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Constitution and *Kulturkampf*: A Reading of the Shadow Theology of Justice Brennan

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COMMENTS

CONSTITUTION AND *KULTURKAMPF*: A READING OF THE SHADOW THEOLOGY OF JUSTICE BRENNAN

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> The nature of any society therefore is not to be deciphered from its laws alone, but from those understood as an index of its conflicts.[1]
>
> —Alasdair MacIntyre

> But modern culture is unique in having given birth to such elaborately argued anti-religions, all aiming to confirm us in our devastating illusions of individuality and freedom.[2]
>
> —Philip Rieff

INTRODUCTION

Since well before his retirement, and certainly afterwards, Justice William J. Brennan, Jr. has been celebrated by the American legal community.[3] In view of his singular contributions to constitutional jurisprudence and his longevity on the bench, this praise is scarcely surprising. What may be surprising, however, is the almost

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† B.S. 1988, University of Pennsylvania; J.D. Candidate 1992, University of Pennsylvania. I wish to acknowledge my greatest debt, to Philip Rieff, whose lectures, seminars, and continuing tutorials have influenced all that follows. If I have not redrafted everything often enough it is not for want of his own penciled criticisms. One of his favorite sayings has been my guide: "Everything is in the delivery of the detail against a theory by which the truth of that theory is tested." I also have benefitted from discussions with other teachers of mine, Chancellor William Allen, Edwin Baker, William Ewald, William Harris, and Michael Moore, and from the comments of Judge Richard Posner. All mistakes of law and fact are my own.

[1] ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 254 (2d ed. 1984).

[2] PHILIP RIEFF, THE TRIUMPH OF THE THERAPEUTIC: USES OF FAITH AFTER FREUD 10 (2d ed. 1987).

[3] For examples of the larger celebration, see the following articles in an issue of a legal magazine devoted to "The Brennan Legacy": Bruce Fein et al., *The Brennan Legacy: A Roundtable Discussion*, A.B.A. J., Feb. 1991, at 52; David O. Stewart, *A Life on the Court*, A.B.A. J., Feb. 1991, at 62; Laurence H. Tribe, *Architect of the Bill of Rights*, A.B.A. J., Feb. 1991, at 46.

unanimous applause emanating from the legal academy.[4] Justice Brennan sought to resolve the most controversial issues of his time;[5] his responses were and remain controversial. Yet despite his controversialism, Justice Brennan's celebrity in retirement may be precedented in American judicial history only by that of Justice Holmes.[6]

A survey of law review articles reveals only one that is openly hostile to Justice Brennan's jurisprudence.[7] But that article, which chastises Justice Brennan for favoring judicial activism instead of originalism, cannot be, any more than the encomia, a model for appraising Justice Brennan's work. Instead of joining that preexisting debate, I will take a different approach. Justice Brennan's judicial sociology, to be expounded below, deserves no less study than his political accomplishments. That judicial sociology can best be examined by following Justice Brennan's major premises until they engage those of other theorists, whose work, while probably if

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[4] This applause includes scholarly work apart from the numerous testimonials and tributes. *See, e.g.*, Arlin M. Adams, *Justice Brennan and the Religion Clauses: The Concept of a "Living Constitution,"* 139 U. PA. L. REV. 1319 (1991) (lauding Justice Brennan's Free Exercise Clause and Establishment Clause opinions); Frank I. Michelman, *Super Liberal: Romance, Community, and Tradition in William J. Brennan, Jr.'s Constitutional Thought*, 77 VA. L. REV. 1261 (1991) (treating Justice Brennan as visionary and political theorist); Geoffrey R. Stone, *Justice Brennan and The Freedom of Speech: A First Amendment Odyssey*, 139 U. PA. L. REV. 1333 (1991) (sketching Justice Brennan's achievements in creating a juridical structure for First Amendment analysis); Mark Tushnet, *Justice Brennan, Equality, and Majority Rule*, 139 U. PA. L. REV. 1357 (1991) (identifying and applauding Justice Brennan's unhesitating and egalitarian interpretations of the Constitution).

[5] One article in the nonlegal literature derides Justice Brennan for just this quality. *See* Wallace Mendelson, *Brennan's Revolution*, COMMENTARY, Feb. 1991, at 36. Exempt from criticism are Justice Brennan's First Amendment opinions. *See id.* at 39. Mendelson appears not to notice their revolutionary quality, perhaps because he thinks it appropriate for the judiciary to 'legislate' in this area.

[6] Richard Posner remarks that there is a "dearth of evaluative writing on individual judges." RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION at viii (1990). Posner's study is helpful in analyzing Justice Brennan's reputation, mostly by way of comparison. In articles mentioning well-known judges and legal scholars, Justice Brennan is the one cited most frequently. *See id.* at 76-78. Justice Brennan's celebrity status approaches that of Justice Cardozo, who was nominated for "sainthood" by his contemporaries. *See id.* at 7 n.15. Michelman anoints Justice Brennan a "Framer," since "prophet" would "trivialize" him. *See* Michelman, *supra* note 4, at 1332.

[7] *See* Raoul Berger, *Justice Brennan vs. the Constitution*, 29 B.C. L. REV. 787, 801 (1988) (describing Justice Brennan's substitution of his own agenda for established methods of construction and his efforts to "proffer some quasi-historical-analytical justification for his interpretive approach").

not palpably alien to Justice Brennan, make explicit what Justice Brennan implies.

Justice Brennan's implicit sociology is evident in his suggestion that lawyers and judges must "turn their minds to the knowledge and experience of the other disciplines, and in particular to those disciplines that investigate and report on the functioning and nature of society."[8] Such knowledge was helpful in *Brown v. Board of Education*,[9] the case that arguably inaugurated the modern period in constitutional law, as well as the explicit use of social science research in judicial decisions.[10] The primacy of sociology, however implicit in Justice Brennan's jurisprudence, suggests that he is an avatar of his historic time, a time that originated with the opinions of Justices Holmes[11] and Brandeis.[12] However else his thinking evolved, the sociological approach to law is a doctrine that Justice Brennan continuously advanced. Section I of this Comment examines this approach; Section II explores its influence upon Justice Brennan's opinions.

Two early commentators recognized Justice Brennan's sociological turn of mind. Their insight is as pertinent today as it was in 1958:

> In the search to solve the great problems of our day . . . a lawyer and certainly a jurist may not rely solely upon the *descriptive* social sciences, as helpful as they are. Rather, one must supplement his factual, positivistic knowledge with interpretative and principled learning. . . . Mr. Justice Brennan undoubtedly recognizes this. When he actually accomplishes it, he will become, with his great legal potential, one of America's outstanding jurists.[13]

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[8] *Brennan Backs Use of Non-Legal Data*, N.Y. TIMES, Nov. 26, 1957, at 17, *quoted in* Francis P. McQuade & Alexander T. Kardos, *Mr. Justice Brennan and His Legal Philosophy*, 33 NOTRE DAME LAW. 321, 349 (1958). Justice Brennan repeated this idea in numerous speeches. *See infra* text accompanying note 69.

[9] 347 U.S. 483 (1954).

[10] *See* David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 565 n.88 (1991).

[11] Although the "'Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics,'" Justice Holmes's Social Darwinism animated his entire jurisprudence, including *Lochner*. *See* LIVA BAKER, THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES 419 (1991) (quoting Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)); *id.* at 539, 588.

[12] Justice Brandeis also inspired many sociological opinions through his innovative Brandeis brief, first used in Muller v. Oregon, 208 U.S. 412 (1908), *see* GERALD GUNTHER, CONSTITUTIONAL LAW 459 n.1 (11th ed. 1985).

[13] McQuade & Kardos, *supra* note 8, at 349.

The acquisition of "interpretative and principled learning" may be both visible in judicial opinions and a necessary element of judicial greatness. A simple comparison of Justices Brennan and Scalia, both influenced by Roman Catholic doctrines,[14] demonstrates, however, that the mere acquisition of principled learning cannot settle a partisan debate about the quality of a jurist. The proper focus of debate is the social theory actually applied.

The presence or absence of Justice Brennan's religious beliefs is a critical factor in his implicit social theory. Soon after Justice Brennan ascended to the Court, one commentator remarked: "As [Justice Brennan] sees it, there is simply no conflict between the obligations imposed by his judicial oath and the obligations enjoined by his faith."[15] To support this interpretation of Justice Brennan's position, the commentator looked at Justice Brennan's majority opinion in the obscenity case *Roth v. United States*.[16] "In any event, it is certain that Brennan was conscious of no conflict between his conception of the Constitution and his personal religious code in the 'obscenity cases,' which were decided during his first year as a Supreme Court Justice."[17] Subsequent opinions written by Justice Brennan, not least in the field of obscenity, reveal the conflict between his Catholicism and his interpretation of the Constitution.[18] It is this conflict, combined with Justice Brennan's

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[14] *See* George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297 (1990) (arguing that Justice Scalia's positivist methodology, although seemingly divorced from an ideological perspective, reflects a Roman Catholic approach to legal text).

[15] Daniel M. Berman, *Mr. Justice Brennan: A Preliminary Appraisal*, 7 CATH. U. L. REV. 1, 12 (1958).

[16] 354 U.S. 476 (1957).

[17] Berman, *supra* note 15, at 13. Justice Brennan also addressed the relationship between Catholicism and *Roth*. *See* William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 6 (1965) ("Thus the moral judgments made by theologians of what constitutes obscenity, if embodied in laws, might well transgress constitutional limits. In other words, the social norm is not necessarily congruent with a religiously held sexual ethic."). This possible incongruity assumes a larger affinity between constitutional law and divine law.

[18] Justice Brennan recently remarked that this conflict was present since his confirmation hearings and that he made it clear then that he would put his religious beliefs aside when interpreting the Constitution. *See* Stewart, *supra* note 3, at 63. This account of the hearings, discussed *infra* text accompanying notes 141-52, is problematic and does not explain his opinion in *Roth*. Justice Brennan has also stated that his religious beliefs would have to give way "to the extent that that conflicts with what I think the Constitution means or requires." SANFORD LEVINSON, CONSTITUTIONAL FAITH 56 (1988).

continued reliance on sociological theory, that this Comment explores.

In *Roth*, the Court first examined the constitutionality of obscenity and found it lacking. Sociological theory, as expressed in cultural history, was at the core of that opinion. Justice Brennan noted that the first obscenity laws were aimed at the eradication of profanity.[19] The history of the First Amendment, he wrote, revealed an overriding "'*social interest in order and morality*'"[20] and a "rejection of obscenity as utterly without redeeming social importance."[21]

Sixteen years later, Justice Brennan reversed course. His dissent in *Paris Adult Theatre I v. Slaton*[22] was founded in part on the belief that the individual liberties inherent in the First Amendment trumped any "unprovable, although strongly held, assumptions about human behavior, morality, sex, and religion."[23] Justice Brennan indicated that a statute prohibiting obscenity is more likely to survive a First Amendment challenge if supported by empirical evidence of the harm obscenity causes,[24] evidence to be provided by social scientists.

In his later dissent in *FCC v. Pacifica Foundation*,[25] Justice Brennan offered a refined justification for why profanity broadcast over public airwaves could not be regulated, despite its harmful effects on children, families, and individual privacy. "Cultural pluralism" is the new governing principle,[26] and "academic research indicates" that certain racial "subcultures" do not find offensive that which the dominant culture considers transgressive.[27] Individual liberty is once again predicated upon a theory of culture, one now based on racial identification and shorn of religious foundations.[28] In that respect the individual rights

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[19] *See Roth*, 354 U.S. at 483.

[20] *Id.* at 485 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)) (emphasis added in *Roth*).

[21] *Id.* at 484.

[22] 413 U.S. 49 (1973).

[23] *Id.* at 109 (Brennan, J., dissenting).

[24] *Id.* at 107-08 (citing Stanley v. Georgia, 394 U.S. 557, 566 & n.9 (1969)).

[25] 438 U.S. 726 (1978).

[26] *Id.* at 775 (Brennan, J., dissenting).

[27] *Id.* at 776. Justice Brennan also refers to people "from different socio-economic backgrounds," *id.*, but his discussion makes clear that either phrase is equivalent to race or racial identification. *See infra* notes 313-21 and accompanying text.

[28] For another polemic espousing cultural pluralism and judging individuals on that basis, in a context different from but compatible with the newfound racial conception of culture in *Pacifica*, see Duncan Kennedy, *A Cultural Pluralist Case for*

language of *Paris Adult* is as far removed from *Pacifica* as it is from *Roth*.

This Comment's thesis is that a *kulturkampf*, warring cultures and warring theories of culture, best explains the shift in Justice Brennan's decisions and his place in the continuing war over the meaning of the Constitution. This war over constitutional meaning was apparent most visibly in Judge Bork's confirmation hearings and the related legal literature.[29] The contested latent contents of those hearings, such as the legal status of abortion and homosexual sodomy, imply the larger cultural war. Justice Brennan's constitutional position on those issues is known, although he chose not to write opinions in *Roe v. Wade*,[30] *Bowers v. Hardwick*,[31] or their forebear, *Griswold v. Connecticut*.[32] Obscenity decisions reveal the

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Affirmative Action in Legal Academia, 1990 DUKE L.J. 705, 746 ("It is not unfair to judge the individual, in deciding to hire or promote, on the basis of the social characteristic of connection to a cultural community, because the individual cannot be separated from his or her culture . . . ."). On the close identity between Justice Brennan's discussion of cultural pluralism in *Pacifica* and his justification for affirmative action programs, see Michelman, *supra* note 4, at 1283-1306.

[29] For discussions of that fight, see ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (1989); PATRICK B. MCGUIGAN & DAWN M. WEYRICH, NINTH JUSTICE: THE FIGHT FOR BORK (1990); MICHAEL PERTSCHUK & WENDY SCHAETZEL, THE PEOPLE RISING: THE CAMPAIGN AGAINST THE BORK NOMINATION (1989); Bruce Ackerman, *Robert Bork's Grand Inquisition*, 99 YALE L.J. 1419 (1990) (reviewing BORK, *supra*); George Kannar, *Citizenship and Scholarship*, 90 COLUM. L. REV. 2017 (1990) (reviewing BORK, *supra*, BRONNER, *supra*, MCGUIGAN & WEYRICH, *supra*, PERTSCHUK & SCHAETZEL, *supra*); Robert F. Nagel, *Meeting the Enemy*, 57 U. CHI. L. REV. 633 (1990) (reviewing BORK, *supra*). The relationship between the Bork fight, the Bork jurisprudence, and the contemporaneous *kulturkampf* is complicated. As Bork and others recognized, the faultlines of the hearings were largely cultural, *see* BORK, *supra*, at 271; BONNER, *supra*, at 349, but Bork's legal theories are as thoroughly modern as those of his opponents. *See* James Boyle, *A Process of Denial: Bork and Post-Modern Conservatism*, 3 YALE J.L. & HUMAN. 263, 294-311 (1991) (discussing Bork's originalism as a schizophrenic ideology that is not in the conservative tradition of Edmund Burke); Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365 (1990) (noting that originalism is seemingly at odds with neoconservatism and that Bork's originalism is tempered by pragmatism). Although Bork saw Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798), as the precursor of his own battle, *see* BORK, *supra*, at 19-20, the dueling opinions of Justices Chase and Iredell shed little if any light on constitutionalism as it relates to questions of culture and modernity.

[30] 410 U.S. 113 (1973).

[31] 478 U.S. 186 (1986).

[32] 381 U.S. 479 (1965).

same cultural conflict,[33] but in these cases Justice Brennan figures larger.

This Comment's analysis, like Justice Brennan's, depends upon the primacy of sociology, or what one oft-cited theorist would call culture criticism.[34] Sections I.B.1., I.B.2., and I.C. are expositions and applications of the social theorists Otto Gierke, Ernst Troeltsch, and Philip Rieff, whose combined works can be seen as continuing a natural law tradition that Justice Brennan came to renounce. Because that tradition has all but ceased, neither of those turn-of-the-century German scholars, Gierke and Troeltsch, nor Rieff, their American descendant, is as prominent in the legal literature as they deserve to be.[35]

Gierke, an historian of natural law theory and a protagonist of the Historical School of German jurisprudence, analyzed the importance of groups in legal theory. His work is especially important today, due to a resurgence of group theory, as expressed in *Pacifica*, and in Feminist and Critical Race scholarship. Gierke's theory of the group-person, this Comment argues, lends theoretical support to Justice Brennan's jurisprudence as applied in *Roth*, but not to its subsequent evolution.

Troeltsch, known best as a sociologist of religion, traced the development of Christian social doctrine and demonstrated its

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[33] Until the recent controversy over Robert Mapplethorpe, the photographer whose partially government-subsidized work became the focus of Jesse Helms's 1990 senatorial campaign, a trial, and a nationwide debate, obscenity was a subject of only symptomatic importance. One of the early important articles in the field expressed this idea in a rather symptomatic manner. *See* Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 45 ("I think it not unlikely that none of the justices takes the evils of obscenity very seriously.").

[34] *See* RICHARD RORTY, CONSEQUENCES OF PRAGMATISM at xl, 60-71 (1982); RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY 44-69 (1989) [hereinafter RORTY, CONTINGENCY]. Rorty believes that the leading form of inquiry is culture criticism. No sciences are objective; they have become, like art and literature, merely modes of critical inquiry. Culture criticism, not philosophy, is therefore of primary interest when constructing social and moral theory in the present age. Critical analysis requires the support of empirical social facts, though it does argue from premises unlikely to be definitively proven by empirical research. For a discussion of the relative merit of critical commentary and empirical social science, see Faigman, *supra* note 10, at 601-12.

[35] This Comment is not the first extended excursion into Rieffian social theory, however. For an excellent Rieffian study of the *kulturkampf* in family law, see Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1842-79 (1985). Rieff recently published an article in a law review for the first time, making him more accessible to legal scholars and harder to ignore. *See* Philip Rieff, *The Newer Noises of War in the Second Culture Camp: Notes on Professor Burt's Legal Fictions*, 3 YALE J.L. & HUMAN. 315 (1991).

necessary relationship to modern sociology and modern legal theory.[36] His exegeses of the Catholic, Calvinist, and Liberal natural law traditions are crucial to understanding the context of Justice Brennan's departures in constitutional law and the controversy surrounding Justice Brennan's jurisprudence ever since his nomination to the Supreme Court.

Rieff, a contemporary of Justice Brennan, is a sociologist of culture and cultural change. In Rieffian theory, modernity denies and negates the sacred orders that all cultures, Catholic and otherwise, address. Included in his theory of cultural warfare, or *kulturkampf*, are theories of legal personality and the relative authority of religious and racial motifs. Section II applies Rieff's theory of *kulturkampf* to Justice Brennan's jurisprudential transition from *Roth* to *Pacifica*.[37]

To Rieff, the first sociological fact worth knowing about cultures is that their continued life depends upon them disarming their competitors. Only as a last resort is military force utilized; the first weapon is words.[38] Of concern in this Comment is the ultimate weaponry of the law, which implies both command and compulsion.[39] To understand *kulturkampf*, it is helpful to know its origins. Rieff reports that the word

> first appeared in common German use in the early 1870's during the struggle of the National Liberal political party to disarm by law the *moral/educational* authority, and political pulpitry, of a triumphalist Roman Catholic hierarchy, revitalized as it then was by its dogma of papal infallibility in matters of faith and morals. The aim of the National Liberals was to shift the German Catholic

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[36] *See* ERNST TROELTSCH, THE SOCIAL TEACHING OF THE CHRISTIAN CHURCHES (Olive Wyon trans., Univ. of Chicago 1981) (1911).

