewitz, *New Secularism*, *supra* note 112, at 12 (describing Kitcher’s place in the New Atheist movement).

¹³⁰ PHILIP KITCHER, *LIVING WITH DARWIN EVOLUTION, DESIGN, AND THE FUTURE OF FAITH* 156 (2007).

¹³¹ *See id.* As will be expressly stated below, Kitcher’s view is not really science. It has scientific aspects, but its overall conclusion about the meaning of life is not a scientific claim. I use the term scientific account because that is often the way these matters are presented, as a clash between science and religion.

¹³² *Id.* at 165.

¹³³ I have elsewhere quoted Neil deGrasse Tyson in the *Cosmos* series as capturing both the human need for significance and its alleged illusory, almost pathetic, character under scientific secularism: “Tyson says of human beings, ‘We hunger for significance. For signs that our personal existence is of special meaning to the universe. To that end, we are all too eager to deceive ourselves and others. To discern a sacred image in a grilled cheese sandwich.’” Ledewitz, *Five Days*, *supra* note 108, at 125 (quoting *Cosmos: A Spacetime Odyssey: When Knowledge Conquered Fear* (Fox Network television broadcast, March 23, 2014)).

but which has given us “one substantive indication of itself—that we, as human beings, live in moral consequence.”¹³⁴ This scientific account deprives human beings of the essence of their humanity by depriving the world of ultimate significance.

Well, why can’t we just be responsible for our own significance? Because significance does not work that way. What we want to know is that our strivings actually matter—not just that we believe, or even decide, that they matter. Here is how Bernard Lonergan describes the difference:

*Is the universe on our side, or are we just gamblers and, if we are gamblers, are we not perhaps fools, individually struggling for authenticity and collectively endeavoring to snatch progress from the ever mounting welter of decline? The question arises and, clearly, our attitudes and our resoluteness may be profoundly affected by the answers. Does there or does there not necessarily exist a transcendent, intelligent ground of the universe? Is that ground or are we the primary instance of moral consciousness.*¹³⁵

Of course, the anti-religion side in the West has known for a long time that its success would deprive ordinary people of “comfort,” as Kitcher puts it.¹³⁶ But what if the effect of the cultural shift away from religion is more diffuse than declining rates of church attendance and the demographic growth of the “nones?”¹³⁷ What if the effect is to deprive people of the sense of a common good and of the importance, or even possibility, of Truth? And what if this effect is felt even by

¹³⁴ E.L. DOCTOROW, CITY OF GOD 256 (2000). This quote is at the heart of my 2009 book about secularism, HALLOWED SECULARISM: THEORY, BELIEF, PRACTICE 7-8 (2009).

¹³⁵ BERNARD LONERGAN, METHOD IN THEOLOGY 101-02 (1990).

¹³⁶ KITCHER, *supra* note 130, at 159.

¹³⁷ The “nones,”—people who answer “none” to questions of religious affiliation, now constitute a little less than one-quarter of American adults. *See generally U.S. Public Becoming Less Religious*, PEW RES. CTR. (Nov. 3, 2015), <http://www.pewforum.org/2015/11/03/u-s-public-becoming-less-religious/> [<https://perma.cc/3LBM-DW52>].

people who still consider themselves to be religious?¹³⁸ That is, what if the culture is now poisoned?¹³⁹

If all that were the case, a communal undertaking like democracy would become impossible. Democracy, with its attendant sacrifices and faith in the future, only makes sense in a universe that makes sense. This can be understood as a matter of trust. The nation might put its trust in God, as in our national motto, or in a particular figure—a Washington or a Lincoln or an FDR. Or, the nation might put its trust in the constitutional structure of government and thus grant legitimacy to its leaders and outcomes overall, even when there are particular disagreements. But today, America feels incapable of trust. Perhaps this lack of trust is a result only of specific disappointments—Vietnam, Watergate, the Iraq War, Islamic terrorism, the 2008 recession, shootings by and of the police, Trump’s absurdities, Clinton’s emails—but it feels larger.

You get a different kind of politics when the universe is only chaos—when the only rational thing to do is maximize an individual’s short-term advantages before the light goes out in his personal life and in the life of the species. You get a politics in which a current generation risks altering the climate of a planet rather than restrict its own material benefits. You get a politics in which persuasion toward the truth no longer is felt to be an option, in which there can only be political warfare among preferences.¹⁴⁰

¹³⁸ This is, after all, still three-quarters of the population, a very high percentage—
”still remarkably high by comparison with other advanced industrial countries.”

Id. What if this group is also affected by the felt decline in moral significance?

¹³⁹ Undoubtedly some would say that capitalism itself set the stage for the growth of individualism and the collapse of meaning or at least contributed. *See, e.g.,* DANIEL BELL, *THE CULTURAL CONTRADICTIONS OF CAPITALISM* (1976).

¹⁴⁰ You also get a different kind of life. Charles Murray, looking at the social side of the breakdown I am describing, calls for moral hectoring by the wealthy to improve the social discipline of the poor. *See* Charles Murray, *The New American Divide*, WALL ST. J. (Jan. 21, 2012), <http://www.wsj.com/articles/SB10001424052970204301404577170733817181646> [<https://perma.cc/RG9B-S3HA>] (“Married, educated people who work hard and conscientiously raise their kids shouldn’t hesitate to voice their disapproval of those who defy these norms. When it comes to marriage and the work ethic, the new upper class must start preaching what it practices.”). Murray fails to appreciate that his research shows precisely the same forces more slowly affecting the wealthy as well. They now marry less, go to church less and only work hard for the moment because they earn so much. That won’t last.

I freely acknowledge that it is impossible to prove that the scientific account—Weber’s “disenchantment of the world”¹⁴¹—is the reason American politics have broken down. But it is uncanny how the breakdown of American Democracy manifests in the ways that the triumph of a scientific worldview along these lines might be expected to produce. Secular and scientific thinkers¹⁴² never intended to undermine American Democracy, but I believe that is exactly what has happened.

Members of the legal profession will more easily see this spiritual crisis at work in two representative examples from our own legal framework. It is easy to overlook how nihilistic the framework of law has become and how this nihilism undermines the foundation of free speech in persuasion toward truth.¹⁴³

As a first example, it is surprising to read the explicit acceptance of legal realism by Justice Scalia in *A Matter of Interpretation*, his book setting forth his method of statutory and constitutional interpretation.¹⁴⁴ Early in the book, Justice Scalia defends the constitutionality of common law judging given the viewpoint of the framers, even though such judging has the effect of creating law:

*I do not suggest that Madison was saying that common-law lawmaking violated the separation of powers. He wrote in an era when the prevailing image of the common law was that of a pre-existing body of rules, uniform throughout the nation (rather than different from state to state), that judges merely “discovered” rather than created. It is only in this century, with the rise of legal realism, that we came to acknowledge that judges in fact “make” the common law remedies, and that each state has its own.*¹⁴⁵

¹⁴¹ For discussion of Weber’s disenchantment of the world in modernity, see Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality, or Max Weber’s Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, 55 HASTINGS L.J. 1031, 1050 (2004).

