

THE LIMITS OF INTEGRITY

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I

INTRODUCTION

Stanley Hauerwas has long objected to “liberal presuppositions and theories” of law that “have sought in theory and practice to protect the law from politics.”¹ His critiques flow out of broader objections to the contemporary liberalism of John Rawls and, to a lesser extent, the antecedents of Rawlsian liberalism in the postwar pluralism of Robert Dahl.² One of Hauerwas’s chief targets is Rawls’s public reason constraint, which limits the role of certain theological voices in considerations of law and policy.³

Hauerwas’s arguments and the theological framework in which they are embedded can also stand against certain strands of legal theory. This article demonstrates that possibility by using Hauerwas to critique Ronald Dworkin’s theory of law as integrity. Hauerwas’s arguments reveal how Dworkin relies on secular, liberal presuppositions by rejecting appeals to “religious convictions or goals.”⁴

Part II sketches Dworkin’s interpretive theory, and part III notes its limitations. Part IV introduces Hauerwas’s views on interpretation and suggests commonalities between Dworkin and Hauerwas. Parts V and VI illustrate the

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1. Stanley Hauerwas, *Christian Practice and the Practice of Law in a World Without Foundations*, 44 *MERCER L. REV.* 743, 743 (1993). For an overview of Hauerwas’s thought and its relationship to law, see John D. Inazu, *Stanley Hauerwas and the Law: Is There Anything to Say?*, 75 *LAW & CONTEMP. PROBS.*, no. 4, 2012 at i.

2. See, e.g., STANLEY HAUERWAS, PERFORMING THE FAITH: BONHOEFFER AND THE PRACTICE OF NONVIOLENCE 227 (2004) [hereinafter HAUERWAS, PERFORMING THE FAITH] (“[Sheldon] Wolin taught me to read Rawls not as the exemplification of democracy, but rather as an attempt to deny the necessity of politics. I read Wolin, moreover, against the background of debates at Yale during my graduate training generated by the work of Robert Dahl. I became convinced that critics of Dahl’s defense of interest group liberalism . . . were right to see that there was a ‘bias of pluralism.’”).

3. *Id.* The debate surrounding the implications of Rawls’s public reason constraint on religious argument is widespread. See, e.g., ROBERT AUDI & NICHOLAS WOLTERSTORFF, *RELIGION IN THE PUBLIC SQUARE: THE PLACE OF RELIGIOUS CONVICTIONS IN POLITICAL DEBATE* (1997). Although I focus in this essay on a Christian theological response to the Rawlsian and Dworkinian constraints, those constraints also reject illiberal or “irrational” religious argument arising out of other theological traditions.

4. RONALD DWORKIN, *JUSTICE IN ROBES* 254 (2006).

exclusionary effects of Dworkin's premises on Hauerwas's arguments by comparing the ways in which both thinkers approach the abortion controversy. Hauerwas's arguments show that Dworkin has either imported his own normative commitments into his interpretive premises or failed to distinguish law as integrity from the constraints of public reason.⁵

II

DWORKIN'S THEORY OF INTERPRETATION

Dworkin believes that what law "permits or requires depends on the truth of certain propositions that are given sense only by and within the practice" of legal interpretation.⁶ For this reason, the process of identifying interpretive standards and how they change over time is partially constitutive of the practice itself.⁷ Dworkin identifies four stages in this process: the semantic stage, the jurisprudential stage, the doctrinal stage, and the adjudicative stage.⁸

The semantic stage ensures that participants "understand the world in sufficiently similar ways and have interests and convictions sufficiently similar to recognize the sense in each other's claims."⁹ Dworkin's recent formulation of the semantic stage suggests a seemingly benign starting point: "What assumptions and practices must people share to make it sensible to say that they share the doctrinal concept so that they can intelligibly agree and disagree about its application?"¹⁰

The jurisprudential stage includes "a general account of the mix of values that best justifies the practice."¹¹ Dworkin describes this stage as gathering the "tentative content" of the authorities that will inform adjudication.¹² He asserts

5. Importantly, Hauerwas offers neither a "theory" of interpretation nor an "ethics" of abortion. His insistence that theories and ethics cannot be abstracted from a community of people formed by certain habituated practices prevents him from embracing a systematic approach like the one Dworkin advocates. Nonetheless, Hauerwas's critiques can be employed against Dworkin to show why the expression of nonpropositional practices has a role in legal interpretation.