[37] Rieff's sociological theory of culture is contained in two books, PHILIP RIEFF, FELLOW TEACHERS: OF CULTURE AND ITS SECOND DEATH (2d ed. 1985) [hereinafter RIEFF, FELLOW TEACHERS], and RIEFF, *supra* note 2, and the epilogue of PHILIP RIEFF, FREUD: THE MIND OF THE MORALIST 358-97 (3d ed. 1979). A volume of Rieff's collected papers, PHILIP RIEFF, THE FEELING INTELLECT (Jonathan B. Imber ed., 1990) [hereinafter RIEFF, THE FEELING INTELLECT], also contains valuable work on this subject. My references are mostly to his recently published article, *see* Rieff, *supra* note 35, and to unpublished manuscripts that together will comprise his forthcoming opus, tentatively titled PHILIP RIEFF, SACRED ORDER/SOCIAL ORDER: IMAGE ENTRIES TO THE AESTHETICS OF AUTHORITY; or, MY LIFE AMONG THE DEATHWORKS (forthcoming 1993). That work will be the first to address the warring nature of typologically distinct cultures. In Rieffian theory, the typology is at once a heuristic and an instrument of the permanent culture struggle.

[38] *See* Rieff, *supra* note 35, at 326.

[39] *See id.*

> imagination away from the church to the state. The Pope responded to newly restrictive laws by forbidding clerical conformity to them. In turn, the state dismissed clerical resisters from their duties and, moreover, suspended their state salaries. Elites of the *kulturstaat*, both Catholic and Protestant, then learned a fatally rational and enduring lesson: the high price of being other than indifferent to the temptation of opposing the *machtstaat*.[40]

This history, well known to the Germans Gierke and Troeltsch, illustrates the scope of the war between cultural elites and the use of the law as weaponry in that war.[41] Known to subsequent generations are the consequences of the Bismarckian *kulturkampf*, Hitler's war of extermination against the Jews.[42] In varying particulars *kulturkampf* continues. To analyze the place of the Constitution, and Justice Brennan's interpretation of it, in the shift of public imagination against religion and toward race and the state, Justice Brennan's writings must be read carefully.[43]

The dimensions of this cultural warfare are not contained by, and may dwarf, the longstanding jurisprudential debates between originalism and non-originalism or between natural law and

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[40] *Id.* at 326-27.

[41] Justice Brennan, too, is aware of the importance of law in affecting cultural change. In answer to his own question, "Why are so many more people pounding on our courthouse doors?," Justice Brennan points to revolutions in technology and social expectations. *See* William J. Brennan, Jr., Address (July 22, 1983), *in* 6 U. HAW. L. REV. 1, 3-4 (1984). "For these have come together to create radical upheaval in American values and to generate vast new legislative and social conflict." *Id.* at 4. Justice Brennan welcomes this responsibility, for "the lawyer and judge . . . are uniquely situated to play a creative role in American social progress." *Id.* "Social progress" is a euphemism applied by those engaging in a *kulturkampf*. To grasp Justice Brennan's cultural stand fully, his speeches on court reform and opinions on standing and jurisdiction must be examined as well, a task not undertaken here. For an assessment of Justice Brennan's achievements in affecting social policy from the bench, see Stanley H. Friedelbaum, *Justice Brennan and the Burger Court: Policy-Making in the Judicial Thicket*, 19 SETON HALL L. REV. 188 (1989).

[42] *See* Rieff, *supra* note 35, at 327.

[43] Justice Brennan's writings include much that he alone did not write. I am mindful of the observation of Michel Foucault that the death of the author is the logical consequence of the death of God. *See* MICHEL FOUCAULT, *What is an Author?*, *in* THE FOUCAULT READER 101, 105 (Paul Rabinow ed., 1984). Perhaps that explains the modern fact that much speech and opinion writing on the Supreme Court is in the hands of clerks. Justice Brennan is unique only in that he openly acknowledges their contributions. *See* BERNARD SCHWARTZ, THE NEW RIGHT AND THE CONSTITUTION: TURNING BACK THE LEGAL CLOCK 261-64 (1990) [hereinafter SCHWARTZ, THE NEW RIGHT]. In this Comment, I will embrace Foucault's fiction of the author function—the necessary fiction that the speeches and opinions of the Justice are his works alone.

positivism.[44] At stake in this culture struggle is the survival or abandonment of the moral authority in the Constitution that is derived from Judaism, Christianity, or any other religion.[45] Though there are those who fear the implementation of a "new right" jurisprudence,[46] the cultural conservatives on the opposing side are largely constrained by their positivism, if not by their originalism.[47] To avoid these artificial constraints, this Comment concludes, a culturally conservative jurisprudence should look to Justice Brennan's theories and their expression in the reasoning of *Roth*.

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[44] For a recent discussion of both debates, see John J. Gibbons, *Intentionalism, History, and Legitimacy*, 140 U. PA. L. REV. 613 (1991). Perhaps the most relevant jurisprudential debate is that between H.L.A. Hart and Lord Devlin, a generation ago, on the subject of the legal restriction of, among other moral evils, obscenity. *Compare* H.L.A. HART, LAW, LIBERTY, AND MORALITY (1963) *with* PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1965). Because that debate, over "legal moralism," disregards the origins of the morals at issue, it can be conducted no matter which side prevails in a *kulturkampf*. Hart, for one, thought the closest analogue of the revival of legal moralism in post-war England to be the statutes of Nazi Germany. *See* HART, *supra*, at 12. None of the three debates explains Justice Brennan's change of heart regarding obscenity. Throughout his career Justice Brennan's jurisprudence appears to fit the conventional categories of non-originalist, natural lawyer, and non-legal moralist.

[45] The stakes may be higher. Pierre Schlag argues that all "normative legal thought" depends upon a conception of the individual that can be justified by contemporary sociological and psychological theory. *See* Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 805-23 (1991). Schlag's belief that such foundations are nonexistent depends on granting his premise that Michel Foucault, Richard Rorty, Clifford Geertz, and a few others have a monopoly on these subjects. *See* Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627, 1649 n.79 (1991). The alternative to Schlag's dismissal of cultural conservatism, *see id.* at 1721-26, is an elaboration of a conservative jurisprudence based on social theorists who incorporate the insights of those thinkers Schlag favors. Paradoxically, today, leftist legal theorists such as Schlag are well versed in contemporary philosophy and social science, while conservatives such as Bork rely upon an easy positivism inherited from Justice Holmes, whose own jurisprudence was a product of encyclopedism.

[46] *See* SCHWARTZ, THE NEW RIGHT, *supra* note 43; Sotirios A. Barber, *The New Right Assault on Moral Inquiry in Constitutional Law*, 54 GEO. WASH. L. REV. 253 (1986).

[47] Deference to state legislation may reach substantially the same results, but only so long as states legislate along socially conservative lines. One is then not looking to the Constitution as a source of moral authority, religious or otherwise. Chief Justice Warren Burger, arguably a conservative, non-originalist, legal positivist, made this defensive argument in *Bowers v. Hardwick*:

> To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.
>
> This is essentially not a question of personal 'preferences' but rather of the legislative authority of the State. I find nothing in the Constitution depriving a State of the power to enact the statute challenged here.

Bowers v. Hardwick, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring).

I. THE VARIETIES OF SOCIOLOGICAL NATURAL LAW JURISPRUDENCE

A. *Justice Brennan's Jurisprudence: An Introductory Exposition*

Justice Brennan speaks most fully about his conception of law and the Constitution in speeches and lectures. In 1965, he delivered a lecture entitled *The Role of the Court–The Challenge of the Future*,[48] in which he predicted an evolution in constitutional law "concomitant of the changes in our society."[49] That lecture was included in a volume of Justice Brennan's opinions and speeches that, in the editor's opinion, best represented the jurisprudence of Justice Brennan. In 1985, Justice Brennan delivered a speech entitled *How Goes the Supreme Court?*,[50] the less hopeful title apparently reflecting an evolution of the law not to the Justice's liking. In that speech, Justice Brennan repeated the above-quoted phrase as well as several pages of the earlier text. These two speeches, delivered a generation apart yet containing almost identical motifs, are central to Justice Brennan's thought in both its continuity and its transformations. They provide an appropriate point of embarkation.

1. Justice Brennan's Sociology of Culture

To explain the movement of constitutional doctrine in his own time, Justice Brennan remarks upon the changes that society underwent in the same period. He points out the most significant signs of continuing change:

> The mists which have obscured the light of freedom and equality for countless tens of millions are dissipating. For the unity of the human family is becoming more and more distinct on the horizon of human events. The gradual civilization of all people replacing the civilization of only the elite, the rise of mass education and mass media of communication, the formation of new thought structures due to scientific advances and social evolution–all these phenomena hasten that day. Our own nation has shrunk its distances to hours, its population is becoming primarily urban and

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[48] WILLIAM J. BRENNAN, JR., *The Role of the Court–The Challenge of the Future*, *in* AN AFFAIR WITH FREEDOM 315 (Stephen J. Friedman ed., 1967).

[49] *Id.* at 331.

[50] William J. Brennan, Jr., *How Goes the Supreme Court?*, 36 MERCER L. REV. 781 (1985) [hereinafter Brennan, *How Goes the Court?*]. For an abbreviated version of this speech, see William J. Brennan, Jr., *Preface* to LOOKING AT LAW SCHOOL at ix (Stephen Gillers ed., 1990) [hereinafter Brennan, *Preface* to LOOKING].

> suburban, and its technology has spurred an economy capable of fantastic production. . . . *Our political and cultural differences cannot stop the progress which is making us a more united nation.*[51]

Several themes are present in this passage. One is Justice Brennan's optimism. Freedom, equality, and unity are all within reach. Progress is not only apparent and inevitable; it is welcome.[52] Mass education, mass media, suburbanization, and new technology are all beneficial. There is no fear or trembling here, no sign of the evils unique to modern society. This American folk faith may be misplaced in light of the publicized failures of the cities, as apparent in 1965 or 1985 as in 1992,[53] but that question is subordinate to Justice Brennan's conclusion.

Cultures, as Justice Brennan understands them, cannot be in opposition to each other; their differences can and will dissolve into a greater unity. Justice Brennan expands upon this point in his speech of 1965, but the excision of this same section in 1985 implies more.

> The maturing tolerance of our religious differences is both symptomatic and significant. As I read in a recent Jewish periodical: "Catholics are talking about their Jewish heritage; church leaders are damning anti-Semitism as sin. . . . And Jews are taking a closer look at Christianity. . . . There is a movement toward unity—not theological unity, but unity as a people, as members of one American society working together to find solutions to mutual problems and mutual concerns."[54]

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[51] Brennan, *How Goes the Court?*, *supra* note 50, at 786 (emphasis added). References to both speeches are cited solely to the *Mercer Law Review*.

[52] For his faith in progress, Justice Brennan can be placed firmly in the modern liberal tradition dating back to St. Simon and Comte. *See* J.B. BURY, THE IDEA OF PROGRESS 278-312 (Dover Publications 1955) (1932). "This idea [of the progress of humanity] means that civilisation has moved, is moving, and will move in a desirable direction." *Id.* at 2. There are two versions of the progressive idea. The "constructive idealists and socialists" see the development of man as a closed system whose term is in reach, and the liberals see the development of man as indefinite, with liberty, harmony, and happiness in the remote future. *See id.* at 236. For the development of this theme in the judicial context, see ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 14 (1970) ("Like the eighteenth-century philosophers . . . our Justices followed a medieval age. . . . They, too, were rationalists coming after men of faith . . . .").

[53] *See* EDWARD C. BANFIELD, THE UNHEAVENLY CITY: THE NATURE AND FUTURE OF OUR URBAN CRISIS (2d ed. 1970).

[54] Brennan, *supra* note 48, at 320 (quoting Lynne Ianniello, *Perspectives on a New Society*, ADL BULL. (Anti-Defamation League of B'nai B'rith), Sept. 1964, at 1).

Justice Brennan had adequate reason to drop this section from his speech in 1985, if only because he had read much else in the intervening years. But the absence of a similar thought is itself "both symptomatic and significant." Perhaps Justice Brennan believed the decline of Christian anti-Semitism to be so marked that it scarcely needed to be noted. The faultlines of contemporary cultural strife, as expressed in public debates over abortion, homosexuality, or obscenity, are not apparently between Jew and Christian. And religious toleration is no longer as significant an issue. Yet cultural boundaries, and Justice Brennan's imperative that they be erased, remain. Freedom, equality, and the ultimate goal of national unity depend upon it. The excision in 1985 gives a new meaning to the previous paragraph. Gone is the connection between cultural unity and religious toleration and the connection between culture and particular religions. The tolerance Justice Brennan implicitly urges in 1985 is not between Jew and Catholic. Considering that no paragraph in the speech of 1985 replaces the excised one, the "political and cultural differences" Justice Brennan refers to, and the "united Nation" he wishes to achieve, must be inferred from the debates and court cases of that time. One generation later, these differences appear to be between religious groups asserting moral commands and ideological antireligious groups claiming to be liberated from them. This incipient *kulturkampf* is the primary "change in our society." Justice Brennan neither ignores it nor notes it; perhaps he represses it. Though without religious referents, Justice Brennan's precept of progress in the service of unity persists, and there lies a vacuum in his sociological analysis that this Comment explores.

2. Justice Brennan's Analysis of Legal History

At this juncture in his speeches, Justice Brennan, as a cleric in the "ministry of the law,"[55] speaks on the theonomic question of adapting received law to "the boiling and difficult currents of life as life is lived."[56] He directs his criticism at the nineteenth century legal philosopher John Austin and his contemporaries, who by "isolating law from the other disciplines, particularly from theology and from philosophy that was not expressly legal philosophy"[57]

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[55] Brennan, *How Goes the Court?*, *supra* note 50, at 786.
[56] *Id.*
[57] *Id.*

allowed jurists to shirk their historic responsibilities. No longer concerned with "the broader extralegal values pursued by society at large or by the individual," positivist judges ceded to specialists, such as psychologists and sociologists, "[t]he substantive problems of human living."[58]

Justice Brennan confronts three distinct jurisprudential problems: a changing society, the legacy of positivism, and the inadequacy of positivist jurisprudence when confronted by social change. He is both attracted to and repelled by the model of law prior to the nineteenth century, when natural law theory was dominant. At that time "law was merged, perhaps too thoroughly, with the other disciplines and sources of human value."[59] "Custom," says Justice Brennan, "was the cherished source of the common law."[60]

Justice Brennan does not specify why custom is an inadequate grounding for law today. Is it because discontinuities in legal theorizing have left us with a legal inheritance in which precedent is uninformed by the value of custom, or because a changing society cannot rely upon custom even if it were contained in our constitutional law? Justice Brennan suggests the latter: "Just as we have learned that what our constitutional fundamentals meant to the wisdom of other times cannot be the measure to the vision of our time; similarly, what those fundamentals mean for us, our descendants will learn, cannot be the measure to the vision of their time."[61]

Seeking wisdom and dismissing custom, Justice Brennan is not without other "sources of human value" upon which to draw. In both speeches, he quotes approvingly from a bar association report that traces the historical development of legal thought from positivism to sociological jurisprudence to the "New Realism" school and, finally, to a "new jurisprudence," which

> "[i]n a scientific age . . . asks, in effect, what is the nature of man, and what is the nature of the universe with which he is confronted . . . . Why is a human being important; what gives him dignity; what limits his freedom to do whatever he likes; what are his essential needs; whence comes his sense of injustice?"[62]

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[58] *Id.* at 787.

[59] *Id.* at 786.

[60] *Id.*

[61] *Id.* at 793.

[62] *Id.* at 787 (quoting Miriam T. Rooney, *Report of Committee on Comparative Jurisprudence and Legal Philosophy*, 1964 A.B.A. SEC. INT'L & COMP. L. 195, 198-99).

Most interesting about this interrogative mode of jurisprudence is Justice Brennan's reaction to it. In two sentences remarkable in their tentativeness, he notes, "[p]erhaps some of you may detect, as I think I do, a return to the philosophy of St. Thomas Aquinas in the new jurisprudence. Call it a resurgence, if you will, of concepts of natural law–but no matter."[63] This "new jurisprudence," like that of St. Thomas, is also in agreement with the Aristotelian and Platonic traditions.[64] In its concern for "seeing things whole . . . [it] draws its validity from its position in the entire scheme of things."[65] The answers to the posited questions are not discussed by Justice Brennan. The bar report from which Justice Brennan quotes does continue, however. It discusses two books based on a "Document . . . of the Holy Office . . . , which underlines 'among the possible areas of harmonious cooperation with non-Catholic Christians, *the joint vindication of ideas based on the natural law and the heritage common to all Christians.*'"[66] These ideas are central to Justice Brennan's speech in 1965, if not his speech in 1985.[67] The "new jurisprudence," so far as Justice Brennan describes it, can be consistent with, although it is distanced from, papal teaching.

Justice Brennan then notes his approval of current legal education, which emphasizes "justice" rather than "abstract rules" and looks to other disciplines toward that end.[68] The disciplines Justice Brennan finds most important are, not surprisingly, those that "examine or explain the functioning and nature of our society and the aspirations and needs of the individuals who compose that society."[69] He continues: "There is pervasive recognition, in other words, that law, to be effective, must conform to the world in

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Much of Justice Brennan's speech is an adaptation of this article, itself a report of the convening of churchmen at the 1962 Ecumenical Council at Rome.

[63] *Id.* at 787-88 (footnote omitted).

[64] *See id.* at 788.

[65] *Id.*

[66] Rooney, *supra* note 62, at 199 (quoting CARDINAL AUGUSTIN BEA, THE UNITY OF CHRISTIANS 102 (1963) (citing INSTRUCTIO DE MOTIONE OECUMENICA, A.A.S., XVII 142-46 (1950))).

[67] Cardinal Bea, who wrote those books discussed in the bar report, was appointed by Pope John to submit a resolution to the Vatican concerning the relationship between the Church and the Jews. It was Cardinal Bea's resolution that "denounced anti-Semitism and placed blame for the crucifixion on sinful mankind, rather than on the Jews" in the words of the *ADL Bulletin* that Brennan quotes in his speech of 1965. *See* Ianniello, *supra* note 54, at 1.

[68] Brennan, *How Goes the Court?*, *supra* note 50, at 788.

[69] *Id.*; *see also supra* text accompanying note 8.

which it finds itself. That world is given; law does not make it."[70] Aside from mentioning the late Harvard professor Lon Fuller in his speech in 1965 when discussing the "new jurisprudence,"[71] Justice Brennan does not credit contemporary legal scholars. His judicial practice benefitted from, but did not require, the elaboration of an academic jurisprudence. Because Justice Brennan can be approached on his own terms, this Comment's analysis is principally sociological. For purposes of elucidation, the successors of Lon Fuller, such as Ronald Dworkin, Frank Michelman, and Michael Moore, who are now dominant in the legal academy and whose works parallel Justice Brennan's, will be discussed in the footnotes of this Comment.

Justice Brennan offers a distinctive approach to modern constitutional problems. To confront the necessities of the present he dispenses with the positivist tradition and looks further back into history. Rather than resuscitating the classical natural law tradition, he invokes its spirit. This approach creates its own difficult questions. Is any aspect of the law fixed or must all laws bend to conform to the given world? Can the "new jurisprudence" find answers in the social sciences as the old natural law jurisprudence found them in theology and philosophy?[72] There is the new danger that Justice Brennan's jurisprudence masks itself in a tradition that is not its own, and that its principles are merely empty abstractions that hide a deep skepticism about the binding character of law.