¹⁴² For an illustration of the scientific worldview, see RICHARD DAWKINS, RIVER OUT OF EDEN: A DARWINIAN VIEW OF LIFE 133 (1995).

¹⁴³ This is a sketch of nihilism in American law. For those looking for a fuller treatment, see Ledewitz, *Five Days*, *supra* note 107.

¹⁴⁴ See generally ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

¹⁴⁵ *Id.* at 10.

The issue in nihilism is not only whether law is made or found. What Justice Scalia learned from the legal realists is that substantive principles, such as the anti-cruelty principle of the Eighth Amendment, are not statements of truth. If they were that, they would be subject to interpretation—the principle of cruelty would then be one “that philosophers can play with in the future.”¹⁴⁶ Because Justice Scalia assumes that there is no ultimately right answer to the nature of cruelty, it would grant too much discretion to judges if cruelty were interpreted as an abstract principle. Cruelty has to be, instead, something fixed—in Justice Scalia’s view, that something is what a particular generation of framers understood cruelty to mean.¹⁴⁷ Only in that way can the meaning of cruelty not be subject to arbitrary will—arbitrary will here implied by the phrase, “play with.” Thus, predictable and determinate outcomes in law are accomplished through an arbitrary limit on the meaning of law.

Justice Scalia’s theory of interpretation rests on the assumption that there is no truth about cruelty that human beings might learn. Because there is no truth about a matter such as cruelty, interpretations of cruelty cannot be judged as either right or wrong. This is how Justice Scalia’s method of interpretation rests on nihilism. Ironically, the generation that wrote the Eighth Amendment thought they were banning cruel punishments. They did not think in terms of “our understanding of cruelty.” Thus, it is impossible for this form of textualism to be faithful to its purported object.

As a second example, Robert Katz has done a service in showing law’s nihilism in a recent short analysis of the opinions in the *Obergefell* case, particularly the majority opinion by Justice Anthony Kennedy and the dissent by Chief Justice John Roberts, in terms of Rawlsian public reason.¹⁴⁸ Public reason describes the types of reasons Rawls would allow office holders to use in public debate.¹⁴⁹

¹⁴⁶ *Id.* at 145.

¹⁴⁷ *Id.* at 40–41.

¹⁴⁸ Robert Katz, *The Role of Public Reason in Obergefell v. Hodges*, 11 *FIU. L. REV.* 177 (2015).

¹⁴⁹ Katz uses as a working definition of public reason, “the idea that the ‘moral or political rules that regulate our common life be, in some sense, justifiable or acceptable to all those persons over whom the rules purport to have authority.’” *Id.* at 177 (quoting Jonathan Quong, *Public Reason*, *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* § 6 (Edward N. Zalta ed., Summer 2013)), <http://plato.stanford.edu/archives/sum2013/entries/public-reason> [<https://perma.cc/B448-EEQR>].

These kinds of reasons are not to be dependent on particular moral and religious convictions—what Rawls calls comprehensive doctrines.¹⁵⁰

According to Katz, it turns out that one cannot be either for or against a constitutional right to same sex marriage without arguably violating the tenets of public reason.¹⁵¹ If one is for the right, one is privileging the comprehensive liberalism of John Stuart Mill. If one is against the right, one is foisting sectarian religious principles on the body politic. Furthermore, in the interests of civility, Justice Kennedy suggests that even ordinary citizens may be subject to these critiques in their speech in the public square.¹⁵²

These are roughly the points that Katz shows both Kennedy and Roberts make, without their adverting directly to Rawls. Katz says the arguments of the Justices are reminiscent of Rawls rather than relying on him. But that just shows how deeply embedded a worldview of neutrality toward substantive political morality has become in legal culture.

On one level, Katz's analysis exposes how silly the Rawlsian project of politics and law without substantive moral and political commitments is. But, on a deeper level, the assumptions of the project are quite serious and quite anti-democratic.

Why should government officials, and to an extent ordinary people, be expected to reach political and legal conclusions without reference to their most cherished and deepest moral and political commitments? Why, in other words, should we limit ourselves to public reason? Rawls's goal was to attain “a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines. . . .”¹⁵³ Rawls thought this could best be done by limiting the grounds of government

¹⁵⁰ *Id.* at 178.

¹⁵¹ Thus, according to Katz, Justice Kennedy's majority opinion criticizes opponents of same sex marriage for impliedly violating “a duty to refrain from advocating and voting for laws that cannot be justified on grounds that are intelligible or potentially acceptable to fellow citizens who do not share one's creed”, while the Roberts dissent criticizes the majority for fostering their own “preferred creed.” *Id.* at 184, 186.

¹⁵² Katz asks expressly why Justice Kennedy addresses these ordinary citizens: “One wonders why Kennedy discusses ordinary citizens who oppose [same sex marriage] *at all.*” *Id.* at 185.

¹⁵³ *Id.* (quoting JOHN RAWLS, *POLITICAL LIBERALISM* xviii (1993)).

action to “reasons that all reasonable persons could endorse.”¹⁵⁴

This means avoiding political and legal reliance on comprehensive doctrines of right and wrong upon which citizens might disagree.

What makes the Rawlsian project impossible to attain, as Katz’ analysis shows,¹⁵⁵ is that politics and law are normative endeavors. In this realm, one always acts out of some kind of morality. The effect of including some moral claims as appropriate and excluding others, usually has the effect of manipulating political and legal debate so as to favor some particular policy outcome. This occurred most notoriously when Rawls argued that the pro-life position inherently violated public reason.¹⁵⁶

What makes the Rawlsian project not just impossible to attain, but actually anti-democratic in principle, is its assumption that our deepest moral and religious commitments are incommensurate. We literally have nothing to say to each other on the deepest matters of public life. There is no serious likelihood of political persuasion because the whole account presumes that there is no possibility of learning the substantive truth about any of these political matters.¹⁵⁷

¹⁵⁴ *Id.* at 179.

¹⁵⁵ I don’t mean to attribute this view to Professor Katz. In the article, he remains strictly agnostic. *See id.* at 188 (noting that “[w]hile [his article] identified many questions raised by a public reason reading of [the Roberts and Kennedy *Obergefell* opinions], it has not addressed them on the merits.”).

¹⁵⁶ RAWLS, *supra* note 153, at 243 n.32 (1993). For discussion, see John Finnis, *Public Reason, Abortion, and Cloning*, 32 VAL. U. L. REV. 361, 368-70 (1998).