6. RONALD DWORKIN, *LAW'S EMPIRE* 13 (1986). This claim helpfully presses against a perspective fashionable in some political-science scholarship that neglects—or, in some strong versions, denies—any internal dimension to the practice of legal interpretation and asserts that legal decisions are simply "judicial politics." See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

7. Cf. DWORKIN, *supra* note 6, at 47 (noting that, when the "interpretive attitude" takes hold, people "try to impose *meaning* on the institution—to see it in its best light—and then to restructure it in the light of that meaning").

8. DWORKIN, *supra* note 4, at 9–21. Dworkin recognizes that these four stages are, "of course, artificial" and that "legal philosophers do not articulate their theories in this stylized way. But the artificial anatomy provides a useful schema for identifying and distinguishing a variety of types of legal theories." *Id.* at 21.

9. DWORKIN, *supra* note 6, at 63.

10. DWORKIN, *supra* note 4, at 9.

11. *Id.* at 12–13. The initial values come from "studying the aspirational concept of law to determine which values supply the best conception of that concept—which other values, that is, best explain the rule of law as a political ideal." *Id.* at 13.

12. DWORKIN, *supra* note 6, at 65. In the interpretive practice of the law, these authorities include constitutions, statutes, codes, legal decisions, and other generally recognized sources of law, as well as

that “[a] useful theory of an interpretive concept must itself be an interpretation, which is very likely to be controversial, of the practice in which the concept figures.”¹³

In the doctrinal stage, participants “construct an account of the truth conditions of propositions of law in the light of the values identified at the jurisprudential stage.”¹⁴ A proposition of law is true “if it flows from principles of personal and political morality that provide the best interpretation of the other propositions of law generally treated as true in contemporary legal practice.”¹⁵ Participants “measure the success of a proposed justification” along two lines: value and fit.¹⁶ Value describes ends that the practice serves—like justice, freedom, legality, democracy, liberty, equality, community, and patriotism.¹⁷ Fit requires that any viable account bears some connection to the authorities identified in the jurisprudential stage to ensure continuity within the practice.¹⁸

Finally, in the adjudicative stage, participants ask “what political officials who are generally expected to enforce the law should actually do in particular cases.”¹⁹ The adjudicative stage unveils the reflective dimension of Dworkin’s interpretive theory: the interpreters reexamine the appropriateness of the authorities they identified in the jurisprudential stage.²⁰ With the benefit of having selected the best account in the doctrinal stage, the participants may conclude that this account excludes some of the authorities previously deemed relevant to the interpretation of their practice—for example, by overruling or distinguishing precedent that initially appeared controlling. As important, the participants may recognize additional applicable authorities not identified at the jurisprudential stage, which are then incorporated as obligations for those involved in the practice. And, in this way, newly recognized obligations are generated by the interpretive practice itself.

“interpretive concepts” like principles and political values. DWORKIN, *supra* note 4, at 10–11. Any account must also “give a prominent place to the ideal of political integrity, that is, to the principle that a state should try so far as possible to govern through a coherent set of political principles whose benefit it extends to all citizens.” *Id.* at 13.

13. DWORKIN, *supra* note 4, at 12.

14. *Id.* at 13.

15. *Id.* at 14.

16. *Id.* at 15.

17. *Id.* at 142, 151, 158.