3. Justice Brennan's Theory of Adjudication

Beyond asking questions and drawing parallels is the practice of judging. Here Justice Brennan's guideposts are familiar, though they lead to uncharted byways. "[I]n those cases in which constitution or statute do not clearly decide the case, the judge perforce makes a value judgment, deciding according to his own intellect,

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[70] Brennan, *How Goes the Court?*, *supra* note 50, at 788.

[71] BRENNAN, *supra* note 48, at 321.

[72] Other theorists have so thought. *See* EDGAR BODENHEIMER, JURISPRUDENCE 324 (1940) ("Only a merger of the methods used by the natural-law jurists with the methods employed by modern sociologists can bring about the rebirth which seems so necessary in a time which questions the very foundations of law."). Harold Berman discusses the importance of a new "social theory of law," which, in a time of skepticism and division, looks for guidance to the customary law of "the prehistory of the Western legal tradition." HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 44-45, 83-84 (1983).

experience, and conscience."[73] Justice Brennan sets up strawmen with regard to the authority of legal texts and decisional freedom. The application of the Constitution's words to specific problems "is not often easy"[74] and yet the judge may not "decide according to his personal predilections."[75] Somewhere between these unsettled boundaries lies a space, whatever its size, in which judges fulfill their charge of "deciding according to law."[76] To understand law is to recognize the judge's role in creating it.

Justice Brennan makes a significant effort to articulate and justify the personal element of judging. In addition to value judgment, intellect, experience, and conscience, Justice Brennan includes reason and, more notably, passion as necessary elements of the judicial process.[77] He defines passion as "the range of emotional and intuitive responses to a given set of facts or arguments, responses which often speed into our consciousness far ahead of the lumbering syllogisms of reason."[78] Justice Brennan appropriately credits Justice Benjamin Cardozo for this insight, for Justice Brennan is aping the realist school in his attack upon pure reason and its role in "the formalist conception of judging."[79] Justice Brennan's contribution to this debate is minimal, but his inclusion of the idea is important. Under cover of the word "passion" he gives himself ample room to apply the ethics he credits to the "new jurisprudence."[80]

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[73] Brennan, *How Goes the Court?*, *supra* note 50, at 789.

[74] *Id.*

[75] *Id.* at 788.

[76] *Id.* at 789.

[77] *See* William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law,"* 10 CARDOZO L. REV. 3, 9 (1988).

[78] *Id.*

[79] *Id.* Cardozo recognized the primacy of logic. "We must know where logic and philosophy lead even though we may determine to abandon them for other guides. The times will be many when we can do no better than follow where they point." BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 38 (1921). On the relative importance to the realists of hunching rather than deducing, see Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 278 (1929). For the updated skeptical view that judging is a practice uninformed by theory, see Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773 (1987). For Justice Brennan, passion is an instrument of theory.

[80] Passions, if not arbitrary, require the application of normative principles external to the passions themselves. *See* Julius Cohen, *Justice Brennan's "Passion,"* 10 CARDOZO L. REV. 193, 197 (1988). Justice Brennan's illustration of the use of passion through an extended study of Goldberg v. Kelly, 397 U.S. 254 (1970), is a clue that his jurisprudence must in large part be culled from the results reached in his judicial opinions. The concept of passion, if it has any content at all, is insufficiently

Legal text and public opinion constrain Justice Brennan's moral interpretations, but they do not impose absolute limits upon them. Written constitutions have an "open-ended nature"[81] and contain "enduring principles" rather than specific binding rules.[82] Each generation must reach a consensus regarding its shared morals,[83] yet Justice Brennan perceives a constant across time, "the constitutional ideal of libertarian dignity protected through law."[84] The judge's role, indeed his "sacred trust,"[85] is to apply these principles[86] to the case at hand.[87] The Constitution, as Justice Bren-

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described to be independently evaluated. Commentators' various explanations of Justice Brennan's passion include a life-enhancing goal including vision and empathy, *see* Charles A. Reich, *Law and Consciousness*, 10 CARDOZO L. REV. 77, 92 (1988), a means of officially recognizing the influence of emotions and empathy, *see* Lynne Henderson, *The Dialogue of Heart and Head*, 10 CARDOZO L. REV. 123, 147 (1988), "a way of looking at legal questions from outside traditional legal categories," Charles M. Yablon, *Judicial Process as an Empirical Study: A Comment on Justice Brennan's Essay*, 10 CARDOZO L. REV. 149, 159 (1988), and the signification of a commitment to "protecting the equal dignity and worth of all individuals, particularly those whom the majoritarian processes slight," David Cole, *A Justice's Passion*, 10 CARDOZO L. REV. 221, 234 (1988). Each view may be true so far as it illustrates Justice Brennan's use of the word passion in different cases.

[81] Brennan, *supra* note 77, at 12. For a discussion of the Constitution as an open-ended document, and the implications for constitutional interpretation, see JOHN H. ELY, DEMOCRACY AND DISTRUST 1-9 (1980). The opposing position is that the Constitution is a charter of limits. *See infra* text accompanying note 247. This limiting character is probably what Chief Justice Charles Evan Hughes appealed to when he wrote: "Behind the words of the constitutional provisions are postulates which limit and control." Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934). Chief Justice Hughes's theories of constitutional interpretation were premised on the assumptions that constitutional democracy is a form of government dictated by God and that constitutional rights are of divine foundation. *See* Ernst Troeltsch, *The Ideas of Natural Law and Humanity in World Politics* (1922), *in* OTTO GIERKE, NATURAL LAW AND THE THEORY OF SOCIETY: 1500 TO 1800, app. 1, at 209 (Ernest Baker trans., Beacon Press 1957) (1934) [hereinafter GIERKE, 1500-1800].

[82] The idea that the Constitution embodies principles rather than rules has been elaborated upon by Ronald Dworkin. *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 71 (1985) ("We have an institution [judicial review] that calls some issues from the battleground of power politics to the forum of principle. It holds out the promise that the deepest, most fundamental conflicts between individual and society will once, someplace, finally, become questions of justice."). Dworkin's theoretical efforts can be seen as an attempt to justify the approaches and opinions of justices akin to Justice Brennan. *See* Barber, *supra* note 46, at 254.

[83] For an analysis of Justice Brennan's rejection of history in his application of natural law jurisprudence, see C.M.A. McCauliff, *Constitutional Jurisprudence of History and Natural Law: Complementary or Rival Modes of Discourse?*, 24 CAL. W. L. REV. 287 (1988).

[84] Brennan, *How Goes the Court?*, *supra* note 50, at 793.

[85] *Id.* at 785.

[86] *See id.* at 793. For another enduring constitutional principle, "universal

nan applies it, is the principles it embodies, not the textual provisions that may or may not be the source of those principles.[88] When text appears to conflict with principle the principle controls.[89]

Since the Constitution is a "public text," Justice Brennan encourages public debate of the text's meaning and informed criticism of the Court, so that judges can better gauge the aspirations of the community.[90] Public debate and criticism today is best focused upon discerning and evaluating Justice Brennan's fundamental constitutional principles. First, it is necessary to understand the theoretical context from which those principles were derived.

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equality, freedom, and prosperity," see William J. Brennan, Jr., *The Equality Principle: A Foundation of American Law*, 20 U.C. DAVIS L. REV. 673, 674 (1987).

[87] These principles are best understood as they are applied in case law, rather than in any theoretical elaboration. Justice Brennan illustrates his understanding of human dignity by pointing to the 'incorporation' cases and his repeated dissents in death penalty cases. *See* William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 441-44 (1986).

[88] *See* Richard A. Posner, *A Tribute to Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 13, 14 (1990) ("Justice Brennan has not pretended that the constitutional revolution in which he has played a leading role was dictated by the text of the Constitution . . . . He does not ask to be judged by his fidelity to a text and a history . . . ."). There is "a text and a history" from which Justice Brennan's principles are derived, however:

> The philosophy of government that emerged from the depression of the 1930's . . . conceived of government as having an affirmative role, a positive duty to provide those things which give real substance to our cherished values of liberty, equality, and human dignity—jobs, social security, medical care, housing, and so forth. That duty was rather similar to the duty expressed in the Universal Declaration of Human Rights. . . . Utopian though it may be, unratified by the United States as is still the case, and unfulfilled for most of the peoples of the world, the declaration nonetheless helps point the way in which law and society should be moving.

William J. Brennan, Jr., *Are Citizens Justified in Being Suspicious of the Law and the Legal System?*, 43 U. MIAMI L. REV. 981, 982 (1989) (citing G.A. Res. 217A III, U.N. Doc. A/810, at 71 (1948)).

[89] To Justice Brennan, the principle of human dignity so animates the Cruel and Unusual Punishment Clause of the Eighth Amendment that capital punishment is thereby unconstitutional. *See* Brennan, *supra* note 87, at 443-44. Explicit references to the practice in the Constitution do not control. *See, e.g.*, U.S CONST. amend. V, cl. 1. ("No person shall be held to answer for a capital, or otherwise infamous crime . . . .").

[90] *See* Brennan, *supra* note 87, at 433-34.

B. *Turn of the Century Theorists at Similar Philosophical Crossroads*

The previous Section summarizes how Justice Brennan's awareness of modernity required him to reject the positivist tradition in favor of a jurisprudence that examines society and the individual. Such a change was needed, Justice Brennan believed, for law to fulfill its historic mission of achieving justice. The implementation of this approach, if not the approach itself, was pioneering. It would be surprising, however, if no legal philosopher had previously posited this theoretical possibility. Max Weber, for one, was the founder of what is now the growing field of law and social science.[91] Justice Brennan's jurisprudence, with its sociological emphasis, cannot help but be influenced by Weber. Justice Brennan's commitment to wrest back from the "specialists" a broader domain for the law, for example, reminds me of a passage of Weber:

> No one knows who will live in this cage in the future, or whether at the end of this tremendous development entirely new prophets will arise, or there will be a great rebirth of old ideas and ideals, or, if neither, mechanized petrification, embellished with a sort of convulsive self-importance. For of the last stage of this cultural development, it might well be truly said: "Specialists without spirit, sensualists without heart; this nullity imagines that it has attained a level of civilization never before achieved."
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> But this brings us to the world of judgments of value and of faith . . . .[92]

This passage presents a significant challenge to all modern jurisprudence, including Justice Brennan's. Instead of Justice Brennan's optimism there is pathos and the ever present specter of a future designated only as "this nullity." By way of an admittedly too simple jurisprudential analogy, positivists symbolize the "specialists without spirit" who preside over the "mechanized petrification" of the law. Classical natural law theorists would then represent the "old ideas and ideals." A question emerges for the "new jurisprudence": is it a "rebirth" of those old ideals?[93] Or is

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[91] *See* RICHARD LEMPERT & JOSEPH SANDERS, AN INVITATION TO LAW AND SOCIAL SCIENCE 2-4, 9-12 (1986).

[92] MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 182 (Talcott Parsons trans., Charles Scribner's Sons 1930) (1920).

[93] Certain contemporary natural law philosophers could be closely identified with the "new jurisprudence." *See, e.g.*, NATURAL LAW THEORY: CONTEMPORARY ESSAYS

its ideal type the "sensualist without heart," who is also characterized as "this nullity?" As a possible first indication, Justice Brennan does believe that society has "attained a level of civilization never before achieved."[94]

An investigation of the relationship between Justice Brennan's "new jurisprudence" and classical natural law theory requires a study of the history of natural law doctrine. To simplify that endeavor, I look to Otto Gierke and Ernst Troeltsch, historians of the "old ideas and ideals" and contemporaries of Weber. They staked out positions and continued in a tradition that few today have consciously adopted.[95]

Like Justice Brennan, Gierke and Troeltsch each saw that the intellectual energy that allowed natural law theory to ascend through the eighteenth century had since dissipated, with ill results. Also like Justice Brennan, they recognized that modern conditions imposed entirely new demands upon jurisprudence. Their work is indispensable to a jurist who wishes to incorporate the spirit of natural law into a post-positivistic jurisprudence. Justice Brennan

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(Robert P. George ed., 1992) [hereinafter NATURAL LAW THEORY] (collected essays on post World War II natural law jurisprudence, including essays by John Finnis and Michael Moore). For a fuller description of their theories, see *infra* note 117.

For a response to that branch of natural law theory represented by Finnis and Moore, see RUSSELL HITTINGER, A CRITIQUE OF THE NEW NATURAL LAW THEORY (1987); Russell Hittinger, *Varieties of Minimalist Natural Law Theory*, 34 AM. J. JURIS. 133 (1989). Not included in the "new jurisprudence" would be those 'maximalist' natural law scholars who seek to recover the transcendent beliefs that are a predicate of classical natural law. *See* Frank S. Alexander, *Three Fallacies of Contemporary Jurisprudence*, 19 LOY. L.A. L. REV. 1, 36 (1985) ("Our inquiry must begin with an acceptance of the limitations of the authority of reason, yet with a conviction of the possibility of a transcendent source of law."); Frederick Crosson, *Religion and Natural Law*, 33 AM. J. JURIS. 1, 17 (1988) ("The crucial question for man is whether he is related to something unchanging and eternal."); Charles E. Rice, *Some Reasons For a Restoration of Natural Law Jurisprudence*, 24 WAKE FOREST L. REV. 539, 571 (1989) ("It is not enough to argue the natural law case in academic terms. A restoration of societal respect for the law and the divine law—a conversion—is needed before the natural law case will prevail in the public arena."). The distinctiveness of this branch of natural law theory, so far as its goal is the recovery and restoration of sacred law, reveals the fallacy of false alternatives between natural law and positivism. The restoration of a "sacred" natural law jurisprudence can draw on elements of both.

[94] *See supra* text accompanying note 51.

[95] Harold Berman is one contemporary theorist whose lineage can be traced to Troeltsch. *See* James L. Adams, *Conceptions of Natural Law, from Troeltsch to Berman*, *in* THE WEIGHTIER MATTERS OF THE LAW: ESSAYS ON LAW AND RELIGION 179 (John Witte, Jr. & Frank S. Alexander eds., 1988) [hereinafter THE WEIGHTIER MATTERS]. Frank Alexander, a disciple of Berman, uses a typology drawn from another interpreter of Troeltsch, H. Richard Niebuhr. *See* Frank S. Alexander, *Introduction: Constituting a People*, 39 EMORY L.J. 1, 2 n.3 (1990).

did not rely upon them, but an exposition of their work is necessary to evaluate the principles absent and present in his jurisprudence.

1. Gierke, the Group, and the Idea of Law

Otto Gierke studied the historical development of legal and political theory from the Greeks to his own time.[96] Of special concern to Gierke were the attempts of every age's theorists to construct theories of the group. Groups exist within, parallel to, and above the state. Intermediary groups between the individual and the state include family, local community, corporation, church, and trade union. For Gierke, individuals enter into groups separate from themselves out of psychological and spiritual necessity.[97] Groups can be conceived of as contracting individuals, fictive persons, or, as Gierke would prefer, entities of a singular group-personality.[98] The question today is whether modern conflicts between a group's members, between parents and children in the case of the family or between shareholders and management in the case of a corporation, so weaken the group that juridical status can no longer be ascribed to a single group-person. Nevertheless, without an organic theory of the intermediary group,[99] one that

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[96] *See* OTTO GIERKE, ASSOCIATIONS AND LAW: THE CLASSICAL AND EARLY CHRISTIAN STAGES (George Heiman trans. & ed., 1977) [hereinafter GIERKE, ASSOCIATIONS AND LAW]; OTTO GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE (Frederic W. Maitland trans., 1900) [hereinafter GIERKE, POLITICAL THEORIES]; GIERKE, 1500-1800, *supra* note 81. These three books are translated sections of Gierke's larger work, DAS DEUTSCHE GENOSSENSCHAFTSRECHT (Berlin, Weidmann 1868).

[97] *See* George Heiman, *Introduction* to GIERKE, ASSOCIATIONS AND LAW, *supra* note 96, at 9-10.

[98] *See* GIERKE, POLITICAL THEORIES, *supra* note 96, at 67-69.

[99] Gierke, and his organic theory of the group, are commonly thought to be quintessentially Germanic and therefore inaccessible to Americans. See Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 930 (1984) ("Some of the problem, however, may be caused by unfamiliarity: Organic theories have had limited influence on mainstream American thought."); *see also* Michelman, *supra* note 4, at 1284 ("Such strong assertions of sociality have little purchase in our prevailing constitutional culture."). But Gierke is in complete agreement with major currents of mainstream American political and legal thought. Justice Holmes viewed the law as an "organic whole" that balanced "'tradition on the one side and the changing desires and needs of the community on the other.'" BAKER, *supra* note 11, at 254 (quoting a letter of Justice Holmes). John Calhoun's theory of the concurrent majority, as opposed to the numerical or absolute majority, depends upon the existence of an "organism" in any proper constitutional structure that inhibits tyranny and allows for the fullest expression of the interests of the community. *See* JOHN C. CALHOUN, A DISQUISITION ON GOVERNMENT 20 (C. Gordon Post ed., Bobbs-Merrill 1953) (1853). Calhoun's theories need not assume a necessary opposition of minority

does not collapse into a theory of its constituent elements, one is left with only the absolute sovereignty of the state and the individual.[100]

This insight alone contributes to an understanding of Justice Brennan. Justice Brennan notes that legal disputes before the Supreme Court are conflicts that "in most cases involve constitutional rights,"[101] and he urges that those cases be understood as "raising conflicts between the individual and government power."[102] If cases are framed in this manner, then Gierke's articulation of the importance of intermediary groups is ignored. A natural law theory that privileges the individual opposes much more than the coercive power of the state.

Justice Brennan's theory of society is not purely individualistic, however. In Gierkean terms, Justice Brennan writes: "Perhaps in no period of human history has the Rule of Law loomed larger as the essential stabilizer of the complex organism that society has become."[103] The resemblance to Gierke may be one of diction only. Society is becoming less organic as it becomes more complex,[104] and the rule of law cannot be both organic and external to society. The rule of law was of central concern to Gierke; he

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interests and individual rights, nor the perpetual opposition of southern political conservatism and federalism. *See* RUSSELL KIRK, THE CONSERVATIVE MIND 153-55 (7th ed. 1985). *But see* Max Beloff, *Introduction* to THE FEDERALIST at lxxi (Max Beloff ed., 2d ed. 1987) (characterizing Calhoun's theories as antithetical to those adumbrated in *The Federalist*). John Adams, rather than Alexander Hamilton, James Madison, or John Jay, may be the Federalist most congenial to Calhoun and the theory of groups. As Vice President, Adams repeatedly lectured the Senate on the stabilizing effects of extragovernmental institutions and forces, such as church, family, and community. *See* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 161 (1985).

These organicist ideas have been revived, in different form, by the republican revivalists. *See, e.g.*, Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1531 (1988) (locating arenas of "normatively consequential dialogue" in voluntary organizations, workplaces, public events, schools, and local government agencies); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1578 (1988) (identifying local communities, religious congregations, and unions as valuable "intermediate organizations in a pluralistic society"). For another recent argument favoring recognition of the claims of intermediary groups, see Ronald R. Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001 (1983).

[100] *See* GIERKE, 1500-1800, *supra* note 81, at 62-64; GIERKE, POLITICAL THEORIES, *supra* note 96, at 87-90.