¹⁵⁷ Even Rawls’ concept of “overlapping consensus” to grant legitimacy in political matters, which has been regarded as supportive of persuasion and legitimacy, *see* Christopher J. Peters, *Persuasion: A Model of Majoritarianism as Adjudication*, 96 NW. U. L. REV. 1, 33-36, is indifferent to actual persuasion, concerning itself only with the theoretical acceptability of reasons people give for their positions. Martha Nussbaum, one of Rawls’s most sympathetic and accomplished interpreters, illustrates why actual persuasion is generally assumed not to happen:

In all modern democracies we find “a diversity of opposing and irreconcilable religious, philosophical, and moral doctrines.” Even though at some point in history people may have believed that these differences would disappear over time, as the true religion gradually won out over its rivals, that has not happened. Differences about religion and the ultimate meaning of life are robust, and it is implausible to think that they are the result of errors of the sort that could be dispelled by rational argument.

MARTHA NUSSBAUM, INTRODUCTION TO RAWLS’S POLITICAL LIBERALISM 1, 2 (2015) (quoting RAWLS, *supra* note 153, at 3-4). Nussbaum’s premise confuses

Democracy and the First Amendment are premised on a very different assumption. We are supposed to argue about something like gay marriage and try to convince each other. The Constitution does put certain commitments beyond the reach of ordinary politics, but even in terms of these constitutional rights, one will be debating the nature and depth of the right—in this case the right to marry. As I have elsewhere stated in criticizing the *Obergefell* majority opinion, the only legitimate and convincing way to support a constitutional right of gay marriage is to assert, and try to show, that as a matter of fundamental political morality, the conventional and religious opposition to gay marriage is mistaken.¹⁵⁸ As arrogant as it may sound, one must be willing to assert that opponents of gay marriage are wrong—not “bigoted”, but wrong nevertheless.¹⁵⁹

religious and moral commitments, which are generally not the stuff of political life, with what generally has to be decided in politics. So, I can hope to persuade someone that abortion, or the death penalty, or the oppression of women and gays, are wrong without formally converting the other person to my religion or philosophical position. Over time, given history, this is exactly what happens in human discourse.

¹⁵⁸ Ledewitz, *Five Days*, *supra* note 107, at 146 (contrasting the willingness of opponents of segregation to label segregationist views as morally wrong, compared to Justice Kennedy’s unwillingness to do that in the majority opinion in *Obergefell*).

¹⁵⁹ In his dissent, Chief Justice Roberts accuses the majority opinion of portraying opponents of gay marriage as “bigoted.” *Obergefell*, 576 U.S. at ___, 135 S. Ct. at 2626. But on the pages referred to in the majority opinion, Justice Kennedy asserts only that the ban on gay marriage imposes stigma and injury. That imputation is sort of inevitable in banning gay marriage. Obviously the ban implies that a gay couple who believe they are the equivalent of a heterosexual couple are not. The actual structure of the majority opinion is the listing of reasons why marriage is a fundamental right and then to assert that these “reasons apply with equal force to same-sex couples.” *Id.* at 2599. This places the burden of persuasion, so to speak, on opponents of gay marriage to show that gay couples are different. This approach actually avoids having to say plainly that assertions of difference are mistaken. Certainly it tries to avoid directly moral claims about gay relationships that conflict with those of opponents of gay marriage. Here is the key passage that suggests that opponents may not use the machinery of the State to impose their religious and moral views, avoiding any suggestion that the majority, of necessity, is doing exactly that:

Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes

Despite its goal, the Rawlsian project does not succeed in avoiding deep-seated political conflict. Instead, it papers over such conflicts and attempts to banish one side from the debate. Because it assumes that political and legal disagreements cannot be intelligently debated at their deepest level, the Rawlsian framework is part of the spiritual breakdown of American Democratic life. With Rawls, politics inevitably becomes a battle of irreconcilable assertions.

In describing the breakdown of democracy as spiritual, I am not suggesting either that one cannot be good without God or that we should somehow become religious believers because nonbelief is bad for the culture. As to the first point, the question is not how to be good without God,¹⁶⁰ but whether and how anyone can be good when the cultural assumption is that there isn't any such thing as the good. All judgments about the right thing to do become subjective and indefensible. As to the second point, people do not choose whether to live in a culture in which unselfconscious belief in God is possible. Once you live in a culture in which belief in God is merely a choice, you cannot render your own belief "natural." The believer's belief in God is as subject to the charge of subjectivism as is anyone else's belief. And the worst part of this is that the assumptions of nihilism and relativism¹⁶¹ would never have to be defended. These assumptions, rather than the assumptions of religion, become "natural." They become obvious.

those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.

Id. at 2602.

¹⁶⁰ See generally GREG M. EPSTEIN, GOOD WITHOUT GOD: WHAT A BILLION NONRELIGIOUS PEOPLE DO BELIEVE (2009).

¹⁶¹ Carlo Invernizzi Accetti helpfully distinguishes between nihilism and relativism, which he defines as "a second-order (that is, meta-ethical) standpoint consisting in the consciousness that all first-order moral judgments depend on a set of prior categories and assumptions, which cannot themselves be justified absolutely." CARLO INVERNIZZI ACCETTI, RELATIVISM AND RELIGION: WHY DEMOCRATIC SOCIETIES DO NOT NEED MORAL ABSOLUTES 165 (2015). But this approach, he maintains, does not deny the existence of moral values as such, as does nihilism. *Id.* at 166. For my purposes, the distinction does not alter the point that in all cases, according to Accetti, moral judgments depend on the categories the individual chooses to employ. Accetti believes that relativism as he understands it can serve as the foundation for democratic life—indeed, that is the point of his whole book. I believe that current events are proving him disastrously wrong.

If all this is so, how could these matters be changed? It must first be acknowledged that perhaps they cannot be changed. No one guarantees the health of a culture. And it would not just be American culture that is sick. It used to be argued that the supportive and compassionate culture of secular Europe's social welfare states shows that secularism is not incompatible with social solidarity. How does that argument look now? Secular Europe is proving much more hostile to non-European immigrants than is formerly religious America, even though America is unfortunately showing a discriminatory side as well.

But if there were a place to begin to challenge nihilism, it would be on the point of chance and accident. It is a matter of faith for some in the anti-religion camp that the fundamental reality in the universe must be a lack of order.¹⁶² But this is not really a scientific conclusion. There are scientific voices who point, instead, to an underlying orderliness in reality. For these scientists, what happened during the last 14 billion years was almost inevitable.¹⁶³

If matter inherently comes to be and is then inherently self-organizing, that can become the rudiment of something rather than nothing. If that is the case with matter, then everything is not up for grabs.¹⁶⁴ Moreover, a standard against which meaningfulness can be measured begins to form: that which contributes to the unfolding of order and complexity is good, or at least better, than that which tends to reductionism.