18. *Id.* at 15. The requirement that the best interpretation of the practice include at least some of the authorities identified in the jurisprudential stage is a necessary but not a sufficient condition of Dworkin’s interpretive theory: even an account that includes all of the authorities from the jurisprudential stage may lack fit if it fails to provide a coherent, explanatory, and justificatory account of the practice. As importantly, the best interpretation may draw upon authorities not identified in the jurisprudential stage. Accordingly, assessing fit, like assessing value, is an interpretative act. See STEPHEN GUEST, RONALD DWORKIN 40 (1997).

19. DWORKIN, *supra* note 4, at 18 (noting that this is “a political and therefore a moral question”).

20. See DWORKIN, *supra* note 6, at 48 (“Interpretation folds back into the practice, altering its shape.”).

III A BIG ENOUGH THEORY?

Dworkin believes that legal interpretation is “an explicitly normative and political enterprise: refining and defending conceptions of legality and drawing tests for concrete claims of law from favored conceptions.”²¹ He maintains that “law is a political concept”²² and that interpretive claims are “dependent on aesthetic or political theory all the way down.”²³ And he insists that the weighing of fit against value at the doctrinal stage of his interpretive theory “is the constraint of one type of political conviction on another in the overall judgment.”²⁴ Yet he concludes that law as integrity nevertheless “aims, in the interpretive spirit, to lay principle over practice to show the best route to a better future, keeping the right faith with the past.”²⁵

Dworkin also acknowledges that the outcome of legal interpretation at the adjudicative stage depends on “decisions taken at the basic semantic stage.”²⁶ The semantic stage ensures that people share certain “assumptions and practices” that allow them to recognize “the doctrinal concept of law” so they can “intelligibly agree and disagree about its application.”²⁷ But, as Dworkin recognizes, these assumptions and practices themselves draw upon “interpretive concepts.”²⁸ One of these concepts is justice, which “marks an agenda for the community as a whole” that precedes and shapes “further questions about what institutional decisions would be necessary” to achieve that agenda.²⁹ In fact, Dworkin considers justice to be “the most abstract political concept of all.”³⁰

Some of Dworkin’s constraints resemble Rawlsian public reason.³¹ Rawls

21. DWORKIN, *supra* note 4, at 170. Dworkin places political values “in a larger and mutually supporting web of conviction that displays supporting connections among moral and political values generally and then places these in the still larger context of ethics.” *Id.* at 168; *cf.* RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 36 (1996) (“Of course my constitutional opinions are influenced by my own convictions of political morality.”).

22. Ronald Dworkin, *Hart’s Postscript and the Character of Political Philosophy*, 24 OXFORD J. LEGAL STUD., no. 1, 2004 at 1, 19.

23. RONALD DWORKIN, *A MATTER OF PRINCIPLE* 168 (1985).

24. DWORKIN, *supra* note 6, at 257.

25. *Id.* at 413. Stanley Fish has argued that, “whenever the distinction between principle and policy is invoked, the line it draws will be bright and visible only within the assumptions of some policy that is, for the moment, so deeply in force as to be beyond challenge; but the challenge can always be made, and when it is, that line—interpretive, constructed, and political to the core—will be drawn again.” STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 369 (1989). The debate between Fish and Dworkin spans many years. *See, e.g.*, DWORKIN, *supra* note 4, at 43–48.

26. DWORKIN, *supra* note 4, at 20.

27. *Id.* at 9.

28. *Id.* at 11.

29. DWORKIN, *supra* note 6, at 406; *cf.* Gerald J. Postema, *Integrity: Justice in Workclothes*, 82 IOWA L. REV. 821, 841 (1997) (“The mandate of justice is not only to set social arrangements in right order, but to make the rightness of that order manifest to every member of society.”).