[101] Brennan, *How Goes the Court?*, *supra* note 50, at 790.

[102] *Id.*

[103] Brennan, *Preface* to LOOKING, *supra* note 50, at xi.

[104] *See* FERDINAND TÖNNIES, COMMUNITY AND SOCIETY (*GEMEINSCHAFT UND GESELLSCHAFT*) (Charles P. Loomis trans. & ed., Mich. State Univ. Press 1957) (1887).

thought the idea was dependent on natural law theory. Although critical of purely individualistic or statist conceptions of natural law, Gierke believed natural law theory to be a necessary supplement to positivist or historical theories of law. In an essay on the relationship between law and the state,[105] Gierke, like Justice Brennan, attempted to incorporate natural law ideas into current jurisprudence after the century-long triumph of the positivist and historical schools of thought.[106] To compare Justice Brennan and Gierke it is necessary to understand how Gierke's theory of groups informed his understanding of the rule of law.

Gierke wanted to rescue "the idea of Law," the idea that law must be grounded historically and organically, from two opposing modern schools. The first modern school is composed of those who believe the content of law to be only either "the idea of Utility" or "the idea of Force."[107] Translate these words today as the 'idea of efficiency' and 'the idea of politics' and Gierke's mission is remarkably relevant for those who question those skeptical branches of law, Law and Economics and Critical Legal Studies.[108] Both branches spring from the American Legal Realist movement.[109] One should, for that reason only, be skeptical of the classical natural law qualities of a "new jurisprudence" with the same lineage.[110] Both of the two alternative conceptions of law recur to the older

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[105] *See* OTTO GIERKE, *Gierke's Conception of Law*, *in* GIERKE, 1500-1800, *supra* note 81, app. 2, at 223-26 [hereinafter *Gierke's Conception of Law*]. This essay constitutes the final pages of Gierke's THE DEVELOPMENT OF POLITICAL THEORY 327-31 (Bernard Freyd trans., W.W. Norton 1939) (1880).

[106] Gierke understood the interrelationship of natural law, positivism, and the historical school in the same manner as does Harold Berman. *See* Harold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 CAL. L. REV. 779, 783-94 (1988). Yet Gierke's belief in law as the positive expression of genuine communities puts him at odds with Berman's "integrative jurisprudence," which aims to combine the best of the three schools in an era without faith in God. Berman decries recent natural law theory for deifying the mind, positivism for deifying the state, and the historical school for deifying history. I can only understand Berman's encouragement of "world law" based on "a common world-wide legal consciousness," *id.* at 799, as an equally improper fictive deification of the planet, as coming pages will make clearer. *See infra* notes 134-39 and accompanying text. Having posited a fictive group, Berman does not improve upon Gierke, whom Berman read as a youth, *see* THE WEIGHTIER MATTERS, *supra* note 95, at xiii.

[107] *Gierke's Conception of Law*, *supra* note 105, at 223-24.

[108] For a discussion of those two schools from a similar perspective, see Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1 (1986).

[109] *See* Richard Tur, *American Legal Philosophy*, *in* AMERICAN PHILOSOPHY 255, 256 (Marcus G. Singer ed., 1985).

[110] *See supra* text accompanying note 62.

positivist school, but abandon the natural law notions that complemented it.[111] Yet "the idea of law," if it is to persist, must be seen as having "won real and permanent conquests from the development of Natural Law,"[112] because only natural law secures "the sovereign independence of the idea of Justice."[113]

The second of the modern schools opposing the idea of law is abstract natural law. Ever attendant to legal theories which fail in their attempt to reify fictions, Gierke cautioned, "I regard as mistaken all the attempts to resuscitate Natural Law into a bodily existence, which can only be the existence of a simulacrum."[114] If not historically grounded, natural law would be reduced to "an idle play of the human imagination."[115] A "true Law," if it is to exist, cannot be "a mere *décor* of traditional well-sounding names."[116] Gierke's warnings are particularly relevant today to scholars who build their natural law theories from the ground up[117] and to jurists like Justice Brennan, who impose decisions from above on the suggestions of a "new jurisprudence" that only resembles classical natural law.

Gierke's idea of law is neither a revival of natural law theory nor a concession to modern economics or politics. To him, positive law and natural law "coincide in their essence."[118] Neither the state nor the law is prior to the other; both are given and inseparable

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[111] *See Gierke's Conception of Law*, *supra* note 105, at 223.

[112] *Id.* at 224.

[113] *Id.*

[114] *Id.* at 226.

[115] *Id.* at 224.

[116] *Id.*

[117] *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980); Michael S. Moore, *Law as a Functional Kind*, *in* NATURAL LAW THEORY, *supra* note 93, at 188. Finnis sets out a theory of natural law that identifies conditions of practical reasonableness and those human goods and institutions meeting those conditions. He claims that natural law cannot have a history and that the only goal of a natural law theory is to prove that there is a natural law with certain contents. FINNIS, *supra*, at 23-25. Moore rigorously applies contemporary analytical philosophy to prove the correctness of natural law theory. To Moore, natural law theory contains two theses: "(1) there are objective moral truths; and (2) the truth of any legal proposition necessarily depends, at least in part, on the truth of some corresponding moral proposition(s)." Moore, *supra*, at 189-90. Gierke was committed to the view that a true theory of law must be basically compatible with the law as it is and should be. The search for moral reality can diverge greatly from an understanding of "contemporary social reality," to borrow a term from the Hart/Devlin debate, *see* DEVLIN, *supra* note 44, at 124-39.

[118] *Gierke's Conception of Law*, *supra* note 105, at 224.

from man.[119] The state is not above the law or outside it: "the liberty of the State [is] within the bounds of the system of Law."[120] This theory admits the possibility of contradiction between actual law and ideal law. But to deny such a contradiction, to Gierke, is to "deny the very idea of Law."[121] Although Justice Brennan does not speak in these terms, two of his admirers do, and they deny the contradiction that Gierke found so necessary to the idea of law.[122] These admirers, both influenced by Critical Legal Studies, believe that Justice Brennan's jurisprudence offers the best opportunity for achieving justice through radical social transformation. To the extent Justice Brennan serves this function he is a transitional figure in the continuing struggle against Gierke's idea of law. To Gierke, justice is something thoroughly positive, not abstract. Only if law is positive can it mediate and stabilize the force of the state.

In their attempts to incorporate the spirit of natural law to restrain the modern state there is an affinity between Justice Brennan and Gierke. Justice Brennan looks to society and ponders, with "passion,"[123] the "nature of man."[124] Gierke sought to affirm "that the living force of Law is derived from an idea of Right which is innate in humanity."[125] Thus far the two thinkers are parallel. The difference between the two lies in the means by which law is sanctioned. Gierke saw law as the positive expression of groups. Unlike Justice Brennan, Gierke refused to identify any "human power" as the "maker and creator of Law."[126] Law is

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[119] *See id.*

[120] *Id.* at 225.

[121] *Id.*

[122] *See* Kenneth M. Casebeer, *Toward a Critical Jurisprudence–A First Step by Way of the Public-Private Distinction in Constitutional Law*, 37 U. MIAMI L. REV. 379, 382 n.8 (1983) ("The argument . . . assumes the unity (but not identity) of thought and reality and thus, the unity of the ideal and the actual."). Casebeer's admiration for Justice Brennan is clearly seen in his *Running on Empty: Justice Brennan's Plea, The Empty State, the* City of Richmond, *and the Profession*, 43 U. MIAMI L. REV. 989, 998 (1989) ("Justice Brennan strains the logic of prevailing doctrinal reasoning in order to accommodate the overcoming of injustice."). *See also* John Denvir, *Justice Brennan, Justice Rehnquist, and Free Speech*, 80 NW. U. L. REV. 285, 316 (1985) ("[T]he opinions of . . . Justices like Brennan . . . may serve as a departure for a new constitutional theory, aimed at restructuring American society by combining incremental political (including legal) change with utopian speculation.").

[123] *See supra* notes 77-80 and accompanying text.

[124] *See supra* text accompanying note 62.

[125] *Gierke's Conception of Law*, *supra* note 105, at 226.

[126] *Id.* at 224; *supra* notes 73-76.

located in a "body of external standards for the action of *free* wills."[127] These standards in turn are grounded in a spiritual force independent of the will.[128] Gierke called that force "reason," but by that term he meant "that Law is . . . a common conviction that [a thing] is."[129] He summarized:

> Law is the conviction of a human community, either manifested directly by usage or declared by a common organ appointed for that purpose, that there exist in that community external standards of will—in other words, limitations of liberty which are externally obligatory, and therefore, by their very nature, enforceable.[130]

This description of how law is appropriately sanctioned bears certain similarities to Justice Brennan's description of how community consensus maintains libertarian dignity. But where Gierke saw the promulgation of specific laws as evidencing appropriate limitations of liberty, Justice Brennan looks to a principle of liberty that can render otherwise legitimate laws unconstitutional.[131] In either case the state consummates law by issuing commands backed by the use of compulsion.[132] This implies a spiritual imperative that might be united with right, since "[t]he human conscience cannot permanently endure the separation of the two."[133] Gierke's theory requires a community guided by conscience, not a society, and political bodies possessing authority, not mere power. Whether such communities exist in modernity is an open question, although the word "community" now proliferates in legal theory.[134]

The return of the idea of community indicates that a century after Gierke's theoretical efforts an emergent school of legal thought appears to be recycling his theory of the group. Frank Michelman, for example, builds on the principle of "intersubjectivity and group consciousness," as contrasted with the older idea of

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[127] *Gierke's Conception of Law*, *supra* note 105, at 224.

[128] *Id.* at 225.

[129] *Id.*

[130] *Id.*

[131] Much of this difference can be attributed to the role of the Supreme Court in American government, an institution that Gierke, unfortunately, did not address.

[132] *See Gierke's Conception of Law*, *supra* note 105, at 225.

[133] *Id.* at 226.

[134] *See, e.g.*, Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 YALE L.J. 1 (1989) (discussing a trend in constitutional theory toward "community" that provides no theory of authority). In Rieffian theory, modern sentimentalized appeals to community are unauthorized and necessarily ineffectual because they are not creedal.

"maximalist, holist social consciousness."[135] The latter notion is close to Gierke. Michelman's discussion of "communitarians" and "collectivists"[136] blurs the distinction, representing perhaps the confusion resulting from recycling group theory without fusing it to its historical antecedents. This emergent scholarship grants juridical status to a fictive group, which instead of being historically grounded, is constructed for the express purpose of liberation or revolution. Under this perversion of group theory, a valid law is not the positive expression of an organic community, but the triumph of an advocacy organization fighting dominant social constructs on behalf of a subordinated class, race, or gender.[137] Such a group is fictive to the extent its putative members do not endorse the voluntary associations of individuals who act in its name,[138] and the expression of its advocates must be circumscribed if their demands oppose the cultural goals of the state's constituent intermediary groups.[139]

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[135] Michelman, *supra* note 4, at 1307.

[136] *Id.* at 1284-87 & 1306-09.

[137] *See* Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95. "A group's escape from subordinate status is accomplished primarily through persuasion," an important part of which is "advocacy." *Id.* at 116. Karst's article is a just proxy for Feminist and Critical Race scholarship, since those schools are dependent on group theory and because Karst's article is recognized as one of few by white, male scholars that affirmatively integrates the propositions of "outsider" scholarship, *see* Richard Delgado, The Imperial Scholar Revisited: How to Marginalize Outsider Writing Ten Years Later 24 (Nov. 5, 1991) (unpublished manuscript, on file with the author).

[138] The Thomas confirmation hearings demonstrate that although many organizations and individuals claim to speak for the "African American community," that race is not united behind its leaders. *See* Elijah Anderson, *The Rap on Thomas: He's Not a 'Race Man,'* PHILA. INQ., Oct. 3, 1991, at A23. This was not always the case. The existence of a rigid "color-line" created a subordinated, segregated group that prevented its members from competing as individuals. *See* 1 ST. CLAIR DRAKE & HORACE R. CAYTON, BLACK METROPOLIS: A STUDY OF NEGRO LIFE IN A NORTHERN CITY 101 (Harper Torchbooks 1962) (1945). In these conditions, blacks looked to the "race man," who would, as an individual representing the entire race, advance the race. *See* 2 *id.* at 390-95. Altered historical and social realities allow for the creation of variegated groups in place of a single monolithic one. Yet "race man" thinking persists. The results of insisting upon a politicized, racial ideology that ignores existing social facts was described by Hannah Arendt. *See* HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 158-61 (2d ed. 1973) (describing race-thinking as a political weapon that denies theoretical truth and cuts across all traditional community boundaries); *see also* Jonathan Reader, *Tawana and the Professor*, NEW REPUBLIC, Oct. 21, 1991, at 39 (reviewing PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1990)) (criticizing Williams's book for being a derivative of "race man" thinking that sacrifices sociological insight to a false racial solidarity).

[139] For a discussion of Gierke's idea of the state as *Kulturstaat* (state of cultures)

Gierke's warnings about a revival of natural law theory seem equally applicable to those who would revive the terminology of group theory. Gierke's importance lies not only in his distinguishing the group from the individual, but also in his differentiating the fictive from the real. As successors and interpreters of Gierke, Troeltsch and Rieff make explicit that creedal communities mediating between sacred law and society are the only types of groups that can transmit the "external obligations" and "spiritual force" that Gierke thought inseparable from a true law.[140] This implication of Gierkean theory may be the most useful in understanding Justice Brennan, who changed his group allegiances over time, in a manner to be explored in detail below.

2. Troeltsch and the Sociological Import of Faith

In his confirmation hearings Justice Brennan confronted the conflicting cultures of Protestantism and Catholicism. His appointment restored the "Catholic seat" on the Court, which had been vacant since the death of Justice Frank Murphy in 1949.[141] The following question, submitted by Charles Smith of the National Liberty League and posed to Justice Brennan by the Senate Judiciary Committee, publicized this conflict over dueling group allegiances:[142]

> You are bound by your religion to follow the pronouncements of the Pope on all matters of faith and morals. There may be some controversies which involve matters of faith and morals and also matters of law and justice. But in matters of law and justice you are bound by your oath to follow not papal decrees and doctrines, but the laws and precedents of this Nation. If you should be faced with such a mixed issue, would you be able to follow the require-

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and *Rechtsstaat* (state of laws), see George Heiman, *State and Law*, *in* GIERKE, ASSOCIATIONS AND LAW, *supra* note 96, at 42, 52.

[140] *See supra* text accompanying notes 125-30.

[141] *See* Barbara Perry, *The Life and Death of the Catholic Seat on the United States Supreme Court*, 6 J.L. & POL. 55, 83 (1989).

[142] For lengthier treatments of this matter, see Berman, *supra* note 15, at 11-13; Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047, 1062-63 (1990); Perry, *supra* note 141, at 83; Lawrence Speiser, *Mr. Justice Brennan and The Bill of Rights*, 11 CATH. U. L. REV. 15, 29 (1962). Even if Smith's question was motivated by simple bigotry, it is worthy of study. The fact that a politically important appointment could be motivated partly because of Justice Brennan's Catholicism says something about the cultural cleavages in America at that time.

> ments of your oath or would you be bound by your religious obligations?[143]

Justice Brennan responded:

> Senator, I think the oath that I took is the same one that you and all of the Congress, every member of the executive department up and down all levels of government take to support the Constitution and laws of the United States. I took that oath just as unreservedly as I know you did, and every member and everyone else of our faith in whatever office elected or appointive he may hold. And I say not that I recognize that there is any obligation of our faith superior to that, rather that there isn't any obligation of our faith superior to that. And my answer to the question is categorically that in everything I have ever done, in every office I have held in my life or that I shall ever do in the future, what shall control me is the oath that I took to support the Constitution and laws of the United States and so act upon the cases that come before me for decision that it is that oath and that alone which governs.[144]

The answer drew more criticism, this time from Catholics who felt Justice Brennan professed insufficient loyalty to the Church.[145]

When a divisive case must be adjudicated the two obligations and constituencies cannot be appeased simultaneously. A commitment to the principle of religious toleration does not help, for the issue is not what faith one subscribes to, but the constitutional import of that faith.[146] A commitment to democracy is also unavailing, since Justice Brennan, unlike many Roman Catholics in high public office, does not mask his personal preferences under

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[143] *Nomination of William Joseph Brennan, Jr.: Hearings Before the Senate Comm. on the Judiciary*, 85th Cong., 1st Sess. 32 (1957) [hereinafter *Hearings*]. Ironically, only Joseph McCarthy, a coreligionist, voted against Justice Brennan's confirmation. *See id.* at 5.

[144] *Id.* at 34.

[145] *See* Berman, *supra* note 15, at 12. *But see* McQuade & Kardos, *supra* note 8, at 327 ("[H]is honest and straightforward response brought praise from everyone.").

[146] The Brennan hearings bear a certain similarity to the Bork, Souter, and Thomas hearings. The debate over abortion aligns significant Protestant and Catholic interests, but it does not eliminate the cultural, and ultimately religious, divisions of the American electorate over the proper interpretation of the Constitution. Do not look to Article VI for the answer to this question. A prohibition against religious tests, which assumes the validity of all denominations, cannot be transformed into its opposite, a prohibition against the influence of religious thought. For a comprehensive discussion of the incoherence of constitutional doctrine resulting from a lack of an "intelligent constitutional commitment to religious freedom," see Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149 (1991).

the guise of radical positivism.[147] Looking to the Constitution itself does not obviate the dilemma either. Justice Brennan incorporates into his jurisprudence both personal morals and constitutional principles.[148] Pluralism, the motive force of liberalism, is sufficient only if significant common ground exists between constituencies.[149] Since the *kulturkampf* is fought on the level of theory, any supposition of shared premises is problematic.[150]

At his confirmation hearings Brennan sought to synthesize the common elements of Catholicism, Protestantism, and liberalism.[151] Considering the judicial obligation to decide cases,[152] and the underlying *kulturkampf*, one or more of these influences must yield. Hence the importance of Troeltsch's exegeses of the rival traditions of Catholicism and Calvinism, and what has become, in the absence of any common ground between them, the opposing modern liberal tradition.

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[147] *See* Kannar, *supra* note 14, at 1319.

[148] See *supra* text accompanying notes 73-90.

[149] *See* Lawrence Solum, *Faith and Justice*, 39 DEPAUL L. REV. 1083, 1088 (1990).

[150] Those who would limit the role of religious convictions in constitutional law may then find that the exceptions to that principle swallow the rule. *See* KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 250 (1988) ("A law should not be treated as unconstitutional if the place of religious convictions or [personal] intuitions is to define the entities that warrant protection or to help resolve questions of fact or conflicts of value when the critical problem is not one that shared premises and common forms of reasoning can resolve.").

[151] For a fine discussion of this American synthesis, written by a descendant of Troeltsch, in a spirit consistent with Justice Brennan's response and his speech in 1965, see Robert N. Bellah, *Civil Religion in America*, *in* BEYOND BELIEF: ESSAYS ON RELIGION IN A POST-TRADITIONAL WORLD 168-89 (1970) (discussing the meaning of references to God in presidential addresses). For evidence that this synthesis is no longer possible, simply look to the present litigation over the public utterance of the word "God," *see* Weisman v. Lee, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 111 S. Ct. 1305 (Mar. 18, 1991) (No. 90-1014), or to the title of an article written by Sanford Levinson, a proponent of a constitutionally based civil religion: "The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices," *see supra* note 142. Confrontation indeed. Justice Thomas is Catholic and called attention to his religious faith in his confirmation hearings. Our nation's civil religion now appears to be watching the secularized stuff of television talkshows.