In a universe of such unfolding order, there is even a place for human beings. For we are the ones who discover that order. As Carl Sagan once put it, humans are "a way for the cosmos to know itself."¹⁶⁵

That perspective could become a new starting point for considering human flourishing and communal life, including democracy and law. There could be a new science of the potential of the human in the cosmos.

¹⁶² See DAWKINS, *supra* note 142.

¹⁶³ For sources, see Ledewitz, *New Secularism*, *supra* note 112, at 21-23.

¹⁶⁴ This is a reference to the sad, aching poem of nihilism that Arthur Leff was reduced to in 1979. See Bruce Ledewitz, *Seeking 'Common Ground: A Secular Statement*, 38 HASTINGS CONST. L. Q. 49, 61 (2010).

¹⁶⁵ Jonathan Cott, *The Cosmos: An Interview With Carl Sagan*, ROLLING STONE (Dec. 25, 1980), <http://www.rollingstone.com/culture/features/the-cosmos-19801225> [<https://perma.cc/67BM-T5T2>].

This understanding of reality would vindicate E.L. Doctorow's character quoted above.¹⁶⁶ Human beings live a life of ultimate purpose—we live a telos. The nature of that telos can be gleaned from the fact that humans live in moral consequence. Human beings believe that what they do and what they believe is of infinite significance. In this understanding of reality, human life does have significance.

The fundamental problem is not that secular renewal along these lines is impossible, but that renewal has not been seen as necessary. Until now, the secular movement has been parasitic on the religious traditions.¹⁶⁷ It could criticize these religious traditions for their obscurantism and prejudices, but it felt no need to build a flourishing secular culture on its own. It did not even discuss the need to do so.

The breakdown of American Democracy, as it reflects the spiritual desert of secularism, exposes that approach as unsustainable and dangerous. Secularism has led America to a dead end. Where are the current sources of creativity in American secularism? Where is its health? Science, though still healthy and productive, is not the product of secularism. Science, as we know it, was originally the product of pious, Christian Europe. Despite occasional tensions and even occasional violence against scientists, Christianity is science's original home.¹⁶⁸

The hard atheist group, including the late Christopher Hitchens¹⁶⁹ and Philip Kitcher,¹⁷⁰ has never come to grips with Doctorow's description of what it means to be human. Clearly, the new atheists shared the view that humans live in moral consequence. That is why they thought it was so important that human beings not believe in God. The reason they spent so much effort trying to convince their fellows that God does not exist is that they did not want people to believe a lie.

¹⁶⁶ See DOCTOROW, *supra* note 134, at 256.

¹⁶⁷ For example, in Gregg Epstein's book, the reason to be good without God is "[t]he dignity of mutual concern and connection and of self-fulfillment through service to humanity's highest ideals." EPSTEIN, *supra* note 160, at 103. But this is a very thin ground as moral motivation. Epstein is able to rest on such a thin ground because the Judeo-Christian worldview, and other religious worldviews, still dominates.

¹⁶⁸ See Perry Dane, *A Holy Secular Institution*, 58 EMORY L.J. 1123, 1144 n. 58 (2009).

¹⁶⁹ See generally CHRISTOPHER HITCHENS, *GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING* (2007).

¹⁷⁰ See KITCHER, *supra* note 130 and accompanying text. For Doctorow, however, living in moral consequence is human life mattering and it is not an illusion.

There could be no better illustration of a commitment to ultimate truth than that atheistic insistence.

But, if all reality is an accident based on chance events, then why do human beings live in moral consequence? The atheist answer should be that we don't and that the feeling that we do is an illusion.¹⁷¹

That response, however, is not convincing. How is it that the universe created creatures with this illusion of significance? One could even say that the smarter a creature is, the more it lives in this illusion of moral consequence. One can see the development of care and compassion and generosity along the evolutionary trail. Humans are as we are as the result of a long development.

I look forward to the day that an atheist takes this question seriously and concludes that with a really smart creature, anomy—normlessness—and its accompanying despair would be a serious threat. Therefore, in strict evolutionary theory, the smart creatures with a sense of meaning were less likely to give up life, either in suicide or just in not escaping from predators. Only the smart creatures with a sense of meaning would survive. So the smart species would develop this illusion of significance. Even to tell this story is to demonstrate how forced and unreal it is.

But what is the alternative? What if it is true that humans have a telos—an ultimate purpose? What if it is true that humans live in moral consequence because the universe is actually constructed that way?

Not everything that makes a secularist would change if there were an order like this to reality. Just because the universe makes sense, it does not follow that there exists a being like a God who could set aside the scientific laws that otherwise govern the universe.¹⁷² But it would mean that the easy affirmation of subjectivism—that anything goes, that there is no Truth, and so forth—would have to be abandoned. And, it would have to be considered whether the word God might somehow apply to the order underlying the universe.

Insofar as the sickness that afflicts American Democracy roots in the soil of nihilism, this change in secularism would affect the framework that is undermining American public life. This one change could be the beginning of the formation of the coalition of the real that

¹⁷¹ See Ledewitz, *Five Days*, *supra* note 107, at 125-26 (referring to the statement by Neil deGrasse Tyson in the Cosmos Series that human beings deceive themselves “that our personal existence is of special meaning to the universe.”).

¹⁷² This of course is not the only God there could be, but the meaning of God is beyond my scope here.

could discover new foundations for meaning and a new acceptance of objectivity.

In this new world, the investigation into democracy that begins in America's religious law schools could expand to all other law schools and from there to a discussion in the rest of society. It would no longer be the case that one could have a conversation about morality only within the confines of religion. In this new world, democracy could be renewed.

But, are we not here a very long way from the God of Israel and Jesus Christ and Allah? Given this possible turn in thinking, it must be asked whether America's religious law schools are suitable for this task, or whether these law schools might consider a task such as this an abdication of their mission.

IV. SHOULD AMERICA'S RELIGIOUS LAW SCHOOLS TAKE UP THIS DEMOCRATIC TASK?

The task I hope to set for America's religious law schools has two aspects. First, there is the primacy of the breakdown of American Democracy as the matter with which American law schools should be engaged. Second, there is the question of the secular nature of that breakdown and whether a new spirituality is needed to heal American public life.

It is an open question whether these tasks can be undertaken in religious law schools and whether they should be. I want to address these issues plainly. They are not easily decided.

I foresee three objections to my proposal, though of course there may be other matters I am overlooking. First, there is the issue of secular indifference to, actually hostility to, anything religious. American culture, especially in its elite manifestations, has embraced an unrelenting commitment to various forms of anti-religious rhetoric. For example, any State law that seeks to protect religious liberty is instantly, and widely, described in the media as a law authorizing discrimination against gay people and others.¹⁷³ Some Americans

¹⁷³ That is how Indiana's Religious Freedom Restoration Act, *see* 2015 IND. LEGIS. SERV. P.L. 3-2015 (S.E.A. 101) (West), was greeted when it was signed into law by Governor Mike Pence in 2015, even though the Act did not mention discrimination against any group. The negative reaction was overwhelming, leading to eventual amendment of the Act. *See, e.g., In Indiana, Using Religion as a Cover for Bigotry*, N.Y. TIMES (March 31, 2015), <https://www.nytimes.com/2015/03/31/opinion/in-indiana-using-religion-as-a->

even ask in a serious way, “Why Tolerate Religion?”¹⁷⁴ If there is so little respect for religion as a cultural resource, how could it be imagined that there would be any interest in what religious law schools might say about American Democracy? So, why should religious law schools bother with such a task?