30. DWORKIN, *supra* note 4, at 148.

31. Rawls’s seminal work is JOHN RAWLS, *A THEORY OF JUSTICE* (1971). Rawls believed that liberal society could never overcome the interminable disagreement that flowed from incommensurable

insisted that, on matters subject to public reason, “we are to appeal only to presently accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial.”³² Because public reason applies to citizens when they vote, “[w]hat public reason asks is that citizens be able to explain their vote to one another in terms of a reasonable balance of public political values.”³³

Dworkin has resisted comparisons between law as integrity and Rawlsian public reason, arguing in *Justice in Robes* that he has “great difficulties” with Rawls’s distinction “between political values on the one hand and comprehensive moral convictions on the other.”³⁴ But Dworkin nonetheless insists on “filling out a conception of legality and adjudication” with “necessary constraints on judicial argument.”³⁵ In one of his most revealing claims, he asserts that “[j]udges may not appeal to religious convictions or goals in liberal societies because such convictions cannot figure in an overall comprehensive justification of the legal structure of a liberal and tolerant pluralistic community.”³⁶

“comprehensive doctrines.” JOHN RAWLS, *POLITICAL LIBERALISM* 224 (1993) [hereinafter RAWLS, *POLITICAL LIBERALISM*]. But he maintained that we could nonetheless achieve political stability that was more than a mere *modus vivendi* by constraining the dialogue between citizens through the concept of public reason. *Id.* at 148. To this end, Rawls advocated that a “political conception” of justice could be attained “without reference” to comprehensive doctrines. *Id.* at 12. For Rawls, comprehensive doctrines “belong to what we may call the ‘background culture’ of civil society,” which “is the culture of the social, not of the political.” *Id.* at 14. In its most nuanced form, public reason “still allows us to introduce into political discussion at any time our comprehensive doctrine, religious or nonreligious, provided that, in due course, we give properly public reasons to support the principles and policies our comprehensive doctrine is said to support.” John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 776 (1997). This reasoning echoes Rawls’s view in *Political Liberalism* that citizens can invoke comprehensive doctrines “provided they do this in ways that strengthen the idea of public reason itself.” RAWLS, *POLITICAL LIBERALISM*, *supra*, at 247.

32. RAWLS, *POLITICAL LIBERALISM*, *supra* note 31, at 224. Rawls would not apply the public reason constraint to all political activity but only to “fundamental matters.” *Id.* at 214. Rawls considers “much tax legislation and many laws regulating property” not to be fundamental matters. *Id.*

33. *Id.* at 243. Thus, according to Rawlsian premises, we are to believe that large segments of the population engage in a series of coherent argumentative steps to reach informed and intellectually defensible positions on a host of complex matters ranging from healthcare to foreign policy to medical ethics.

34. DWORKIN, *supra* note 4, at 253; *see also* RONALD DWORKIN, *IS DEMOCRACY POSSIBLE HERE?* 65 (2006) (“The schism over religion in America shows the limitations of Rawls’s project of political liberalism, his strategy of insulating political convictions from deeper moral, ethical, and religious conviction. Our strategy must be different.”). Dworkin contends that, “[i]f we accept an interpretivist conception, we do not need a separate doctrine like the doctrine of public reason.” DWORKIN, *supra* note 4, at 254.

35. DWORKIN, *supra* note 4, at 254.

36. *Id.* Others have also linked Dworkin’s law as integrity with Rawls’s public reason. *See* Paul F. Campos, *Secular Fundamentalism*, 94 COLUM. L. REV. 1814, 1826–27 (1994) (“Law as integrity parallels the idea of public reason legitimating the exercise of coercive state power ‘in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational.’”); Edward J. McCaffery, *Ronald Dworkin, Inside-Out*, 85 CALIF. L. REV. 1043, 1057 (1997) (book review) (“Dworkin’s method can be understood as a form of public reason in the law.”); *cf.* George Rutherglen, *Private Law and Public Reason*, 92 VA. L. REV. 1503, 1511 (2006) (“Dworkin would not have to modify much of his legal or

The consequences of this constraint are twofold. First, it discourages or inhibits religious argument in our discussions about the nature of law and how we understand its meaning. Even though Dworkin limits his constraint to “judges,” the premise on which it rests is far broader: “[R]eligious convictions . . . cannot figure in an overall comprehensive justification of the legal structure of a liberal and tolerant pluralistic community.”³⁷ Dworkin may well be right that some theocratically oriented arguments from religious fundamentalism are incompatible with the legal structure of contemporary American democracy. But given his interpretive commitment to an argumentative *process*, it seems odd that Dworkin would reject outright even overtly theocratic arguments. For even though such arguments will likely fail Dworkin’s fit requirement, they might nonetheless yield useful insights within the reflexive interpretive process Dworkin advocates.