[152] *See* H.L.A. Hart, *Ascription of Responsibility and Rights*, 49 PROC. ARISTOTELIAN SOC'Y 171 (1949) ("[W]hat a Judge does is to judge. . . . It is not his function to give an ideally correct legal interpretation of the facts . . . .").

a. The Dilemma of Rival Doctrines

Troeltsch understood natural law theory as emanating from within alternative Christian ethics. Writing a generation later than Gierke, he studied modernism and rejected its claim of emancipation from religious questions. The fundamental premise of his *The Social Teaching of the Christian Churches* is that the problem of social reform is the problem of properly applying religious doctrine to the secular entity, society.

> [T]he science of Society cannot create ultimate values and standards from within. . . . The question, therefore, is not whether it is permissible to formulate social doctrines from the standpoint of the churches and of religion in general; all we have to do is to ask whether these attempts have achieved something useful and valuable for the modern situation.[153]

Stoic and Platonic natural law lives only through its partial incorporation into Christianity; effective modern social theory cannot be wholly severed from religion. Between these points of cultural closure is Christian doctrine, Troeltsch's domain.[154] To see social reform as a modern religious problem is to recognize the need to study the history of the Christian ethic. "[Although] the old theories no longer suffice . . . new theories must be constructed, composed of old and new elements, consciously or unconsciously, whether so avowed or not."[155] To apply a Christian ethic to a social problem is to import sacred law into civic law. That is natural law, as understood by Troeltsch. "Thus the State again tends to become identified with economic social problems, and the social doctrines of the Church . . . become the doctrine of its relation both to the State and to Society."[156]

Studying natural law in its distinct forms, Catholic and Protestant, Calvinistic and Lutheran, Early Christian and Medieval, within a church and within sects, Troeltsch's insights yield prescriptions both general and denomination specific. The "modern social

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[153] TROELTSCH, *supra* note 36, at 24. At this stage of the analysis Troeltsch's position is identical to that of Kent Greenawalt. *See* Kent Greenawalt, *Religious Convictions and Lawmaking*, 84 MICH. L. REV. 352 (1985). But unlike Troeltsch, Greenawalt only wants to incorporate religious beliefs into an otherwise liberal, secular jurisprudence, not suggest an alternative foundation for law.

[154] Troeltsch does not discuss the cultural importance of Judaic natural law apart from its incorporation into Christian thought.

[155] TROELTSCH, *supra* note 36, at 25.

[156] *Id.* at 32.

problem" confronts the social teachings of all Christians, yet each western nation must have its own response depending upon the faiths of its people.[157] An American response must accord with the largely Calvinistic traditions of our nation.[158] Justice Brennan could not help but be aware of this tension, considering his confirmation hearings and his sociologically oriented jurisprudence. For that reason the Catholic and Calvinistic traditions merit further exploration, even if it reveals how Justice Brennan's jurisprudence is catholic and protestant where it is not Catholic or Protestant.[159]

b. The Catholic Inheritance

Troeltsch believed Thomism to be "the great fundamental [form] of Catholic social philosophy."[160] Thomism unified human personality and society with God and struggled to create a society that accorded with its view. "[Thomism] must aspire to carry out those ideas into the life of the whole, far beyond the circle of the particular religious community."[161] The social aims of earthly life are preserved, as is a means of ascent to an ultimately religious end.[162]

Catholic social philosophy today, according to Troeltsch, must maintain this means of ascent from the worldly to the transcendental.[163] He cautions:

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[157] Troeltsch argued that a new ethical and historical attitude was imperative for Germany in the interwar years. *See* Troeltsch, *supra* note 81, at 201-22. He diagnosed the "spiritual crisis" of modern Germany and prescribed a recovery of those moral theories that Germany contributed to the Enlightenment. Troeltsch saw modern democracies and their institutions, from The League of Nations to the American Constitution, as maintaining a profoundly theistic basis. *See id.* at 208-09.

[158] The religious roots of this country are decidedly Protestant. No colony gave full rights to Catholics or Jews, and only Rhode Island provided complete religious freedom to all Christian sects. *See* MCDONALD, *supra* note 99, at 4. Not until Justice Brennan's generation, that of the Kennedy presidency, did public authority in America no longer reside predominately in figures of Protestant ancestry. *See* Perry, *supra* note 141, at 84-85. *See generally* E. DIGBY BALTZELL, THE PROTESTANT ESTABLISHMENT: ARISTOCRACY & CASTE IN AMERICA (1964) (discussing the decline in authority of "The Protestant Establishment")

[159] On the subject of Protestantism, compare to Troeltsch the protestation of Ronald Dworkin, on the last page of his most recent book: "[Law's empire] is a protestant attitude that makes each citizen responsible for imagining what his society's public commitments to principle are, and what these commitments require in new circumstances." RONALD DWORKIN, LAW'S EMPIRE 413 (1986).

[160] TROELTSCH, *supra* note 36, at 277.

[161] *Id.*

[162] *See id.*

[163] *See id.* at 279.

> Wherever Catholicism accepts the social doctrine of modern rationalism and individualism, and adopts the idea that all movement and vital unity is spontaneously generated from within, without any external authoritative law, and therefore without any power of compulsion, it there departs from its own traditional spirit, and the inevitable result must follow, in the shape of destructive reactions upon its metaphysic and its ethic.[164]

"[S]o-called 'Americanism' and Modernism"[165] are significant to Troeltsch because they prove the close connection between metaphysics and ethics. Catholicism cannot adopt such "varied modern ideas" and succeed as Thomism did when it incorporated the clarities of Aristotelianism.[166] An organizing principle is needed, "an authority which will control the whole, which will erect dogmatic and ethical propositions which will be clear and absolutely binding, removing from the individual the burden of making this adjustment, and dominating the common life in an authoritative manner."[167] The Constitution must permit the state to promulgate dogmatic laws if the Constitution is to converge with Catholic social philosophy.

The Catholic conception of law is that it is given, and therefore exists prior to the state.[168] All positive expressions of law attain their binding character to the extent they accord with principles substantially contained in the Ten Commandments.[169] The state cannot legally introduce great social transformation, since natural law is neither revolutionary nor world-transforming.[170] "Catholic social reform, theoretically and fundamentally, simply means a return to the Law of Nature . . . to the unpolitical class society guided by the Church, in which the State has only utilitarian tasks . . . ."[171]

How does one square such teaching with the modern state? Troeltsch concludes that liberal progress need be opposed insofar as it creates new servitudes, monopolies, and regulations.[172] The individual in the sight of God must be affirmed to forestall the

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[164] *Id.*
[165] *Id.*
[166] *See id.*
[167] *Id.*
[168] *See id.* at 305.
[169] *See id.*
[170] *See id.*
[171] *Id.* at 310.
[172] *See id.* at 311.

exploitation logically consequent to the modern derivation of morality from the struggle for existence.[173] To the extent Justice Brennan's opinions deviate from this ideal, he is at odds with Thomistic natural law teaching. If Justice Brennan did not intend to so deviate then he spoke accurately when he said, "there isn't any obligation of our faith superior to that [oath]."[174]

c. Calvinism and American Democracy

Calvinistic natural law doctrine must be studied because of its historic impact upon American society. Troeltsch saw "an inward affinity" between Calvinism and modern democratic movements, and he thought Calvinism could be incorporated into the American temperament if the sovereignty of life's religious sphere was preserved.[175] So long as Calvinism (as adapted by Locke) adopted the principle of religious toleration, there is no contradiction between American constitutional government and the Christian character of the state, as preserved "in various institutions, and above all in the national spirit."[176] Troeltsch observed that Calvinism did not fully explain the American character. "Americanism [has] an independent existence, which is almost entirely divorced from a religious basis of any kind."[177]

These positions can be reconciled by acknowledging the growing impact of Freudian thought upon Americans. No longer primarily Calvinistic, the American character is primarily therapeutic.[178] The question is more cultural than psychological, since Freud's importance is as a theorist of culture, not as a scientific psychologist.[179] The institutions of government had to be transformed for the state to serve therapeutic ends rather than play a mediating role in a Calvinist church civilization.[180] The therapeutic movements

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[173] *See id.*

[174] *See supra* text accompanying note 144; *see also supra* notes 15-18 and accompanying text.

[175] *See* TROELTSCH, *supra* note 36, at 640.

[176] *Id.* at 672.

[177] *Id.* at 577-78.

[178] *See* RIEFF, supra note 2, at 48-65; PHILIP RIEFF, *The American Transference: From Calvin to Freud, in* RIEFF, THE FEELING INTELLECT, *supra* note 37, at 10. Freudian thought refers to the therapeutic and analytic attitude in a general sense, not Freud's complex doctrine or any implication that Freud intended to be so 'successful' in America.

[179] *See* PHILIP RIEFF, FREUD: THE MIND OF THE MORALIST, *supra* note 37.

[180] *See infra* note 235 and accompanying text.

that drive the modern welfare state can be conceived of as groups, but they are not Gierkean groups, which are always extragovernmental communities that stabilize the state. The question for a judge is whether the law should privilege the Calvinistic or the therapeutic, antireligious aspects of American individualism.

Calvinism identified natural law with the Ten Commandments and saw in positive law the approximation of both.[181] Church and state were to be closely united, although each retained a significant character.[182] Calvinistic theocracy contemplated a divine covenant based on revelation, a new Israel established upon the divine law incorporating the spirit of the New Testament.[183] A holy community was to be created, consciously and systematically, through the incorporation of the individual and the secular community.[184]

Covenantial religious teaching of Calvinist descent exerted a great influence upon the constitutions and charters of the colonial settlers and their descendants.[185] Scholarly inquiry along these lines can be more confusing than clarifying. A covenant means more than drafting official documents in a certain form; it signified to the Jews and those in the Jewish tradition a willingness to be bound by divine commandment. Covenantial teaching requires obedience to the Ten Commandments in private life just as it demands limitations upon government power in the political complement of the Ten Commandments, the Bill of Rights. The search for unenumerated rights by Justice Brennan or any jurist cannot be an effort to substitute the latter covenant for the former.

Calvin, and those Americans from the constitutional framers to Rieff who follow in the Calvinistic tradition, require the state to fuse to society "the eternal unchangeable rules of the Divine moral law."[186] To Calvin, the state is at once a vibrant political body

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[181] *See* TROELTSCH, *supra* note 36, at 580-81.

[182] *See id.* at 580.

[183] *See id.* at 585-86.

[184] *See id.* at 610.

[185] *See* COVENANT, POLITY, AND CONSTITUTIONALISM (Daniel J. Elazar & John Kincaid eds., 1980); Donald S. Lutz, *Religious Dimensions in the Development of American Constitutionalism*, 39 EMORY L.J. 21, 23-25 (1990); Vincent Ostrom, *Religion and the Constitution of the American Political System*, 39 EMORY L.J. 165, 170-72 (1990); John Witte, Jr., *How to Govern a City on a Hill: The Early Puritan Contribution to American Constitutionalism*, 39 EMORY L.J. 41, 44-45 (1990); *see also* Bellah, *supra* note 151, at 175-78 (discussing references to Israel in presidential addresses).

[186] TROELTSCH, *supra* note 36, at 613.

and a "good and holy institution."[187] The family, the state, and society, each being products of natural law, are "useful institutions for attacking evil, for the furtherance of good, and for the realization of the glory of God."[188] The state is good so far as it is so useful. Government must be concerned with maintaining true religion and promoting peace, order, and prosperity.[189] Political ministers are subordinate to the ministry, which guides the community.[190]

The distinctive characteristics of individualism and democracy, combined with a sense of the unchangeable nature of law, incline Calvinistic peoples to a social ideal that is essentially conservative and authoritative.[191] In its molding of state, society, and family in a fellowship of individualism and community, Troeltsch saw in Calvinism the first comprehensive social ethic in the history of Christianity.[192] That ethic is part of our nation's sacred history. Should conservative legal scholars and judges look to an historical ideal, Calvinist doctrine is a richer source than the positivistic proxy of the original understanding of the Constitution's specific clauses.

d. The Deficiencies of Natural Law Liberalism

In its historical development, Neo-Calvinism led to "the modern classical rationalistic Natural Law of Liberalism."[193] It is the liberal tradition, not the Catholic or Calvinistic, that is closest kin to the jurisprudence of Justice Brennan.[194] Troeltsch interpreted liberalism not as a product of Calvinism, but instead as "created by Humanistically inclined jurists, who drew their inspiration from a

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[187] *Id.*

[188] *Id.* at 615.

[189] *See id.*

[190] Until John Dewey transformed the theological function into modern social science theory, the leading American thinkers were Calvinist ministers. *See* Bruce Kuklick, *Does American Philosophy Rest on a Mistake?*, *in* AMERICAN PHILOSOPHY, *supra* note 109, at 177.

[191] *See* TROELTSCH, *supra* note 36, at 619-20.

[192] *See id.* at 622.

[193] *Id.* at 673. For a compatible historical study of natural law liberalism in constitutional jurisprudence, see Russell Hittinger, *Liberalism and the American Natural Law Tradition*, 25 WAKE FOREST L. REV. 429 (1990).

[194] *See* Edward V. Heck, *Justice Brennan and the Heyday of Warren Court Liberalism*, 20 SANTA CLARA L. REV. 841 (1980). Heck concludes: "Brennan deserves credit for shaping the direction of the Court during the 1962-1969 heyday of Warren Court liberalism." *Id.* at 884; *see also* Michelman, *supra* note 4 (referring to Justice Brennan as a "Super Liberal").

Stoicism which was freed from Christian influences, and from the Roman Law, and also by modern psychological philosophers, with their habit of deducing everything from experience."[195] Reason, unguided by revelation, conceives an autonomous natural law to realize the utilitarian ends of secular institutions.[196] Because church and state are really "societies," the principle of fellowship is extended so that all relationships are seen as associations to be protected so long as they are freely formed.[197] Christian standards continue to penetrate a liberal society as a social force, though only when propagated directly by the church in its separate sphere.[198]

The question for Troeltsch is whether natural law separated from a church can survive in light of modern criticism and modern developments. He saw radical individualism and the rise of toleration based on sectarianism as presaging a new age of constraint; economic factors would limit the freedom of individuals, and the state would be required to exercise compulsion upon a society wracked by endless division.[199] Since neither Catholicism nor Protestantism has the energy to confront this situation, there is "an imperative demand for a new Christian ethic."[200]

A Christian ethic is required, said Troeltsch, because only it possesses a conviction of personality and individuality based on firm metaphysical foundations, foundations without which "every kind of individualism evaporates into thin air."[201] Similarly, only Christianity possesses an unshakable socialism, a mutual sense of obligation and charity;[202] its aspirations "raise[] the soul above the world without denying the world."[203] Justice Brennan's commitment to individual rights is manifest,[204] but its distance from

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[195] TROELTSCH, *supra* note 36, at 674.

[196] *See id.*

[197] *See id.* at 675.

[198] *See id.* at 676.

[199] *See id.* at 998. The "collectivism" that Michelman discusses in relation to Justice Brennan's affirmative action decisions seems more like this notion of Troeltsch's than the organic groups of Gierke. *See supra* text accompanying note 136.

[200] TROELTSCH, *supra* note 36, at 1002.

[201] *Id.* at 1005.

[202] *See id.*

[203] *Id.* at 1006.

[204] For a discussion of Justice Brennan's reference to a "broad right to inviolate personality," see Stephen J. Friedman, *Mr. Justice Brennan: The First Decade*, 80 HARV. L. REV. 7, 8-15 (1966) (quoting Lopez v. United States, 373 U.S. 427, 456 (1963) (Brennan, J., dissenting)).

religious foundations makes its durability difficult to discern. Troeltsch's critique, and this Comment's analysis,[205] suggest that the individual rights Justice Brennan posits mask a shifting allegiance to groups and traditions that deny religious individualism.

Troeltsch's diagnosis is confirmed by Alasdair MacIntyre, who explores the problem of individual personality within the liberal tradition.[206] MacIntyre observes that rational justifications for conviction can only be conceived of within rival philosophical traditions.[207] Modern liberal culture presupposes universal standards of rationality, but this presupposition is fictitious.[208] Similarly, liberal society requires that individuals order their preferences, even if conflicts within the self must be falsely disguised and repressed.[209] The tradition opposing all religious traditions degenerates into a preoccupation with the therapeutic curing of the divided self, an insight Macintyre credits to Philip Rieff.[210] To Rieff one must turn for a vision of the social order that denies the moral imperative of Troeltsch's "new Christian ethic."

C. The Limits Inseparable from a Sociological Jurisprudence: Philip Rieff, Sacred Sociology, and the War of the Culture Classes

Justice Brennan, Gierke, and Troeltsch each articulate philosophies of law that depend upon a theory of society. Justice Brennan does not develop such a theory, but adopts the insights of sociologists and recognizes certain principles the law must enliven as society changes in a manner otherwise beyond the law's jurisdiction. Gierke saw law as the expression of the community, and required authoritative constraints upon both. Troeltsch dismissed the purely sociological approach from the start, believing that societal forces will overwhelm the individual if law does not emanate from a religious ethic that itself subordinates any theory of society. The

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[205] *See infra* notes 277-301 and accompanying text.

[206] *See* ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 346-47 (1988).

[207] *See id.* at 401-03.

[208] *See id.* at 400. An appeal to rationality can then no more settle a question of morals than an appeal to passion. *See supra* note 80. Yet rationality, if not purely instrumental, is dependent upon a doctrine of truth, the predicates of which are denied by the Enlightenment tradition. *See infra* note 224.

[209] *See id.* at 346-47.

[210] *See id.* at 347 (citing RIEFF, *supra* note 2); *see also* MACINTYRE, *supra* note 1, at 30-31 (discussing Rieff and the impact of therapy upon nonmedical institutions).

challenge to Justice Brennan's approach from both scholars is formidable.

The general charge is that Justice Brennan conflates social change and cultural change. As historians who recognized the uniquely modernist problem of a law removed from sacred order predicates, Gierke and Troeltsch did not make Justice Brennan's error, but proving this allegation requires a distinctly sociological inquiry that comprehends modern culture with the benefit of another century of perspective.[211] Philip Rieff's recent theoretical work illuminates how modern legal systems no longer mediate rival conceptions of sacred natural law. The current *kulturkampf* is constituted as a fight against the claims of all cultures. As a contemporary theory of culture, Rieff's work is illuminated by the natural law tradition that extended through Gierke and Troeltsch as well as by the liberal ideologists from St. Simon to Justice Brennan who find the science of society a sufficient replacement for the commanding truths that are the reality of religion.[212]

To Rieff, cultures are symbolic worlds constantly translating invisible sacred orders into observable, habitable, and particular social orders.[213] Culture mediates between the sacred and the

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[211] Twentieth century atrocities provide perspective, if nothing else. Michael Moore writes that "[t]he jurisprudence that interests me is that natural law jurisprudence which grew up after the Second World War and which may be seen as being in part a reaction to the atrocities done by the Nazis in the name of German law." Moore, *supra* note 117, at 188. Maybe. Troeltsch interests me because he foresaw the tragedy and believed that only a reclamation of natural law jurisprudence in its historical particulars would forestall it. *See* Troeltsch, *supra* note 81, at 218; *supra* note 157. But neither Moore nor his natural law colleagues study Troeltsch or engage in that reclamation. The Nazis may have defeated and inspired two different types of natural law theory. One must choose between them. *See supra* note 93.