The second objection is related to the first. In this culture of hostility against religion, religious law schools already have a task, one they have been attempting to fulfill. Their task is to defend religious believers and religious belief, both in terms of the rights of believers and in terms of the presence of religion in the public square. In terms of individual believers, religious law schools, both institutionally and through individual faculty members, have provided intellectual foundations and, sometimes, legal arguments for their protection.¹⁷⁵ In this culture, there may be few other resource to protect this minority group of active and serious believers.

At the cultural level, religious law schools have been trying to maintain a space for public religious expression.¹⁷⁶ However,

cover-for-bigotry.html?_r=1 [https://perma.cc/USH3-773F]. It is surprising to me that the left endorses the kind of corporate blackmail to which Indiana was subjected. I am waiting for the NBA and other corporations to boycott New York and California until those States lower their tax rates.

¹⁷⁴ BRIAN LEITER, WHY TOLERATE RELIGION? (2013).

¹⁷⁵ I don’t mean that only religious law schools provide resources for the protection of religious liberty. The Religious Liberty Clinic at Stanford is a prime example of a litigation commitment at a secular school. But I believe it is fair to say that the institutional focus of religious law schools in this regard is much greater, whether primarily as an intellectual endeavor—Saint John’s University School of Law Center for Law and Religion; the Emory University School of Law Center for Study of Law and Religion; the Institute on Religion, Law & Lawyer’s Work at Fordham University School of Law; Regent University School of Law, namely its Fall 2016 Law Rev. Symposium on the implications of the *Obergefell* case—or in courtroom presence—the University of St. Thomas School of Law Religious Liberty Appellate Clinic. As for individual faculty members, while there are plenty of exceptions—Douglas Laycock, for example, widely regarded as the leading figure in the field, and very active in conceptualizing and defending the rights of religious believers, teaches at the University of Virginia. Nevertheless, as I am glancing at the Executive Committee of the AALS Section on Law and Religion from the December 2015 newsletter, I note that of the eight members of the Executive Committee, five teach at religious law schools. *See Dec. 2015 Newsletter*, ASS’N. OF AM. LAW SCHS. SEC. ON L. AND RELIGION 1, <https://www.scribd.com/document/292405646/Section-on-Law-and-Religion-Newsletter-28December-2015#> [https://perma.cc/ASM8-CLDU].

¹⁷⁶ While not all religious law schools engage collectively in such endeavors, a number of them do so, such as Saint John’s University School of Law Center for

commitment to a rigorous separation of church and state, supported by skepticism about the value of religion in general, has been gaining cultural and political support nationally, although this position has not yet been genuinely successful in court.¹⁷⁷ Previously sustained practices like legislative prayer and Christmas holiday displays are under increasing political challenge and practices formerly not controversial, such as public Ten Commandments displays, are now plainly out of bounds in many jurisdictions.¹⁷⁸ These challenges to public religion are certain to increase as society becomes ever more secular.

Given all this, religious law schools may feel justified in adopting an openly partisan stance on behalf of religion. From this point of view, the kind of open partnership with the culture that I have been promoting would abandon believers in particular, and religion in general, just when the need for legal champions is greatest. It could be said that this *is* the time for defenders of religion to circle the wagons.

The third objection is the most significant theologically. As William Simon stated at the beginning of this article, this society no longer publically speaks the traditional language of faith. Therefore, a spiritual engagement with this increasingly secular culture requires that religious concerns and values at least be translated into a new kind of vocabulary and not be proclaimed in traditional, dogmatic terms. If religious law schools were to enter into my proposed relationship with the culture, they would have to abjure, in the Christian example, simply proclaiming Christ's lordship in the world. While it might be

Law and Religion and the Emory Center for Study of Law and Religion. Then there is the collective Conference of Religiously Affiliated Law Schools, at whose Conference a version of this paper was delivered. For the special role of religious law schools in the promulgation of values in their students, which one might consider the private role of such law schools as opposed to the public role that is the theme of this article. See Jennifer L. Wright, *Religious Law Schools and Democratic Society*, 57 HOW. L. J. 277 (2013). Of course the education of lawyers in a democratic society has an undeniably public aspect, as well as a private one.

¹⁷⁷ There have been few important Establishment Clause cases in the past ten years, but religious expression has certainly not been curtailed. See *Salazar v. Buono*, 559 U.S. 700 (2010) (upholding land transfer to accommodate a Latin cross on formerly federal land); *Town of Greece, N.Y. v. Galloway*, 572 U.S. ___, 134 S.Ct. 1811 (2014) (upholding legislative prayer).

¹⁷⁸ For example, there is a long-standing Ten Commandments display on the outside of the Allegheny County Criminal Courthouse, but it is unimaginable that the political will would exist to place it there today.

obvious to religious believers that the breakdown of American Democracy would be alleviated through Christian renewal of this culture, the very nature of cultural dialogue would inevitably mean that this message would not be the only one delivered, or even be the message most emphasized. If you speak to the world on worldly matters—or matters the world imagines are worldly matters—you inevitably end up speaking the language of the world.

From a certain religious perspective, speaking the language of the world is very much the error made by Friedrich Schleiermacher in *On Religion: Speeches to its Cultured Despisers*.¹⁷⁹ It is precisely the approach that Karl Barth rejected.¹⁸⁰ It is precisely the error made by liberal Protestantism and Reform Judaism, which has led to their dramatic demographic decline.¹⁸¹ In other words, it could be said that all attempts to engage the world on the world's terms are destined to fail to meet the actual needs of the world. Only religion on its own terms can provide anything worthwhile. And if this means that religion is not understood by most people, that is just the usual condition of the saving remnant. From this perspective, the crucial matter for religious law schools is to remain faithful. This may look like an inward turning, but it really amounts to keeping one's eyes on God.

¹⁷⁹ See generally FRIEDRICH SCHLEIERMACHER, *ON RELIGION: SPEECHES TO ITS CULTURED DESPISERS* (John Oman, trans., 1994) (1799).