Moreover, by invoking a blanket restriction against “religious conceptions or goals,” Dworkin bears the burden of explaining why *every* religious argument fails to “figure in an overall comprehensive justification of the legal structure of a liberal and tolerant pluralistic community.”³⁸ For example, he would need to explain why the concept of sphere sovereignty arising out of the Dutch Calvinist tradition and articulated by contemporary thinkers like Jim Skillen could not align with the political ordering of a pluralistic community.³⁹ He would also need to show how the quite different political theology of the Mennonite John Howard Yoder has nothing to offer a legal structure consistent with a liberal pluralistic community.⁴⁰ Religious arguments like those offered by Skillen and Yoder may not prevail as the best or most persuasive accounts of

political theory to limit the range of political discourse to what Rawls recognizes as reasonable.”).

37. DWORKIN, *supra* note 4, at 254. Importantly, the participants engaging in the interpretive practice of law are not limited to judges. Judicial opinions are not hermetically sealed to the influence of lawyers, clerks, litigants, journalists, politicians, academics, and legislators. Dworkin’s exclusion of religious convictions and goals encounters further difficulty because it assumes a well-functioning communal practice of legal interpretation in the absence of appeals to those convictions or goals. But the existence of that practice is far from clear—particularly when it comes to judicial resolution of the most controversial social issues. See H. JEFFERSON POWELL, *THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION* 232 n.229 (1993) (“Dworkin’s theory depends, anachronistically, upon the actual (*not* notional) existence of a community of lawyers sharing professional norms of argument and rationality.”).

38. DWORKIN, *supra* note 4, at 254.

39. See JIM SKILLEN, *RECHARGING THE AMERICAN EXPERIMENT: PRINCIPLED PLURALISM FOR GENUINE CIVIC COMMUNITY* (1994); see also Robert F. Cochran, Jr., *Tort Law and Intermediate Communities: Calvinist and Catholic Insights*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 486 (Michael W. McConnell, Robert F. Cochran, Jr. & Angela C. Carmella eds., 2001); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.–C.L. L. REV. 79 (2009). For an example of a liberal pluralist recognition of these perspectives, see WILLIAM A. GALSTON, *THE PRACTICE OF LIBERAL PLURALISM* 23–26 (2005).

40. See, e.g., JOHN HOWARD YODER, *THE CHRISTIAN WITNESS TO THE STATE* (2002); JOHN HOWARD YODER, *THE PRIESTLY KINGDOM: SOCIAL ETHICS AS GOSPEL* (1984). Thomas Shaffer has asserted that Yoder’s scholarship contained “an implicit theology of law, a jurisprudence, and a legal ethic.” THOMAS L. SHAFFER, *MORAL MEMORANDA FROM JOHN HOWARD YODER: CONVERSATIONS ON LAW, ETHICS AND THE CHURCH BETWEEN A MENNONITE THEOLOGIAN AND A HOOSIER LAWYER*, at iii (2002).

the legal structure, but Dworkin gives no reason to exclude them *a priori* from among the arguments that might be considered in the practice of legal interpretation.⁴¹

The second consequence of Dworkin's constraint on "religious convictions and goals" is that it neutralizes what may be the strongest objections to his own normative commitments. Here it is important to note that Dworkin's *application* of law as integrity moves beyond "an overall comprehensive justification of the legal structure" to discrete issues like abortion and euthanasia.⁴² Tellingly, Dworkin's eventual policy positions look remarkably similar to those that Rawls espouses. That Rawls and Dworkin reach such uniformity across a range of controversial issues might raise our suspicions about the premises that make their syllogisms operable. And in questioning those premises, we should be mindful not only of what they assert but also of what they exclude.