[212] Rieff describes St. Simon's guiding elite, who would succeed the theologians, as "[a]n anti-priesthood of art-worshipping and antitraditionalist laity [who] would create the symbolic organization necessary to establish the one divine imperative urged by Christ: the most immediate moral and material advancement of the vast majority, the poorest classes." Philip Rieff, Aesthetics of Authority: Sacred Order/ Social Order Before Tocqueville and After 8 (1990) (unpublished manuscript, on file with the author). This definition also describes Justice Brennan's "ministry of the law." *See supra* note 52 & text accompanying *supra* note 55.

[213] *See* Rieff, *supra* note 35, at 316-17. Culture, as understood by Rieff, is similar to *nomos*, as articulated by Robert Cover. *See* Robert M. Cover, *Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 4 (1983) ("We inhabit a *nomos*—a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void.") Cover's belief that opposing cultures can be maintained by the universalist values of modern liberalism renders him the theoretical counterpart of the Brennan jurisprudence. But Cover's approval of the "imperial virtues and the imperial mode of world maintenance," *id.* at 16, should give even the

social, creating representative political and legal structures, such as the courts.[214] By so renewing themselves, cultures disarm their competitors. Rieff typologizes the history of these symbolic particularities into three worlds. Chronologically, the types, numbered first, second, and third, are pagan, monotheist, and modern.[215] The guiding motifs of the three are fate, faith, and fiction.[216] As known through their motifs, the three world cultures exist synchronically in the present. As it is presently impossible to live solely in one of these worlds, the war among them continues, publicly and privately.[217] This war is the *kulturkampf*.

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quick and agreeable reader pause. The Romans were liberal in their tolerance of multiple pagan deities. As Gibbon wrote: "The various modes of worship, which prevailed in the Roman world, were all considered by the people, as equally true; by the philosopher, as equally false; and by the magistrate as equally useful. And thus toleration produced not only mutual indulgence, but even religious concord." 1 EDWARD GIBBON, THE DECLINE AND FALL OF THE ROMAN EMPIRE 29 (J.M. Dent & Sons Ltd. 1910) (1776). But it is no historical accident that the Jews would not submit to imperial authority. Cover's attempt to justify the imperial virtues by an appeal to Rabbi Simeon ben Gamaliel or the sixteenth century Talmudic codifier Rabbi Joseph Caro, *see* Cover, *supra*, at 11-13, is theoretically impossible. The destruction of the Temple does not imply the destruction of all 613 commandments upon which Jewish law is based. Encouragement of imperial justice or any other Roman virtue in contravention of these interdicts is not within the Jewish traditions that link the Talmudic codifiers to the present. To Jews, the emperor's wish never has the force of law, as it did in Rome, *see* G. Inst. 1.5. In one of Rieff's sayings: "The Emperor's wish becomes, millennia later, *der Führer Wunsch*; Hitler's imperial wish is the very substance of Auschwitz." Modern liberalism must look to sources opposing the Jewish to justify Cover's First Amendment theory.

[214] In Rieff's forthcoming book, *Sacred Order/Social Order*, the "/" is a sign of mediation indicating the task of culture.

[215] *See* Rieff, *supra* note 212, at 3, 15, 24.

[216] For an introduction to motif analysis, see *id.* at 1-2. The remainder of that work is an elaborate exegesis of the motifs of the three world cultures.

Sanford Levinson is familiar with Rieffian thought. *See infra* note 227. His premise, that the death of constitutionalism may be the central event of our time, just as Nietzsche's announcement of the death of God was the central event of the last century, is compatible with my own. *See* LEVINSON, *supra* note 18, at 52. But Levinson's "faith" contributes to constitutionalism's demise. As its title implies, *Constitutional Faith* is partially a response to Philip Bobbitt's *Constitutional Fate*, published in 1982. An equally ironic response to Levinson must be entitled *Constitutional Fiction*, since constitutionalism becomes a parody of itself, the ultimate legal fiction, if it refers to faith in an invention of man. *See infra* note 223; *cf.* CALHOUN, *supra* note 99, at 8 ("Constitution is the contrivance of man, while government is of divine ordination. Man is left to perfect what the wisdom of the Infinite ordained as necessary to preserve the race."). Recall Nietzsche's interpretation of the entrance of Zarathustra, who is introduced shortly after the announcement of God's death: "*incipit parodia*, no doubt." FRIEDRICH NIETZSCHE, THE GAY SCIENCE 33 (Walter Kaufman ed., Random House 1974) (1887).

[217] *See* Rieff, *supra* note 35, at 317.

The first and second worlds address themselves to an ultimate authority. All pagan worlds, whether Native American or Athenian, conceive ultimate authority in a common manner, as "mythic *primacies of possibility* from which derived all agencies of authority, including its god-terms."[218] Rieff's acronym for primacy of possibility is *pop*. He postulates that pagan cultures have virtually vanished, although their aesthetics and *pop* motifs are recycled continuously by the elites of the third world.[219] Second cultures, by contrast, refer to a singular highest authority, from which all other authorities are derived.

In its recycling of fantasy first worlds, the third world is not a true culture. It translates no sacred orders into social orders. Necessarily, this anticulture is a negation of the second world, opposing all the traditions out of Jerusalem, whether Jewish, Catholic, Protestant, or Islamic.[220] These negational truths are artifices, returns of *pop* motifs from better worlds, worlds once colonized, but now colonizing the second worlds.[221] "'A third world does not exist as such.' It is an invention of certain second world elites, 'a euphemism for backwardness and-perhaps—for . . . ideological Blackness.'"[222]

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[218] *Id.* at 319.

[219] Rieff elaborates:

> Faith would there were no more parades, except by honest-to-God pagans; of whom none survive in the West. Sacred history never repeats itself. We live in unmythical, irreversible time. In our late show time, transgressions, eternally so declared, acquire the authentic glitz of endlessly new therapies of liberation from everything that is sacred, even to pagans of whatever mythic imposture.

RIEFF, *supra* note 2, at xi.

[220] *See* Rieff, *supra* note 35, at 319.

[221] *See id.* Professor Rieff informs me that Alexis de Tocqueville first noted this colonizing phenomenon in America and called it by its nineteenth century name, pantheism. *See* 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 32-33 (Phillips Bradley ed., Vintage Books 1945) (1835). The *pop* motif lies in his description of "an immense Being, who alone remains eternal amidst the continual change and ceaseless transformation of all that constitutes him." *Id.* Tocqueville continues: "such a system, although it destroys the individuality of man, or rather because it destroys that individuality, will have secret charms for men living in democracies. . . . Against it all who abide in their attachment to the true greatness of man should combine and struggle." *Id.* at 33. If evolutions in constitutional law are, as Justice Brennan believes, "concomitant of the changes in our society," *see supra* text accompanying note 49, then the Constitution becomes such an "immense Being," a further challenge to Justice Brennan's individualism.

[222] Rieff, *supra* note 35, at 319 (quoting SHIVA NAIPAUL, *The Illusion of the Third World*, *in* AN UNFINISHED JOURNEY 31, 37, 39-40 (1987)).

The task of sacred sociology is the inverse of modern sociology, which incorrectly posits sacred order as a projection of social order.[223] To best understand the emergent third world, as the essentially meaningless disorder it is, is to read it from the perspective of the second world it negates.[224] All readings take place within a culture, and are unavoidable participations in the fight. To read in a value-neutral manner is impossible,[225] and the pretense of so doing amounts to taking the third world side.[226]

The task of culture is to avoid the spiritual abyss of personal primacies of possibility.[227] More simply put, culture inhibits

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[223] Rieff, *supra* note 212, at 37. "God is not a godterm representing Society, however so, heteronomous, the great Emile Durkheim, son and grandson of rabbis on both parental sides, found it. Durkheim's suicide was his Sociology." *Id.* Similarly, the Constitution is not a godterm either, standing in for the American collective, to be venerated for its own sake. *But see* Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 22 (1984) ("From Durkheim's conception of religion to a religion of the Constitution is an easy step."). A rejection of Durkheim's conception requires instead an acknowledgement of the Constitution as a symbolic second cultural address to sacred order.

[224] *See* Philip Rieff, Worlds at War: Illustrations of an Aesthetics of Authority; Toward a Sacred Sociology 8 (1990) (unpublished manuscript, on file with the author). Leo Strauss made a similar claim. "The critique of the present, the critique of modern rationalism, understood as the critique of modern sophistry, is the necessary beginning, the constant accompaniment, and the unmistakable mark of that search for truth which is possible in our age." LEO STRAUSS, PHILOSOPHY AND LAW: ESSAYS TOWARD THE UNDERSTANDING OF MAIMONIDES AND HIS PREDECESSORS 4 (Fred Baumann trans., Jewish Publication Soc'y 1987) (1935) (footnote omitted). Strauss believes medieval rationalism to be superior to modern rationalism since only the former is guided by "the idea of Law." *See id.* at 20.

[225] *See* Rieff, *supra* note 35, at 326. "Neutral principles" is the term in constitutional jurisprudence. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9 (1959). For one still paying this positivistic principle homage, see BORK, *supra* note 29, at 143-60 (asserting that the only legitimate interpretations of the Constitution are politically neutral ones). In First Amendment doctrine the analogue is "content-neutrality," a concept that recent commentators favor or seek to expand. *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 190 (1983); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 617 (1991). For an article criticizing obscenity doctrine on the basis that the First Amendment enshrines neutral principles, such as content neutrality, and not moral judgments, see David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974).

[226] Rieff, *supra* note 35, at 326.

[227] *See* RIEFF, FELLOW TEACHERS, *supra* note 37, at xvi. Sanford Levinson paraphrases this remark of Rieff's in his *Testimonial Privileges and the Preferences of Friendship*, 1984 DUKE L.J. 631, 661, and, more obliquely, refers to "contemporary analysts of culture like Clifford Geertz" who teach us that "*all* aspects of social life are pervaded by decidedly non-neutral assumptions whose acceptance by a member of the culture define what is 'possible' for that person," LEVINSON, *supra* note 18, at 156.

transgression, the enactment of all that is possible. Culture is the answer to a question posed by Justice Brennan's "new jurisprudence;" it "limits [man's] freedom to do whatever he likes."[228] All second culture readings take the form of an address to sacred order and the "vertical in its authority" (*via*), along which one's life is entirely symbolic in its ascents or descents.[229] This vertical is composed of a three-part moral range. All raisings are interdictory; all lowerings are transgressive. The middle range is remissive, constituting that which is not to be done, yet is pardonably done.[230] A society is remissive if it does not punish that which sacred orders prohibit. One way to imagine the third world anticulture is to postulate radical remissiveness as a first principle: *pop* as culture in the *via*'s stead.[231]

One need not look far for examples of *pop* theory, no farther than Justice Brennan and the "new jurisprudence." First, one must know the legal expressions of authority in the three world cultures. First world prohibitions take the form of taboos. Such prohibitions are of unknown origin, have no grounds, yet inspire dread. They are not to be confused with second world interdicts, which are particular commands of the highest absolute authority taking the form "thou shalt not." Third worlds stabilize their social orders, though without reference to a predicate sacred order. Rules and regulations, bureaucratically created, predominate in modern societies.[232]

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[228] *See supra* text accompanying note 62.

[229] *See* RIEFF, FELLOW TEACHERS, *supra* note 37, at xiv.

[230] *See id.* at xvi.

[231] *See* PHILIP RIEFF, *By What Authority? Post-Freudian Reflections on the Repression of the Repressive as Modern Culture*, *in* RIEFF, THE FEELING INTELLECT, *supra* note 37, at 330, 332. Harold Bloom is one critic who has sought to so transform the definition of culture. *See* Harold Bloom, *Reflections on T.S. Eliot*, 8 RARITAN 70, 87 (1988) ("'It is against a background of Christianity that all our thought has significance.' That seems to be the center of Eliot's polemic . . . . The Age of Freud, Kafka, and Proust, of Yeats, Wallace Stevens, Beckett: somehow these thoughts and visions suggest a very different definition than the Eliotic one." (quoting T.S. ELIOT, NOTES TOWARDS THE DEFINITION OF CULTURE 126 (1949)). Richard Rorty builds on this theme by espousing a desacralized Bloomian "poetical culture," whose virtues are embodied in the "revolutionary artist and the revolutionary scientist." RORTY, CONTINGENCY, *supra* note 34, at 53, 61. The authority of the artist and scientist lie in their refusal to recognize limits upon that which is possible. *See* RIEFF, *supra* note 2, at x n.5.

[232] On the relationship and distinctions between interdicts, taboos, and rules, as expressed in a discussion of a debate between Rieff and Foucault on the subject of homosexuality, see Rieff, *supra* note 212, at 37-39, 47 & n.28. For the debate itself, compare *Sexual Choice, Sexual Act: An Interview with Michel Foucault*, SALMAGUNDI, Fall

Justice Brennan insists that he is more interested in "justice" than "abstract rules."[233] By "abstract rules" I understand Justice Brennan to mean legal rules, common law precedents that preserve the particularity of the interdicts or, as Gierke would word it, preserve the "idea of Justice" secured in positive law by the old conception of natural law.[234] Justice Brennan's "justice," like his "passion," are *pop* terms, granting him unmediated access to a mythical legal truth. Legal precedent and reason, those tools once thought necessary to the judicial office, may be disregarded in the service of justice: to better rationalize and expand the modern welfare state, for example.[235] But any jurisprudence that severs

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1982-Winter 1983, at 10 (James O'Higgins trans.) with Philip Rieff, *The Impossible Culture: Wilde as a Modern Prophet*, SALMAGUNDI, Fall 1982-Winter 1983, at 406, *reprinted in* RIEFF, THE FEELING INTELLECT, *supra* note 37, at 273. To summarize the Rieffian framework: First world restrictions on homosexuality were taboos, in the Greek case regulated by a pedagogic eros. Second world prohibitions are of divine ordination, as seen in specific biblical passages. Unlike eros, the law of love as agape subserves divine law, which is absolute. Third world attacks on this second culture interdict take the form of reducing it to a rule, which is to be overridden by *pop* notions of personal liberty and autonomy. Once legitimated by law, homosexual relationships are to be regulated in the manner of heterosexual ones. For examples of this form of debate in legal literature, see Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) ("Like Justice Holmes, I believe that '[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.' . . . we must analyze . . . Hardwick's claim in the light of the values that underlie the constitutional right to privacy." (quoting Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897))); Michael S. Moore, *Sandelian Antiliberalism*, 77 CAL. L. REV. 539, 550 (1989) (arguing that the values of pluralism, tolerance, and autonomy outweigh any "moral badness" of homosexuality, albeit not conclusively).

[233] *See supra* text accompanying note 68.

[234] *See supra* text accompanying notes 111-13. For a contemporary defense of "abstract rules," see Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

[235] Once again, Justice Brennan's favorite example of these ideas, his majority opinion in Goldberg v. Kelly, 397 U.S. 254 (1970), is instructive. *See supra* note 80 and accompanying text. In that case the modern "due process revolution" began. *See* Brennan, *supra* note 77, at 19. Justice Brennan applied the Due Process Clause of the Fourteenth Amendment to the administrative regulations of the New York State welfare system and found them wanting. Welfare benefits became a constitutionally protected property right, rather than a gratuity. *See Goldberg*, 397 U.S. at 262 n.8. Justice Brennan, in his discussion of the case, noted that government regulations dominate an individual's life "'from *before* the cradle to *beyond* the grave.'" Brennan, *supra* note 77, at 18 (quoting JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 12 (1985)). With that social fact Justice Brennan has no quarrel. *See* David Rudenstine, *Justice Brennan, the Constitution, and Modern American Liberalism*, 10 CARDOZO L. REV. 163, 177 (1988). Justice Brennan's only regret is that he contributed to the "formality" of the welfare bureaucracy by his application of the principle of human dignity. *See* Brennan, *supra* note 77, at 22. This is an ironic

its connection to the interdicts, by denying the sacred self that is the basis of identity,[236] even if it aims at beneficence and justice, bears a necessary relationship to transgressive legal regimes.[237]

The import of Rieff's sacred sociology is clear. Constitutional interpretation must, in theory and practice, retain second culture motifs whenever opposed by the rival claims of the third. Otherwise the law is reduced to an empty abstraction that can legitimate any fiction, no matter how transgressive. That is the cultural meaning behind Justice Brennan's excision of references to Judaism and Christianity in 1985.[238] Cultural pluralism, a necessary doctrine

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regret considering the weight Justice Brennan places on Max Weber's theory of modern bureaucracy. *See id.* at 18-19. As Justice Black pointed out in dissent, Justice Brennan entrenched bureaucratic formality in the Constitution, even though "[t]he operation of a welfare state is a new experiment for our Nation." *Goldberg*, 397 U.S. at 279 (Black, J., dissenting).

Concerning bureaucrats, Rieff describes the sociological transformation from second culture to third:

> This is where the second member of the new officer class comes in. Max Weber named him "bureaucrat." Knowing the work of the church historian, Rudolf Sohm, Weber knew that in Western culture the first bureaucrats were those who managed the most helpless members—widows, orphans, the sick, the dead—of the *ecclesia*, sacred order so far as it could be realized charitably in social order. The last bureaucrats are the therapists of our regnant, democratic anticulture. They are the regnant managers of our passionate indifferences, of our moralities at a distance and distinctly ideological in character.

PHILIP RIEFF, *For the Last Time Psychology*, *in* RIEFF, THE FEELING INTELLECT, *supra* note 37, at 357. Until the early nineteenth century, relief for the poor was primarily a responsibility of religious groups, rather than the state. Thereafter, the responsibility shifted. *See* Harold J. Berman, *Religious Freedom and the Challenge of the Modern State*, 39 EMORY L.J. 149, 156-60 (1990). This analysis does not imply easy answers. If traditional intermediary groups such as the church retreat, then the state may have to intervene, despite its inherent inadequacies. Any further examination of Justice Brennan's justifications for *Goldberg* and an expansive role for the state is beyond the scope of this Comment.

[236] For a discussion of highest law and sacred selves, see Rieff, *supra* note 35, at 342-43.

[237] *See* BODENHEIMER, *supra* note 72, at 174-80. In Bodenheimer's schematization, Justice Brennan's jurisprudence would resemble that of the free law movement, "which arose in continental Europe at the beginning of the twentieth century [and] may be viewed as an attempt to put [the] concept of 'a natural law with varying content' into application." *Id.* at 174-75. Bodenheimer, applying Weber, warned that "a justice whose administration is not bound to strict and definite rules, is often linked with an autocratic type of government." *Id.* at 179. Justice Brennan's natural law jurisprudence is implemented through the creation of voluminous rules and regulations. *See supra* note 235. The legal weight given to these rules when a question of "justice" arises then assumes primary importance. *See supra* note 232.

[238] *See supra* text accompanying notes 54 & 63-67.

in the fight against religious bigotry and racism, must draw a line separating all second cultures from the anti-cultural third.[239] The *kulturkampf* continues, but the fight must remain one of words. Rieff stipulates: "The permanent war of the worlds can only be conducted, rightly, in conditions of social peace and cultural pluralism."[240] The alternative, a violent war of the culture classes, must not be encouraged by our constitutional law, least of all by the freedom of speech.[241]

II. JUSTICE BRENNAN'S READING OF THE FREEDOM OF SPEECH: FROM SECOND CULTURE TO THIRD

Much theoretical groundwork completed, it is time to return to the Constitution and the jurisprudence of Justice Brennan. For a preliminary analysis of First Amendment theory and obscenity, however, I will defer to Philip Rieff's analysis of the field. Buried in a portion of a lengthy footnote in a work far afield from constitutional theory, it is an analysis unnoticed by legal scholars, though it supersedes the volumes of law reviews on the same subject.