¹⁸⁰ For Barth, the basic theological issue became “the failure of 19th century Liberalism that deified man and humanized God. . . .” JAMES NKANSAH-OBREMPONG, *KARL BARTH'S THEOLOGICAL METHOD 2* (2015), https://www.researchgate.net/publication/277137505_Karl_Barth's_Theological_Method [<https://perma.cc/YS54-QDLC>]. So much did Barth become identified as the opponent to Schleiermacher's liberal Protestant theology, that Jack Forstman's Foreword to *On Religion* notes that by “normal reckoning,” the era begun by *On Religion* “came to an end with the publication of Karl Barth's *Romans*.” SCHLEIERMACHER, *supra* note 179, at vii.

¹⁸¹ For an account of the decline of mainline Protestant Christianity and its connection to the culture, see Edward McClelland, *The Christian Right's Shocking Conquest: Why Religious Moderates Have Disappeared From America*, SALON (May 22, 2015), http://www.salon.com/2015/05/22/the_christian_rights_shocking_conquest_why_religious_moderates_have_disappeared_from_america/ [<https://perma.cc/98A6-HFQE>]. There is now some question about this accepted account of liberal theology and decline as evangelical churches begin to suffer similar trends. See Tom Krattenmaker, *Why a Stout Theological Creed is Not Saving Evangelical Churches*, REL. NEWS SERV. (Aug. 10, 2016), <http://religionnews.com/2016/08/10/why-a-stout-theological-creed-is-not-saving-evangelical-churches/> [<https://perma.cc/MB3E-39B9>].

Only the last of these three objections is really opposed to the thrust of this article. In terms of the first objection, yes, secular culture assumes that religious law schools can have nothing of importance to contribute to a fundamental issue like the state of democracy. But if democracy is worth taking up, the potential responses by the world to the offer cannot determine the course of action.

In terms of the second objection, yes, it may be that religious law schools have an institutional obligation to defend believers and religion. But they also have an obligation to free inquiry. Since no institution is value free, the commitment to protect the interests of believers is no disqualification from democratic study. Any other position leaves the study of democracy to those whose commitments are hostile to religion.

In addition, there is no absolute opposition between the two tasks of study and defense. The value of protecting religious liberty is honored among all civil libertarians, especially at a time when unfair attacks on Islam and Muslims are increasing. For example, the Summer 2016 issue of the ACLU magazine, *Stand*, leads with a story about countering discrimination against Muslims.¹⁸² The ACLU has been at the forefront of the struggle for gay rights as well, even though there, the ACLU opposes the interests of religious believers.¹⁸³ So, the concern for democracy that lies at the heart of this article, and the concern to protect religious liberty, are not mutually exclusive.¹⁸⁴

¹⁸² Ali Gharib, *Muslim and American*, *STAND*, Summer 2016, at 25.

¹⁸³ The official ACLU position is that religious exemptions to anti-discrimination laws, including bans against discrimination based on sexual orientation, should not be granted. "Religious freedom in America means that we all have a right to our religious beliefs, but this does not give us the right to use our religion to discriminate against and impose those beliefs on others who do not share them. Through litigation, advocacy, and public education, the ACLU works to defend religious liberty and ensure that no one is discriminated against or denied services because of someone else's religious beliefs." *Using Religion to Discriminate*, ACLU (2017), <https://www.aclu.org/issues/religious-liberty/using-religion-discriminate> [<https://perma.cc/DZ3M-W3D9>].

¹⁸⁴ See Mike Stetz, *Best Law Schools for the Devout*, 17 *PRELAW* 28 (Winter 2014), http://www.nxtbook.com/nxtbooks/cypress/prelaw_2014winter/#/32 [<https://perma.cc/K6NV-MKX8>]. The story identified 52 American law schools "affiliated with a religious faith" and while the story did not list the schools, it was clear that the schools were predominantly Christian. The story stated that "U.S. religious-based law schools have ties to a variety of Christian denominations" and then goes onto two schools affiliated with Judaism. *Id.* at 32.

The third objection requires a different kind of response. The question is whether the responsibility of a religious law school—a Christian law school, for example, since most are—begins and ends with the proclamation of salvation through Christ. If that is the case, then attention to American Democracy is misplaced.

But a law school is not the Church. The decision of a religious denomination to sponsor a law school, which will be open to students of all religions and no religion, implies a dimension of secular concern.¹⁸⁵ All religious law schools contribute to the good of society in ways that have little to do with any religious message per se—the betterment of copyright law, perhaps, or a more efficient tax collection system. The context I am raising here—the breakdown of American Democracy—looks somewhat different only because it raises more fundamental questions. Thus the issues raised here—of truth and meaning—are closer to matters of direct concern to religion. However, the maintenance and promotion of American Democracy remains a proper role for any American law school.

That is only a partial response, though. Even in purely secular matters, I presume a religious law school would not endorse activities that directly or indirectly conflict with the fundamental precepts of its religious tradition.¹⁸⁶ If a religious law school points out the spiritual decline in American society without directly linking that decline to the culture's rejection of God, has not that law school participated in the very spiritual decline that it is decrying?

I think the answer to that question is no, or at least could be no. When Paul wrote his letters to the mixed churches that he had founded, with Jewish and Gentile members, he wrote in a way that

¹⁸⁵ See the classic statement of the role of a Catholic Law School in Mark A. Sargent, *What Does it Mean to be a Catholic Law School?*, VILLANOVA L., Spring 2003, at 3. If not for the circumstances that led to the end of his term as Dean at Villanova University School of Law, I believe this short article would be required reading at all religious law schools.

¹⁸⁶ But I have never seen the proposition formally stated beyond a particular context, such as Pope John Paul II's encyclical, *Ex Corde Ecclesiae* (August 15, 1990): "the objective of a Catholic University is to assure in an institutional manner a Christian presence in the university world confronting the great problems of society and culture . . ." Pope John Paul II, *Apostolic Constitution of the Supreme Pontiff John Paul II on Catholic Universities* (August 15, 1990) http://w2.vatican.va/content/john-paul-ii/en/apost_constitutions/documents/hf_jp-ii_apc_15081990_ex-corde-ecclesiae.html [<https://perma.cc/K5BM-XSZQ>].

would be accessible and meaningful to non-Jews.¹⁸⁷ He did not sound the same as Stephen in the Book of Acts recapitulating the history of Israel in Jerusalem to the Sanhedrin.¹⁸⁸ Paul was assuring a hearing by a different audience.

And when Paul addressed the Athenians, likening Christ to the unknown God the Athenians already knew,¹⁸⁹ he was not demeaning the Gospel. He was pointing out that the Christian message was not alien to the experiences of his non-Jewish listeners. So, there is precedent for speaking in a way that the world can hear. It is not more faithful to use a religious vocabulary that exacerbates barriers between believers and nonbelievers.

C.S. Lewis, the great Christian popularizer, was obviously a master in these matters. Not only did his work, as in the Narnia tales,¹⁹⁰ present religious messages in non-dogmatic terms, he also showed that at least the rudiments of the Christian message were already held by almost everyone.¹⁹¹ Such an approach does not compromise a law school's religious mission.