IV

HAUERWAS AND DWORKIN

Like Dworkin, Hauerwas recognizes that acts like legal interpretation are political precisely because they are embedded in communal practices:

[P]olitics is nothing else but a community's internal conversation with itself concerning the various possibilities of understanding and extending its life. In fact, the very discussion necessary to maintain the tradition can be considered an end in itself, since it provides the means for the community to discover the goods it holds in common. Without the authority of the tradition to guide such a discussion there would be no possibility of the community drawing nearer to the truth about itself or the world.⁴³

Political authority "must be grounded in a community's self-understanding, which is embodied in its habits, customs, laws, and traditions."⁴⁴ This authority "allows for reasoned interpretations of the community's past and future goals."⁴⁵ Interpretation, in turn, is "the constant adjustment that is required if the current community is to stay in continuity with tradition."⁴⁶ For Hauerwas, "[i]nterpretation is not an objective science because, from beginning to end, it is an exercise in politics. It is not only about power and authority, but also about shared goods and judgments that constitute a history worth remembering for a people."⁴⁷ Interpretation must "remain open to a new narrative display not only

41. Of course, Dworkin's categorical exclusion of religious convictions or goals extends beyond arguments like those from Skillen and Yoder. *See, e.g.*, SABA MAHMOOD, *POLITICS OF PIETY: THE ISLAMIC REVIVAL AND THE FEMINIST SUBJECT* (2005) (critiquing "secular-liberal and progressive sensibilities" through an exploration of Islamic revival movements).

42. *See, e.g.*, RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA AND INDIVIDUAL FREEDOM* (1993).

43. STANLEY HAUERWAS, *A COMMUNITY OF CHARACTER: TOWARD A CONSTRUCTIVE CHRISTIAN SOCIAL ETHIC* 61 (1981).

44. *Id.* at 60.

45. *Id.*

46. *Id.* at 61.

47. STANLEY HAUERWAS, *UNLEASHING THE SCRIPTURE: FREEING THE BIBLE FROM CAPTIVITY*

in relation to the future, but also whenever we come to a new understanding of our past.”⁴⁸ This kind of understanding starkly contrasts the “ahistorical rationalism derived from the illusion of American Constitutionalism—that is, that the law can be based upon principles abstracted from practices.”⁴⁹

Hauerwas’s approach to interpretation shares much with Dworkin’s approach. Both presuppose an internal point of view in which a community’s self-understanding shapes the intelligibility of its propositions. Both purport to recognize the inescapably political nature of all interpretation. Both acknowledge that interpretation is partially constitutive of the shared ends of the participants in a practice. And Hauerwas’s contention that the “current community” must “stay in continuity” with the tradition from which it emerges resembles Dworkin’s fit requirement.

Dworkin and Hauerwas also share an epistemology that hangs in the balance between a fixed textualism and an unbounded pragmatism.⁵⁰ Although they recognize a contingent flexibility to the meaning of language, they do not think that meaning is completely determined by use simply because some meanings that now seem obvious might later be rendered ambiguous.⁵¹ Rather, our very ability to make interpretive judgments relies on a degree of shared meaning. We abide in a certain grammar that bounds our interpretations and gives us normal cases that are not utterly malleable.⁵² Both Hauerwas and

TO AMERICA 21 (1993).

48. HAUERWAS, *supra* note 43, at 61.

49. Hauerwas, *supra* note 1, at 746 (citing Mary Ann Glendon, *Tradition and Creativity in Culture and Law*, FIRST THINGS, Nov. 1992, at 13, 15–16).