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[239] For the only response I know of to the argument that the fight against discrimination requires a wholly new legal scholarship of inclusion, see Rieff, *supra* note 35, at 346-48.

On the purveyors of multiculturalism, a cultural pluralism that includes all, except a culture of limits, and the transgressiveness of their fictions, see Nietzsche:

> I adventured too far into the future: horror seized upon me.
>
> . . . .
>
> All eras, all peoples, peer multi-coloured through your veils; all customs and beliefs speak multi-coloured in your gestures.
>
> . . . .
>
> Nay, but how could ye believe, ye motley ones—ye that are compound pictures of all that hath ever been believed!
>
> Ye are walking refutations of belief itself, and a dislocation of all the limbs of thought. *Untrustworthy*—thus I name you, ye realists!
>
> . . . .
>
> Half-open doors are ye, whereat grave-diggers wait. And this is *your* reality: "All things are worthy to perish."

FRIEDRICH W. NIETZSCHE, THUS SPAKE ZARATHUSTRA 109-10 (Alexander Tille trans., 1958) (1883).

[240] Rieff, *supra* note 224, at 61.

[241] As Bodenheimer wrote: "A constitutional clause guaranteeing freedom of speech and press, might be held, under a permissible latitude of interpretation, not to sanction . . . statements apt to divide the nation into hostile and warring camps, such as incitements to racial or religious hatred and strife." EDGAR BODENHEIMER, JURISPRUDENCE 409-10 (rev. ed. 1974)

In obscenity, the first point of discussion is the question of censorship, no matter how judges hate to have that authoritarian term affixed to the constitutional act of adjudication.[242]

> [W]e are obliged to reopen the question of censorship—not only by inquiring further into *sex/violence* but, equally important, into the new *media/message* of representation. . . . Exactly and massively reproducible visual actings-out of a printed page are stimuli in which aesthetic merit and obscene effect may become one and the same; the damage is *in* the viewable act, not merely after it. We viewers are lowered; so, too, are the actors. To discriminate between what is permitted and what is censorable in mass media, we cannot assimilate those media to works of art and books, which cannot be seen in a public darkness.[243]

Assuming that *United States v. One Book Called "Ulysses"*[244] is distinguishable from nonliterary obscenity cases,[245] we ask the second question: what is the import of the First Amendment?

> We scholars have no choice except to reexamine, as well, the meaning of even such apparent clarities on behalf of our infinite privileges as that in our national charter, the Constitution—on freedom of speech. . . . The culture in which the fathers made it clear that freedom of speech was not to be abridged was itself patently interdictory and the character generated in that culture was severely inhibited. Are we members in that same character, generated in that self-same culture? Does our sacred document

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[242] Justice Brennan takes the greatest umbrage at the word. "Nor can we understand why the Court's performance of its constitutional and judicial function in this sort of case should be denigrated by such epithets as 'censor' or 'super-censor.'" Jacobellis v. Ohio, 378 U.S. 184, 190 (1964). Later in his career, Justice Brennan resorted to the same epithet: "A given word may have a unique capacity to capsule an idea, evoke an emotion, or conjure up an image. Indeed, for those of us who place an appropriately high value on our cherished First Amendment rights, the word 'censor' is such a word." FCC v. Pacifica Foundation, 438 U.S. 726, 773 (1978) (Brennan, J., dissenting).

[243] RIEFF, FELLOW TEACHERS, *supra* note 37, at 158 n.103.

[244] 5 F. Supp. 182 (S.D.N.Y. 1933) (holding that Joyce's *Ulysses* is not obscene), *aff'd*, 72 F.2d 705 (2d Cir. 1934).

[245] Censorship of literature is no longer a hotly disputed issue in American society or in obscenity doctrine. *See* CHARLES REMBAR, THE END OF OBSCENITY (1968). The unfettered publication of Henry Miller's works, among others, did require a substantial modification in obscenity doctrine. *See id.* at 493. What it did not require is the repudiation of the constitutionality of all obscenity laws. Justice Brennan's repudiation came later, in service of less accomplished nonliterary artists. *See infra* notes 274-85 and accompanying text.

> address those among us who use four-letter words, of which 'Fire' may not be the 'relevant' example?[246]

Lest one think that the words of the Constitution are not binding upon our society, or that originalism is the appropriate inquiry, the third question is how the First Amendment should be interpreted.

> The question is not precisely what the fathers had in mind: rather, in that cultural document, what territories of mindful conduct shall be protected from initiatives that take away those protections? 'Freedom' can be a cover word for an unprecedented vulnerability. In that case, "no law" takes on a double meaning. Freedom conceals limits that cannot be abridged, through the remissions granted in that word, into its contrary, limitlessness. Our Constitution is a charter of limits. Only so are there freedoms which it protects; only so, in its limiting character, upon even our freedom of speech (limited, as I have implied earlier, for our safety and common civility), is the Constitution interpretable as a sacred document—*within*, not outside, its culture.[247]

A second culture interpretation of the Constitution, one affirming the sacred element of the document, permits the censorship of obscenity to subserve the freedom of speech. Justice Brennan so interpreted the First Amendment in *Roth v. United States*.[248]

A. *A Study in Cultural History:* Roth v. United States

As mentioned previously, one early commentator remarked that Justice Brennan's majority opinion in *Roth* was wholly consistent with Catholic teaching, and that Catholics, therefore, needed not doubt Justice Brennan's loyalty to his religion, however he expressed it in his confirmation hearings.[249] Justice Brennan grounded the opinion religiously and historically, so that any deviations from the traditional test for obscenity are of only minor cultural consequence.[250]

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[246] RIEFF, FELLOW TEACHERS, *supra* note 37, at 158 n.103.

[247] *Id.* at 158-59 n.103; *see also* ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 72 (1975) ("This sort of speech constitutes an assault. More, and equally important, it may create a climate, an environment in which conduct and actions that were not possible before become possible."); Hadley Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 SUP. CT. REV. 281.

[248] 354 U.S. 476 (1957).

[249] *See supra* notes 15-18 and accompanying text.

[250] *But see* John M. Finnis, *"Reason and Passion": The Constitutional Dialectic of Free*

In *Roth*, the constitutional question was whether a federal criminal obscenity statute violated the protections of speech and press found in the First Amendment.[251] No issue was presented concerning the obscenity of the material involved.[252] Justice Brennan began his analysis by noting that although the question was a first for the Court, many previous decisions had assumed that obscenity was not protected speech.[253] To delimit the concept of free expression, Justice Brennan cited numerous blasphemy and profanity statutes enacted in all fourteen states that had ratified the Constitution by 1792.[254] He paid special attention to a 1712 Massachusetts law that "made it criminal to publish 'any filthy, obscene, or profane song, pamphlet, libel or mock sermon' in imitation or mimicking of religious services."[255] Justice Brennan concluded: "Thus, profanity and obscenity were related offenses."[256]

This historical argument led Justice Brennan to reason that the purpose of the First Amendment, to assure the free interchange of ideas no matter how unorthodox, is not implicated by the validity of obscenity statutes.[257] Obscenity conveys something, "[b]ut implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."[258]

Speech and Obscenity, 116 U. PA. L. REV. 222, 224 (1967). Finnis notes that *Roth* departs from the traditional common law test for obscenity, that which has a tendency to "deprave and corrupt." *See id.* (citing Regina v. Hicklin, 3 L.R.-Q.B. 360, 371 (1868)). *Roth* instead used the "appealing to prurient interest" test. *See Roth*, 354 U.S. at 487. Finnis believes that in dropping the *Hicklin* test, the *Roth* Court rejected a religious foundation for obscenity in favor of an aesthetic standard that excludes passions, emotions, and desires. *See* Finnis, *supra*, at 224. This reading requires a tremendous abstraction of the opinion's manifestly moral, as opposed to aesthetic, emphasis.

[251] *See Roth*, 354 U.S. at 479. In a companion case, Alberts v. California, 354 U.S. 476 (1957), the question was "whether the obscenity provisions of the California Penal Code invade[d] the freedoms of speech and press as they [are] incorporated in the liberty protected from state action by the Due Process Clause of the Fourteenth Amendment." *Roth*, 354 U.S. at 479-80 (footnote omitted). The constitutional analysis of the two statutes by Justice Brennan and the other Justices, except Justice Harlan, was identical.

[252] *See Roth*, 354 U.S. at 481 n.8.

[253] *See id.* at 481.

[254] *See id.* at 482 n.12.

[255] *Id.* at 483 (citing Act of Mar. 12, 1712, ch. 1, § 8, *in* ACTS AND LAWS OF HIS MAJESTY'S PROVINCE OF THE MASSACHUSETTS BAY IN NEW ENGLAND 183, 186 (Samuel Kneeland & Timothy Green, Boston 1742)).

[256] *Id.*

[257] *See id.* at 484.

[258] *Id.*

Obscenity's relation to the exposition of ideas is not "essential" and any benefit derived from it is "'*clearly outweighed by the social interest in order and morality*.'"[259] That "obscenity should be restrained" is not simply a personal opinion; it is a "universal judgment."[260] An international agreement, numerous federal statutes, and legal precedent are all evidence of that judgment.[261]

In fashioning an obscenity standard, Justice Brennan noted that the fundamental freedoms of speech and press, though indispensable, must be circumscribed "to prevent encroachment upon more important interests."[262] Here is the limiting character of culture, present and controlling in a discussion of freedom.[263] Justice Brennan is careful to note that he is not altering existing American precedent in constructing his obscenity standard.[264] The trial judge's charge to the jury, that they act as the "common conscience of the community" in testing whether the material taken as a whole "would arouse sexual desires or sexual impure thoughts" was undisturbed.[265] That jury charge, and Justice Brennan's acceptance of it, can be seen as a synthesis of Gierke's theory of law as the positive expression of intermediary groups and Troeltsch's imperative for a new Christian ethic, both second culture theories in the Rieffian framework.

One commentator grasped the importance of *Roth*, recognizing the central issue in the case to be "whether the state may suppress expression it deems immoral."[266] There being no assumption that obscene speech will incite any action, it is prohibited solely because of "aspirations to holiness and propriety."[267] "Obscenity,

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[259] *Id.* at 485 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)) (emphasis added in *Roth*).

[260] *Id.*

[261] *See id.*

[262] *Id.* at 488.

[263] *See supra* text accompanying note 247.

[264] *See Roth*, 354 U.S. at 489. *Hicklin*, *see supra* note 250, allowed isolated excerpts of material to be judged by its effect upon particularly susceptible persons, while *Roth* adopted an "average person, applying contemporary community standards" test in an assessment of the "dominant theme" of the material. *Roth*, 354 U.S. at 488-89. For a thorough analysis of the state of obscenity law shortly before *Roth*, see William B. Lockhart & Robert C. McClure, *Literature, The Law of Obscenity, and the Constitution*, 38 MINN. L. REV. 295 (1954).

[265] *Roth*, 354 U.S. at 489-90.

[266] Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 392 (1963).

[267] *Id.* at 393.

at bottom, is not crime. Obscenity is sin."[268] Characterizing obscenity laws as 'morals legislation' clarifies the cultural issue. This commentator knew that a reassessment of the constitutional validity of *Roth* turned on a recognition of its historical and religious foundations.[269] In 1963, he thought it "novel" to argue that "private indulgence obscenity laws may raise serious questions of liberty and privacy."[270] Ten years later, Justice Brennan reached the same conclusion.[271]

B. *Rejecting the Religious Rationale:* Paris Adult Theatre I v. Slaton

After *Roth*, Justice Brennan and the Supreme Court began a tortured quest to define obscenity.[272] *Roth* itself proved a durable precedent, for majorities continue to accept the premise that obscenity, whatever it is, falls outside the parameters of the First Amendment.[273] Not until 1973, sixteen years after *Roth*, did

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[268] *Id.* at 395.

[269] *See id.* at 407-11. Henkin asked "whether legislation that is based on a particular religion, even on what is common to many religions, on what is supported by history only, on what is not capable of reasoned consideration and solution, is rendered unto government by the Constitution." *Id.* at 411. This question is close to mine: whether a second culture Constitution can sanction third culture constitutional law. These questions, as Henkin recognized, are distinct from the debate between Professor Hart and Lord Devlin. *See id.* at 414; *supra* note 44. As the present controversy over anti-pornography laws illustrates, one can be a legal moralist regarding third culture morality, while rejecting second culture legal moralism.

> Because obscenity does not receive first amendment protection, it is tempting to propose that anti-pornography statutes ban only those materials that can be constitutionally classified as obscene. But obscenity's legal meaning is imbued with concepts of puritanical distaste for sexuality, and these notions impede the conversion of obscenity law into an effective vehicle for advancing women's civil rights. If pornography were attacked through reliance on current obscenity laws, a central purpose of the anti-pornography movement would be negated.

Note, *Anti-Pornography Laws and First Amendment Values*, 98 HARV. L. REV. 460, 466 (1984) (footnote omitted).

[270] Henkin, *supra* note 266, at 412.

[271] *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 109 & n.27 (Brennan, J., dissenting) (citing Henkin, *supra* note 266, at 395).

[272] For an overview of the modifications in obscenity law from *Roth* through *Paris Adult*, see GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1203-33 (2d ed. 1991).

[273] The present standard for obscenity was laid down in Miller v. California, 413 U.S. 15, 24 (1973) (defining as obscene "works, which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political or scientific value").

Justice Brennan, dissenting in *Paris Adult*, depart from that proposition.[274] In the main text of *Paris Adult* Justice Brennan did not attack *Roth*'s central premise that a class of obscene material exists which may be totally suppressed by government.[275] He rested his decision on the belief that the Court's failure to reach a consensus regarding the definition of obscenity created a constitutionally impermissible level of vagueness in the law.[276]

Footnote nine of Justice Brennan's dissent in *Paris Adult*, however, reveals the *kulturkampf* in Justice Brennan's constitutional theory. Gone are the resonances in *Roth* of Gierke's notion of the binding expression of the local community and Troeltsch's imperative for a new Christian ethic. In that footnote, Justice Brennan announced that he was "now inclined to agree that 'the Constitution protects the right to receive information and ideas,' and that '[t]his right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society.'"[277] Citing *Griswold v. Connecticut*[278] and its progeny, Justice Brennan recognized "intertwining rights" that called into question the validity of *Roth*.[279] Justice Brennan summarized: "[I]f a person has the right to receive information without regard to its social worth—that is, without regard to its obscenity—then it would seem to follow that a State could not constitutionally punish one who undertakes to provide this information to a *willing, adult recipient*."[280] Apart from the caveats of adulthood and willingness, the moral limits inherent in freedom of speech disappear.

In Rieffian terms, "information and ideas" are *pop* motifs, limitless yet fundamental to Justice Brennan's First Amendment theory.[281] They cannot be judged, nor constitutionally punished. Obscenity has a precise meaning in second culture; it lowers one in the *via*[282] by its appeal to transgressive thoughts, themselves related to particular sexual interdicts.[283] The two films in ques-

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[274] Due to its durability, *Roth* cannot be dismissed easily as a "freshman's efforts," *see* Fein et al., *supra* note 3, at 58, even if present-day admirers of Justice Brennan are embarrassed by its content.

[275] *See Paris Adult*, 413 U.S. at 85-86 n.9 (Brennan, J., dissenting).

[276] *See id.* at 103.

[277] *Id.* at 85 n.9 (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969)).

[278] 381 U.S. 479 (1965).

[279] *See Paris Adult*, 413 U.S. at 86 n.9 (Brennan, J., dissenting).

[280] *Id.*

[281] *See supra* notes 218-37 and accompanying text.

[282] *See supra* notes 227-31 and accompanying text.

[283] Justice Brennan has discussed the tension between the theologian's definition

tion, *Magic Mirror* and *It All Comes Out in the End*, depicted "scenes of simulated fellatio, cunnilingus, and group sex intercourse," in the words of the majority, and "hard core pornography" which left "little to the imagination," in the words of the Georgia Supreme Court.[284] Justice Brennan abstracts these images into "information and ideas,"[285] and according to his radically remissive Constitution, states cannot legislate about such matters.

What else cannot be constitutionally punished and why? Surely not abortion, for Justice Brennan describes it, like obscenity, as "predicated on unprovable, although strongly held, assumptions about human behavior, morality, sex, and religion."[286] In second cultures, sodomy, adultery, sadomasochism, and incest fall into that grouping, as does sexual harassment and rape. If those interdicts are merely assumptions, what interdicts are not? None, not even murder, in the third culture.[287] Though Justice Brennan reasons that states retain the power to regulate the morals of the community,[288] as apart from the health, safety, and general welfare, his list of legislation that is at least partially grounded in morality,

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and understanding of obscenity:

> [I]t must in turn be admitted that theologians themselves have not provided a precise definition of obscenity even for their own purposes. . . . "To the theologian . . . there exists no compelling reason to search for a precise definition of the term, for he is primarily concerned with pointing out the dangers inherent in exposing one's self to the type of material one finds particularly stimulating to the sexual appetite."

Brennan, *supra* note 17, at 6 (quoting M.C. Slough & P.D. McAnany, *Obscenity and Constitutional Freedom–Part II*, 8 ST. LOUIS U. L.J. 449, 455 n.320 (1964)).

[284] *Paris Adult*, 413 U.S. at 52.

[285] For a similar critique of the tenuousness and abstractness of modern liberal constitutional reasoning, see Hittinger, *supra* note 193, at 487-99.

[286] *Paris Adult*, 413 U.S. at 109 (Brennan, J., dissenting).

[287] Ronald Dworkin's recent writings confirm the implications of Justice Brennan's reasoning. Arguing that euthanasia is constitutionally protected, Dworkin writes that the idea that human life has intrinsic value cannot be grounded on "religious doctrine" and be constitutional. *See* Ronald Dworkin, *The Right to Death*, 38 N.Y. REV. BOOKS, Jan. 31, 1991, at 14, 17. A legitimate, secular account of the value of life is based on the idea that life "go well" rather than "bad" and be "successful," not "wasted." *Id.* By this standard, euthanasia is justified in certain cases. *Id.* In a lecture delivered at the University of Pennsylvania, entitled "The Sanctity of Life," (Oct. 22, 1990), Dworkin expanded his views. He said that there is a sense of "cosmic shame" when a flourishing life is cut off, and that no law can be based on the first premise "thou shalt not" and be constitutional. "Cosmic shame" instead of "thou shalt not": a perfect example of constitutional law being emptied out of second culture meaning and filled in with third culture unmeaning. Where Mosaic Law was, there New Age Aristotelianism will be.

[288] *Paris Adult*, 413 U.S. at 108-09 (Brennan, J., dissenting).

"compulsory public education laws, civil rights laws, even the abolition of capital punishment,"[289] does not refer to any specific second culture interdicts.