How does that change in vocabulary apply to the democratic task of religious law schools? The most important theological divide in America is not over whether God exists. And it is certainly not over any policy issues, such as abortion, or war or gay marriage. On those matters, conversations can go on as long as there are shared starting points. The theological divide concerns those starting points.

The basic question that divides us is whether life is meaningful. Not just meaningful in our opinion, but meaningful. Because, if life is meaningful, that is not altogether a human accomplishment. Because, if life is meaningful, it follows that judgments about values such as the good, the true and the beautiful, are also not altogether human

¹⁸⁷ “St. Paul did not in fact advocate a total break with the past or maintain that all earlier forms of belief had been heresy. . . .” SETON LLOYD, *ANCIENT TURKEY: A TRAVELER’S HISTORY* 216 (1989) (citing Paul’s statement in Romans 1:20 that God was known through His creation from the beginning by all human beings).

¹⁸⁸ *Acts* 7:1-53.

¹⁸⁹ *Acts* 17:22-23.

¹⁹⁰ The Chronicles of Narnia is a series of seven fantasy novels by C. S. Lewis, with heavily Christian influenced themes, though in entirely non-Christian form. See Todd A. DeMitchell & John J. Carney, *Harry Potter, Wizards, and Muggles. The First Amendment and the Reading Curriculum*, 173 ED. L. REP. 363, 365 (2003) (“many perceive [The Chronicles] to be an extended Christian allegory. . .”).

¹⁹¹ This is especially so in *MERE CHRISTIANITY* (1958). See discussion in: Bruce Ledewitz, *Seeking ‘Common Ground’: A Secular Statement*, 38 HASTINGS CONST. L. Q. 49, 68-69 (2010).

judgments. If life is meaningful, it should be possible to learn something real and lasting about the good, the true and the beautiful. It should be possible to decide that some claims and positions are further away from the real and lasting and others are closer—even if, in the nature of things, all of our claims and positions are largely false and misguided. We see through a glass darkly, but we still see something.

This is more than just a hope. In history, the history that all humans know, more becomes revealed than was known at an earlier time. History brings us closer to Hilary Putnam's "epistemologically ideal conditions."¹⁹² In history we learn, for example, that chattel slavery was wrong, despite the assertions of some slave owners at the time of slavery—sometimes cynically, but sometimes in good faith—to the contrary. The slaveholders were wrong. We are learning something similar in this time about the equality of women. And we may yet learn something along these lines about gay life.

I believe it is possible to build a vibrant and diverse coalition around this commitment to the real—to the reality of the good, the true and the beautiful.¹⁹³ By diverse, I mean specifically, believers and nonbelievers—religious practitioners and nonpractitioners.¹⁹⁴

But this coalition will have to be explicit about its commitments. Building a movement of renewal must include not only affirming the real, but challenging thoughtless and offhand comments about subjectivity and relativism. Much of the nihilism in this culture is unthought. It has become a default position. When I have noted the nihilism in law, for example, I have doubted whether the speakers

¹⁹² HILARY PUTNAM, REASON, TRUTH AND HISTORY 55 (1981) ("We speak as if there were such things as epistemologically ideal conditions and we call a statement 'true' if it would be justified under such conditions.").

¹⁹³ Although beyond my scope here, this suggestion bears similarities to Bernard Lonergan's focus on Cosmpolis to arrest decline: "a redemptive community that would motivate people on a *cultural* level instead of attempting through economics or politics to impose new social structures." MARK T. MILLER, THE QUEST FOR GOD AND THE GOOD LIFE: LONERGAN'S THEOLOGICAL ANTHROPOLOGY 177-78 (2013).

¹⁹⁴ It is at this point that I differ from R. R. Reno. *See supra* note 121. Reno does not reject my project in theory—he says he would "be delighted if people took up the themes of my book in isolation from my Christian convictions." But in the end, "It's my conviction that this won't work. It's mere exhortation. Ideas don't transform societies. Convictions lived out in community are what animate a culture." *See Movsesian, Conversations: R.R. Reno, supra* note 121.

would have affirmed their statements if they had been challenged.¹⁹⁵

One of the democratic tasks of religious law schools is to provide just that challenge. One task is to confront a William Simon, for example, and charge him with complicity in the breakdown of moral life that he suggests he is merely accommodating.

This coalition of the real will have to be equally open to religion and science. It will have to live with their apparent differences and will have to assume in faith that their deepest truths cannot be contradictory.

Religious law schools are a good place to start reaching out to form this coalition. This is the first step in healing the breakdown of American Democracy. There is nothing here that requires religious law schools to break faith with their own, particular traditions. But it does require of them something quite new.

Can this happen? On the secular side, I have already pointed out the difficulties—secularists mostly do not acknowledge the need for their own renewal and partnership with religion. But there is a problem also on the religious side. For this to happen, traditional religion would have to come to terms with the secularization of society—not sociologically, or even legally, but theologically.

For the religious traditions in law schools, the rise of a secular culture presents a daunting question—has God abandoned America? How else to explain the rapid national shift away from religion? On one view, it must be our evil—our acceptance of abortion, gay marriage and war, perhaps.

For the religious believer, though, there is another possibility. The other possible stance toward secularism is that somehow this event manifests God's will. To quote Gamaliel in the Book of Acts, why oppose this new moment of secularism? If it is not from God, it will not last. If it is from God, then it should not be opposed.¹⁹⁶

It is not the case that everything traditional religion stands for has been abandoned in American culture. The young care deeply for each other. They have turned away from nationalism and militarism. Those are not exactly anti-Christian themes.

¹⁹⁵ See Ledewitz, *Five Days*, *supra* note 107, at 124. I suggest there that the Justices perhaps would have liked to assert a genuinely objective commitment to values, but could not.

¹⁹⁶ *Acts* 5:38-39.

Even the widespread surmise that conservatives—here a substitute for traditional religion—have lost the culture war is overstated.¹⁹⁷ Specifically, it is the case that the culture has embraced gay marriage. But that is not true of all social issues. The culture has not embraced abortion, for example. Cultural discomfort with abortion has not collapsed; in fact it has grown, along with the widespread use of ultrasound imaging in pregnancy.¹⁹⁸

Is it not possible that the culture has better judgment here, better instincts, than does traditional religion? Perhaps abortion is really morally wrong and gay marriage is a more nuanced matter.

More generally, the religious traditions teach that God sometimes does a new and unexpected thing. The younger brother might inherit the blessing, rather than the older.¹⁹⁹ A shepherd might replace a king.²⁰⁰ It was certainly hard for First Century Judaism to accept as a Messiah a man who failed to oppose Roman rule and who failed to bring ascendancy to a Jewish Commonwealth. Yet, some Jews saw God's hand in this new development. Could the growth of secular life in America today be akin to that moment?