50. Their epistemic views resemble those advanced by Ludwig Wittgenstein. See, e.g., LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G.E.M. Anscombe trans., 1953). On Wittgenstein’s influence on Hauerwas, see BRAD J. KALLENBERG, *ETHICS AS GRAMMAR: CHANGING THE POSTMODERN SUBJECT* (2001); see also Peter Dula, *Wittgenstein Among the Theologians*, in *UNSETTLING ARGUMENTS: A Festschrift on the Occasion of Stanley Hauerwas’s 70th Birthday 3* (Charles R. Pinches, Kelly S. Johnson & Charles M. Collier eds., 2010). Although Wittgenstein’s influence on Dworkin has not been widely discussed, and although Dworkin himself might reject the comparison, some of Dworkin’s interpretive strategies seem deeply Wittgensteinian. See, e.g., DWORKIN, *supra* note 6, at 68–73 (engaging in the thought experiment about the nature of “courtesy” in an imaginary community).

51. Dworkin and Hauerwas both believe that *some* meaning of some texts is determined by the use of those texts in a particular community, which is consistent with Wittgenstein’s understanding. In contrast to Saul Kripke’s claim that “the meaning of a word is determined by its use,” Wittgenstein wrote, “For a large class of cases—though not for all—in which we employ the word ‘meaning’ it can be defined thus: the meaning of a word is its use in the language.” WITTGENSTEIN, *supra* note 50, ¶ 43.

52. Hauerwas’s grammar may be more internally coherent because it appeals to transcendence and to an antecedent tradition to limit its malleability. Dworkin has no similar recourse. As James Boyle has argued, because Dworkin’s notion of integrity “is a concept that is both interpretive and deontological,” it “sounds best when one represses the knowledge that both the principles to be applied and the boundaries within which they are applied are constantly being remade, and remade in a way that turns to policy, to utilitarian calculation, to pragmatic consideration of effects.” James Boyle, *Anachronism of the Moral Sentiments? Integrity, Postmodernism, and Justice*, 51 STAN. L. REV. 493, 503, 509 (1999). Boyle convincingly argues that, “if one’s proposition is that principle constrains in a way that mere policy never could, one has to make it an historical claim rooted in a particular culture and practice, not an epistemological or deontological claim rooted in the nature of language or morals.” *Id.* at 509 (emphasis omitted).

Dworkin imagine the possibility of participating in a world we find rather than controlling a world we make—the abnormal cases give us pause, but the normal cases let us begin before we arrive at the pause.⁵³

Significantly, both Dworkin and Hauerwas justify their epistemic practices by a kind of *faith*.⁵⁴ They do not and cannot know what comes next in their interpretive traditions. Nor can they be certain that interpretive coherence will continue in perpetuity: we may one day lack the practices to sustain it. We might not even know when that day arrives, which is also to admit the possibility that it is already upon us.⁵⁵

Although Hauerwas addresses his interpretive guidance with theological particularity to the Christian church, he insists that the interpretations emerging from that community have implications for the world. He writes that the church is “an ontological necessity if we are to know rightly that our world is capable of narrative construal” and that “[w]ithout the church the world would have no history.”⁵⁶ It is from this starting point, “from the life of the church, past, present, and future, that [Christians] even come to understand the nature of politics and have a norm by which all other politics can be judged.”⁵⁷

While this language is wildly incongruent with Dworkinian (and Rawlsian) assumptions, it is not a theocratic claim.⁵⁸ To the contrary, Hauerwas’s

53. Wittgenstein insisted that “[i]nterpretations by themselves do not determine meaning” because “any interpretation still hangs in the air along with what it interprets, and cannot give it any support.” WITTGENSTEIN, *supra* note 50, ¶ 198. As D.Z. Phillips has argued,

[i]nterpretations, like theory-laden perceptions, are parasitic on concepts which are not interpretations, and on perceptions which are not theory-laden. For example, there are situations where we need to interpret whether someone is angry or sorrowful. But were there not situations in which what we mean by “anger” and “sorrow” does not call for interpretation, the call for interpretation, in other contexts, would be unintelligible. If “anger” and “sorrow” were not appreciated by someone in the situations where no interpretation is called for, we would conclude that they did not understand what is meant by “anger” and “sorrow.” To be sure, we can be puzzled, philosophically, about such concepts and that may call for elucidation. Such elucidation, however, seeks to give a perspicuous representation of the role those concepts actually have, not to get to something “behind” them of which they are supposed to be interpretations.