Justice Brennan's "independent" First Amendment check on obscenity, and other similar transgressions whatever they may be, is empirical proof that exposure to it causes violent crime.[290] Interdictory authority is removed from his First Amendment analysis. As MacIntyre and Rieff know, and Troeltsch all but prophesied, once the connection between God and man is severed, only therapy will restore psychological and social order. A violent order it will be, since therapy, unlike freedom, recognizes no interior limits upon transgression. Rieff writes: "Therapy is to transgression as theology was to prohibition: inseparable."[291] After *Paris Adult*, even children and unconsenting adults are not spared this theoretical move.[292]

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[289] *Id.*

[290] *See id.* at 107-08 & n.26. Perhaps a Brandeis brief may be sufficient to translate sacred order into social order.

[291] Rieff, *supra* note 35, at 325. Current First Amendment theories attack interdictory authority to serve the third culture ideal of therapy. *See* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 81 (1989) ("General prohibitions [are usually unconstitutional abridgements of freedom of speech because they] restrict expressive conduct that operates noncoercively to advance self-fulfillment and popular participation in change."). Pierre Schlag recognizes similar attributes in Lee Bollinger's "Tolerance Theory." *See* Pierre Schlag, *Freedom of Speech as Therapy*, 34 U.C.L.A. L. REV. 265, 265 (1986) (reviewing LEE BOLLINGER, THE TOLERANT SOCIETY (1986)) ("[T]he 'Tolerance Theory' is grounded in the therapeutic model of law: for Bollinger, freedom of speech should be viewed as a type of social therapy."). Although Baker and Bollinger would not condone violence, the question is whether their theories, if enacted into law, would check it or facilitate it.

> Violence is the therapy of therapies . . . . There is less and less to inhibit this final therapy, least where the most progressively re-educated classes seem ready to go beyond their old hope of deliverance, from violence as the last desperate disciplinary means built into the interdicts, as punishment, to violence as a means toward a saving indiscipline, as self-expression.

RIEFF, FELLOW TEACHERS, *supra* note 37, at 50.

[292] Justice Brennan left these questions for another time, although he spoke of "our emerging view that the state interests in protecting children and in protecting unconsenting adults *may* stand on a different footing from the other asserted state interests." *Paris Adult*, 413 U.S. at 106 (Brennan, J., dissenting) (emphasis added).

C. *Applying the Sociology of the Third Culture:* FCC v. Pacifica Foundation

In *FCC v. Pacifica Foundation*[293] the Court held that an administrative agency has the authority to prohibit from afternoon broadcast a comedy routine of George Carlin's that featured seven particular words: shit, piss, fuck, cunt, cocksucker, motherfucker, and tits.[294] Two distinctly moral reasons were provided by the Court: the protection of unconsenting adults and children.[295] The family, the most fundamental of intermediary groups, was being protected from external assault.[296] Justice Brennan did not find these reasons, or these words, dispositive.[297] Although he defend-

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[293] 438 U.S. 726 (1978).

[294] *See Pacifica*, 438 U.S. at 750-51. "I was thinking about the curse words and the swear words, the cuss words and the words that you can't say, that you're not supposed to say all the time . . . the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever," said George Carlin in his comedy routine "Filthy Words," the subject of this case. *Id.* at 751 (Appendix to Opinion of the Court). The words themselves convey the meaning of this case far better than the categories "obscene speech," "offensive speech," or "indecent speech." The distinction here is meaningless, because at issue are the specific words believed to possess the maximal effect. In Carlin's estimation, no words are more obscene, offensive, or indecent. For a discussion of the category offensive speech, see Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 292-96 (1981).

Legal categories have a tendency to take on a life of their own, too readily abstracted from the facts at hand. *See* Robert F. Nagel, *How Useful is Judicial Review in Free Speech Cases?*, 69 CORNELL L. REV. 302, 333 (1984) ("It is not a sign of any dangerousness in the culture, but of the awkwardness of legal thinking that the public should not easily understand a Supreme Court decision involving 'nonobscene' pornographic pictures of children."); *cf.* Frederick Schauer, *Harry Kalven and the Perils of Particularism*, 56 U. CHI. L. REV. 397, 397 (1989) (reviewing HARRY KALVEN, A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA (1988)):

> To understand the First Amendment is to understand the process of abstraction. Nazis become political speakers, profit maximizing purveyors of sexually explicit material become proponents of an alternative vision of social existence, glorifiers of sexual violence against women become advocates of a point of view, quiet residential streets become public forums, and negligently false harmful statements about private matters become part of a robust debate about issues of public importance.

[295] *See Pacifica*, 438 U.S. at 748-50.

[296] One commentator, hostile to the majority's view, nevertheless believes that the protection of parental prerogatives in the raising of a child is the best argument for regulation. *See* Harold Quadres, *The Applicability of Content-Based Time, Place, and Manner Regulations to Offensive Language: The Burger Decade*, 21 SANTA CLARA L. REV. 995, 1033 (1981).

[297] *See Pacifica*, 438 U.S. at 770 (Brennan, J., dissenting). In a matter of principle, no interest, no matter how compelling, is sufficiently compelling. *Pacifica* presents

ed his decision by appealing to the prerogatives of individual families, Justice Brennan's rationale—that some parents would think it "healthy" to expose their children to the breaking of the "taboo" against uttering the so-called "'dirty words.'"[298]—is not Gierkean since it is therapeutic and not creedal.[299]

Pacifica represents the clean break from *Roth* that Justice Brennan alluded to in *Paris Adult*. To Justice Brennan, the Constitution does not speak for, and the Court cannot censor on behalf of, any particular culture or aggregation of Gierkean group-persons. "[C]ultural pluralism" should govern, not "acute ethnocentric myopia."[300] Having demanded in *Paris Adult* scientific proof for the truths of second culture, Justice Brennan in *Pacifica* is satisfied with the evidence legitimating the third, as a matter of constitutional law.[301] *Pacifica*'s facts and Justice Brennan's reasoning bear this out.

George Carlin does not seem to have chosen the original number of unspeakable words arbitrarily. "I have to figure out which ones you couldn't and ever and it came down to seven but the list is open to amendment, and in fact, has been changed . . . ."[302] Seven is a sacred number in second cultures, seen not only in the seven deadly sins. According to the sacred text of second cultures, in seven days the world was created. Carlin was not the first to recognize (whether or not he recognized it at all) that seven is, therefore, a significant number in the creation of the third world. The great modernist, James Joyce, thought of seven far subtler words to parody the second world's creation and inaugurate

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the question of profanity in its most extreme form, whether any claims of context or competing rights control the question of content. *But see* Daniel A. Farber, *Civilizing Public Discourse: An Essay on Professor Bickel, Justice Harlan, and the Enduring Significance of* Cohen v. California, 1980 DUKE L.J. 283, 294 (arguing that *Cohen* presents the central issue of content, while *Pacifica* presents only the subsidiary issue of context). Justice Brennan's opinion addresses the central question squarely, and within a cultural framework alien to Professor Bickel and Justice Harlan.

[298] *Pacifica*, 438 U.S. at 770 (Brennan, J., dissenting).

[299] *See supra* text accompanying notes 140 & 180.

[300] *Pacifica*, 438 U.S. at 775 (Brennan, J., dissenting).

[301] *Cf.* Thomas G. Krattenmaker & L.A. Powe, Jr., *Televised Violence: First Amendment Principles and Social Science Theory*, 64 VA. L. REV. 1123 (1978). Krattenmaker and Powe find the sociological evidence behind government regulation wanting and both the majority opinion in *Pacifica* and the sociological approach to First Amendment jurisprudence dangerous. But more dangerous is adopting the latest antinomian sociological theory as a justification for an expansive First Amendment.

[302] *Pacifica*, 438 U.S. at 751.

the third: "Let there be fight? And there was."[303] "And there is," adds Rieff.[304] That fight is the *kulturkampf*, a continuing war in which *Pacifica* is only a skirmish.[305]

On the heels of Joyce's first seven words follow the seven last words of the *kulturkampf*: "Foght. On the site of the Angel's . . . ."[306] The *kulturkampf* is fought on territory that once belonged to the second world. As Justice Brennan recognized, his "new jurisprudence" is reclaiming cultural territory that the law ceded when it isolated itself from theology.[307] Justice Brennan's progression from *Roth* to *Paris Adult* to *Pacifica* is symbolic of the second culture ceding the Constitution, our nation's sacred document, to the third. At first, Justice Brennan is on the side of the angels, then he banishes them, and finally he builds a juridical structure upon a countervailing sociological principle to ward them off.

Thematically, Carlin's seven words are merely a crude example of Joyce's last seven. As suggested by Rieff, and by the noted *Ulysses* decision,[308] Joyce and the latest profanity or erotica need not be treated identically under the First Amendment. Yet Justice Brennan sees no way to discriminate amongst art,[309] especially by the judiciary,[310] while he trusts the public's ability to do so.[311] Either

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[303] JAMES JOYCE, FINNEGAN'S WAKE 90 (rev. ed. 1958), *quoted in* Rieff, *supra* note 35, at 316.

[304] Rieff, *supra* note 35, at 316. Joyce is, to Rieff, the leading artist of modernity because he expresses this sociological truth so subtly and concisely. *See id.*

[305] *Cf.* MACINTYRE, *supra* note 1, at 253 ("What this brings out is that modern politics cannot be a matter of genuine moral consensus. And it is not. Modern politics is civil war carried on by other means, and *Bakke* was an engagement whose antecedents were Gettysburg and Shiloh."). Unlike the Civil War, the *kulturkampf* is not a war in which both sides pray to the same God. Neither is it a war between North and South, man and woman, or black and white. *Pacifica*'s antecedents, Joyce and *Griswold*, are, like the third culture itself, largely unprecedented.

[306] JOYCE, *supra* note 303, at 90, *quoted in* Rieff, *supra* note 35, at 318.

[307] *See supra* notes 55-72.

[308] *See supra* notes 243-45 and accompanying text.

[309] Justice Brennan writes:

> The rationales could justify the banning from radio of a myriad of literary works, novels, poems, and plays by the likes of Shakespeare, Joyce, Hemingway, Ben Jonson, Henry Fielding, Robert Burns, and Chaucer . . . and they could even provide the basis for imposing sanctions for the broadcast of certain portions of the Bible.

Pacifica, 438 U.S. at 771 (Brennan, J., dissenting).

[310] *See id.* at 771-72. Justice Brennan maintains this position "even accepting that this case is limited to its facts." *Id.* at 771.

[311] *See id.* On this point, see Nagel, *supra* note 294, at 332-33 ("It is doubtful that a society that has internalized the level of self-doubt taught by the judiciary could

Justice Brennan is retreating from his conviction that even the hardest social questions are the responsibility of the courts,[312] or he means this decision to be an exercise of cultural judgment. So the question returns: on whose behalf does Justice Brennan speak?

The simple answer is that Justice Brennan speaks for an anticulture, third world culture, though he uses a slightly different word:

> The words that the Court and the Commission find so unpalatable may be the stuff of everyday conversations in some, if not many, of the innumerable subcultures that compose this Nation. Academic research indicates that this is indeed the case. See B. Jackson, "Get Your Ass in the Water and Swim Like Me" (1974); J. Dillard, Black English (1972); W. Labov, Language in the Inner City: Studies in the Black English Vernacular (1972). As one researcher concluded, "words generally considered obscene like 'bullshit' and 'fuck' are considered neither obscene nor derogatory in the [black] vernacular except in particular contextual situations and when used with certain intonations." C. Bins, "Toward an Ethnography of Contemporary African American Oral Poetry," Language and Linguistics Working Papers No. 5, p. 82 (Georgetown Univ. Press 1972). Cf. *Keefe v. Geanakos*, 418 F. 2d 359, 361 (CA1 1969) (finding the use of the word "motherfucker" commonplace among young radicals and protesters).[313]

Here the jurisprudence of *Brown v. Board of Education*[314] is turned on its head and "separate but equal" returns with a vengeance. 'Blackness' is now a distinct "subculture," which may be isolated, preserved, celebrated, but not judged. Though Justice Brennan's reasoning would allow truly equal broadcast rights to "black English vernacular," there can be no integration of that vernacular, or Carlin's monologue, and a prescriptive grammar. Allied with the "inner city" blacks are the "young radicals and protesters," satirists like Carlin, and Justice Brennan. These "subcultures" *are* third world culture, a reconstituted cultural class of distinct anti-second culture elements comprising no true intermediary group in the Gierkean sense. "Subcultures" are a recycling of Gierkean group theory in its fictive form: truly "an invention of certain second

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make the kinds of elementary judgments of degree, context, and proportion that make vigorous public debate tolerable or desirable.").

[312] *See supra* note 41 and accompanying text.

[313] *Pacifica*, 438 U.S. at 776 (Brennan, J., dissenting).

[314] 347 U.S. 483 (1954).

world elites, 'a euphemism for backwardness and-perhaps-for . . . ideological Blackness.'"[315]

Only certain second world elites are implicated and race itself is not a qualification. "Academic research" will not discover the commonplace use of "motherfucker" in the oratory of Dr. Martin Luther King, for example. The search for identifiable "subcultures" is nothing more than a field study of the culturally impoverished, the uninhibited, and thus transgressive.[316] Will "academic researchers" examine next the vernacular in use on death row, that distinct subculture comprised of those sentenced according to that second culture interdict, the sixth commandment?[317] Would Justice Brennan cite that study as well?

Justice Brennan recognized the significance of culture in *Pacifica*. "In this context, the Court's decision may be seen for what, in the broader perspective, it really is: another of the dominant culture's inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting, and speaking."[318] Justice Brennan is exactly right. Those "inevitable efforts" are what culture is, even when the cultured are in the

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[315] *See supra* text accompanying note 222.

[316] As one sociologist who studied and admired the "subculture" of the British punk rock movement theorized:

> Notions concerning the sanctity of language are intimately bound up with ideas of social order. . . .
>
> . . . Similarly, spectacular subcultures express forbidden contents (consciousness of class, consciousness of difference) in forbidden forms (transgressions of sartorial and behavioural codes, law breaking, etc.). They are profane articulations, and they are often and significantly defined as 'unnatural.'

DICK HEBDIGE, SUBCULTURE: THE MEANING OF STYLE 91-92 (1979). A shame that *Pacifica* predated the latest in fashionable sociology. By referring to the interdict as a "taboo" Justice Brennan fudges the issue of the sanctity of language and the transgressiveness of profanity. *See Pacifica*, 438 U.S. at 770 (Brennan, J., dissenting); *supra* note 232 and accompanying text. Hebdige's description applies equally well to the "subculture" of rap music, which in notable cases is characterized by its profanity and glorification of criminality. *See, e.g.*, N.W.A., "____ *tha Police*," *on* STRAIGHT OUTTA COMPTON (Priority Records 1988) ("N.W.A." stands for "niggers with attitude").

[317] *See Exodus* 20:13.

[318] *Pacifica*, 438 U.S. at 777 (Brennan, J., dissenting). One commentator has a similar perspective: "[The FCC] has implicitly adopted a point of view. It has asserted that these particular words are harmful and in fact pose the very dangers that Carlin's message professed to denounce." Quadres, *supra* note 296, at 1038. The question is not whether bureaucracies have a point of view, so much as it is what point of view a given bureaucracy has. *Pacifica*, like *Goldberg*, is partly about the *kulturkampf* within the apparatus of the state. *See supra* note 235.

minority. The equally inevitable resistance against those efforts by anticultures seeking the sanction of law *is* the *kulturkampf*. The only questions are who and what will prevail. Will it be the messengers of sacred limits and the commanding truths they mediate or will it be the advocates of expressive ideologies and the profanations they offer as our third world?

Drawing on Justice Brennan's post-*Pacifica* opinions, one commentator writes: "[Justice Brennan's] thought is anything but hostile to insurgent or critical-cultural pluralism. His thought is, however, consistently unfriendly to *enactment as law* of the particularist values, cultures, and visionary ambitions of social groups."[319] Third culture lawyers will not be restrained by that distinction, even though they desire the "enactment as law" of many "particularist values" following the abolition of contrary laws. After *Pacifica* comes the implementation of laws consonant with the "subculture" of rap music: accreditation policies mandating law faculty "diversity" and the enactment of regulations permitting Afro-centric curricula and Afro-centric schools.[320] Perhaps third world pedagogy will civilize the inner cities more successfully than would constitutionalizing civility. But will it produce a more "united nation"[321] and is it the necessary legacy of our Constitution and *Brown v. Board of Education*?[322] Thinking, acting, speaking and the Constitution itself are all disputed territory in the *kulturkampf*. One battlefield is the freedom of speech.

CONCLUSION

Justice Brennan's importance cannot be overestimated. His jurisprudence allowed him to confront the central event of our time: *kulturkampf*. In that struggle Justice Brennan was never a neutral party; he never pretended to be above the fight. At various points in his career he was an eloquent spokesman for both typological camps, each of which can find in his opinions glimpses of more

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[319] Michelman, *supra* note 4, at 1326.

[320] For an essay "On Diversity" by the current president of the Modern Language Association arguing that the teaching of African American rap music is the appropriate response to a putative crisis in the humanities, see Houston A. Baker, Jr., *Whose 'Crisis' is it Anyway*, THE PA. GAZETTE, Dec. 1989, at 24. My response to that essay is printed in THE PA. GAZETTE, Apr. 1990, at 4. *See also supra* note 316.

[321] *See supra* text accompanying note 51.

[322] The most historically comprehensive response to the "demand for *diversity!*" is Paul D. Carrington's One Law (Oct. 12, 1991) (unpublished manuscript, on file with the author).

comprehensive theories. Jurisprudentially, Justice Brennan scarcely wavered. His speech in 1965 reflected the doctrine of *Roth*, while an almost identical speech in 1985 argued the premises of *Pacifica* with force. What changed was society itself. Cultural pluralism had one meaning when Justice Brennan ascended to the bench and a far different one when he retired.

At stake is a choice between worlds. The Constitution can be read against a background of either commanding truths or therapeutic fictions. So much is clear in the transition from *Roth* to *Pacifica*. Those opinions speak to more than speech. They explain *Brown*, *Griswold*, *Roe*, *Bowers*, and many less celebrated cases. Wanting today is an effective response to the reasoning of *Pacifica*, reasoning that was present in *Roth*. Conservative jurists can either argue from first principles of culture, as Justice Brennan did, or they can cite cases such as *Roth* and appeal to virtues that are distinctly "legal," though separable from "the Law." Should they adopt the former approach conservatives would find it easy to accomplish the necessary task of explaining why *Brown* was decided correctly and *Griswold* was not.

Recently, by the latter approach, the Supreme Court correctly, though unconvincingly, found that the application of a public indecency ordinance to nude dancing, which banned in effect those acts, did not transgress the bounds of the First Amendment.[323] The conservative majority, however, chose not to adopt the theme of one opinion in the court below, which discussed the "persistent attempts to make use of the judiciary and the device of a 'living constitution' to create a moral structure at odds with our Judeo-Christian heritage."[324] That essential truth provides the frame for a post-Brennan jurisprudence. With elegance and skill Justice Brennan appealed to old legal orders only to empty them of their substance and allow for a newly created world to be made into law. Conservatives must, in turn, recover the truths of our theoretical past. Only then can a truly conservative jurisprudence, of sacred limits, be built. When it is, Justice William J. Brennan, Jr., as well as Gierke, Troeltsch, and Rieff, will have a place in it, a place that will endure longer than the echoes of the still present applause.

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[323] Barnes v. Glen Theater, Inc., 111 S. Ct. 2456 (1991).

[324] Miller v. Civil City of South Bend, 904 F.2d 1081, 1105 (7th Cir. 1990) (Coffey, J., dissenting), *rev'd sub nom.*, Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991).