At least one Christian thinker has so affirmed—Dietrich Bonhoeffer. In the midst of the darkest manifestation of human secularism, in prison in the Nazi State, Bonhoeffer, in *Letters and Papers from Prison*, proclaimed man come of age.²⁰¹ He suggested that God was teaching humanity to get along without Him.

¹⁹⁷ For a statement of the view that the right lost the culture war, see Baron Swaim, *The Left Won the Culture War*, PITTSBURGH POST-GAZETTE, (June 5, 2016), at D1.

¹⁹⁸ According to the basic Gallup poll question on abortion, while the “Illegal under all circumstances” has consistently remained at about 20% of the population, the “Legal under any circumstances” category has declined from 55% to 50% since 1977. Meanwhile, the category “Legal only under certain circumstances” has grown from 22% to 29%. *Abortion*, GALLUP, <http://www.gallup.com/poll/1576/abortion.aspx> [<https://perma.cc/MFN6-GL3N>] (last visited May 1, 2017).

¹⁹⁹ Not, admittedly, without cunning by the younger brother. See *Genesis* 27.

²⁰⁰ 1 *Samuel* 16:1.

²⁰¹ See generally DIETRICH BONHOEFFER, *LETTERS AND PAPERS FROM PRISON* (Eberhard Bethge ed., Reginald H. Fuller trans., 1953). Here the quote refers to “world” and “people” come of age. The phrase referring to man appears in a letter from the same period. See RICHARD H. BUBE, *MAN COME OF AGE: BONHOEFFER'S RESPONSE TO THE GOD-OF-THE-GAPS* 204, http://www.etsjets.org/files/JETS-PDFs/14/14-4/14-4-pp203-220_JETS.pdf [<https://perma.cc/V7SG-6WNP>].

Of course, I am pushing Bonhoeffer in a direction he would have resisted. The action of God to which he referred was a form of kenosis, the emptying of God, not the brassy, godless culture into which America is currently drifting.

Nevertheless, this is a moment in which the religious/nonreligious boundaries could prove porous. The coalition of the real, to which I adverted above, would be hard to characterize in the old religion/not religion categories. It would contain both traditional believers and those who would have previously been called nonbelievers. That certainly would be a new and good thing.

What should a religious believer do when the context changes and the old forms of religion no longer seem meaningful? In a rabbinic Midrash,²⁰² the backstory of Abram, later renamed Abraham,²⁰³ is told prior to the divine command of Lech Lecha—the command to go to an unknown land that God would show him.²⁰⁴ In this Midrash, Abram is already a religious seeker as a young man. His family works in the religion business, so to speak—Abram’s father produces idols, which Abram, even before knowing God, would smash.²⁰⁵ So, Abram can be understood as oriented toward the old religious forms, but, finding them inadequate, looking for something else—something more real than an idol. That is when God says Leave, even though Abram does not know where he is going.

The changing religious landscape in America feels that way to me. It felt necessary for me to leave the old form of religion even though it was not, and is not, clear what the new land will be. So this may be a time for the new—a time for Lech Lecha.

CONCLUSION

At the beginning of this article, Professor Simon observes that religious law schools are a place where rich religious and moral conversations can still take place. In this article I have given that assumption a very particular meaning, which is probably not the

²⁰² A little difficult to translate. Not just stories and fables, but, as the tradition saw it, the true inner meaning of the words of the Old Testament derived by the sages.

MOSHE WEISSMAN, *THE MIDRASH SAYS, THE BOOK OF RESISHIS* vii, (1980).

²⁰³ *Genesis* 17:5.

²⁰⁴ *Genesis* 12:1.

²⁰⁵ See Rachel M. Solomon, *Stories of Our Ancestors*, MY JEWISH LEARNING, <http://www.myjewishlearning.com/article/stories-of-our-ancestors/2/> [<https://perma.cc/28XW-QNA2>] (last visited May 8, 2017).

meaning that Professor Simon intended. Obviously, in a religious law school composed solely, or even largely, of religious believers in a particular tradition, there could be a religious and moral conversation about American public life within the language and doctrines of that religious tradition. That conversation would indeed be richer than the denuded one that Professor Simon believes most Americans are stuck with by virtue of the collapse of secular, public morality. But that in-house, religious law school conversation would be of little or no importance to the larger community, which is composed mostly of nonbelievers and of members of other religious communities. A situation along these lines is probably what Professor Simon had in mind when he contrasted Duquesne with a nonreligious law school.

That view is too narrow. Religious law schools are not just places for fellow believers. Their concern is not just the welfare of one religious community, or even just the welfare of religious believers in general. By virtue of being American law schools, religious law schools have a responsibility to American public life. Given the breakdown of American Democracy, their task is to replenish the language of morality in such a way that the discussions at religious law schools about American public life break through into the consciousness of the greater community, thus transforming America. That is what I propose here as the role of religiously affiliated law schools in the renewal of American Democracy. It would not be an easy role to undertake, but, in the present darkness, it is a path toward light.

But morality is only a step on that path. I had once thought that the way to heal American Democracy would be to introduce the question of being into law school study.²⁰⁶ But I now see that the question of being is too alien to those without grounding in continental philosophy.

So, let me ask instead a comparable question: is it possible for the study of law to be a high and holy calling? I mean this the way I imagine the study of law used to be, when it was assumed as background principle that law could reveal the good, hidden order in reality and democracy would lead, at least inexactly and partially, toward Truth and Justice. My mentor Charles Black believed this. But, today, we can have the high and holy only as a question.

²⁰⁶ See Ledewitz, *Five Days*, supra note 107, at 178.

Given the current technological and other conditions in the culture, the actual answer to that question is plainly, no—law study cannot be high and holy. And the answer is no at religious law schools, also.²⁰⁷ But, in order for the breakdown of American Democracy to be healed, it is necessary that the cultural conditions be altered so that the answer becomes, potentially, yes. Just consider how transformative the I Have A Dream speech and the Gettysburg Address have been. Those were moments of high and holy calling.

Religious law schools are one place where the gap between what is currently possible and what is necessary could be acknowledged and addressed. That is, the question of the high and holy could at least be asked. That is the ultimate role of religious law schools in a new beginning for American Democracy.

²⁰⁷ That is, the answer is plainly no for nonreligious law schools and most religious law schools as well. David Grenardo reminds us that experiments along these lines are going on. See David Grenardo, *Improving the Law School Classroom and Experience Through Prayer: An Empirical Study*, 13 AVE MARIA L. REV. 68 (2015). I note though, that in Professor Grenardo's thoughtful telling, prayer and law are separate. To be a calling that is high and holy, law and prayer would have to relate in a most fundamental way. Could we say, in a sense, that every moment in law school and every relationship would have to be a form of prayer? For a taste of this kind of encounter with law, see Douglas A. Allen, *A Spiritual Look at Choosing a Legal Career*, 27 TEX. TECH. L.REV. 977 (1996).