D.Z. PHILLIPS, RELIGION AND THE HERMENEUTICS OF CONTEMPLATION 9 (2001).

54. Cf. D.Z. PHILLIPS, FAITH AFTER FOUNDATIONALISM 131, 132 (1988) (explaining that “saying that our epistemic practices are not underpinned by any kind of metaphysical necessity . . . does not entail that the practitioners of these practices are in a state of doubt as to whether the practice corresponds to reality” and that, rather, “we justify our epistemic practices by faith”).

55. We could be like the hypothetical citizens at the beginning of Alasdair MacIntyre’s *After Virtue* who fail to see that they are no longer practicing science because “everything that they do and say conforms to certain canons of consistency and coherence and those contexts which would be needed to make sense of what they are doing have been lost, perhaps irretrievably.” ALASDAIR MACINTYRE, AFTER VIRTUE 1 (2d ed. 1984).

56. STANLEY HAUERWAS, CHRISTIAN EXISTENCE TODAY: ESSAYS ON CHURCH, WORLD, AND LIVING IN BETWEEN 61 (1988). This is “the most determinative realist claim Christians can possibly make.” *Id.*

57. HAUERWAS, *supra* note 43, at 2.

58. Hauerwas disputes my characterization. See Stanley Hauerwas, *Trying to Have Something to Say*, 75 LAW AND CONTEMP. PROBS., no. 4, 2012 at 233, 248 (“I certainly do not want a rule by priests, but I am a theocrat. I believe that Jesus is Lord, but Jesus Lordship is exercised as a rule of love that

ubiquitous warnings about Christian complicity in state power have subjected him more regularly to criticisms of sectarianism than theocracy.⁵⁹ Although he does not advocate for “a rejection of the world, or a withdrawal from the world,” his first challenge is “for the church to be a ‘contrast model’ for all polities that know not God.”⁶⁰ For this reason, “the church must stand as a reminder to the pretensions of liberalism that in spite of its claims to legitimate authority, some necessarily rule over others as if they had the right to command obedience.”⁶¹ But Hauerwas also believes that the church affects the structures around it: “Christians do not have a theory that leaves everything the way it is, but we are part of the community that changes everything.”⁶²

Dworkin’s interpretive account forecloses this kind of theological particularity. For Dworkin, theological claims must be either translated in a way that avoids reliance on “religious convictions or goals” or excluded from consideration within his interpretive theory. Hauerwas refuses to acquiesce in this kind of translation because to do so is to extract a proposition from the practices that give it meaning.

If Dworkin wants to identify the best account of legal interpretation, then he ought to be conceptually open to one that emerges from beyond the usual constraints of contemporary political liberalism. In light of the interpretive theory he has developed, it would seem that he should aim

to enter into controversy with other rival standpoints, doing so *both* in order to exhibit what is mistaken in that rival standpoint in the light of the understanding afforded one’s own point of view *and* in order to test and retest the central theses advanced from one’s own point of view ⁶³against the strongest possible objections to them to be derived from one’s opponents.

By excluding appeals to “religious convictions or goals” like those that Hauerwas makes, Dworkin may have failed to subject his interpretive arguments to the most salient objections. To illustrate this possibility through a concrete moral and political issue, the remainder of this article focuses on the abortion controversy. The issue of abortion is well suited for a number of reasons. First, to the extent that the current political arrangements in the United States constitutionalize the abortion question, they implicate the kind of legal interpretation covered by Dworkin’s theory. Second, both Hauerwas and

prohibits the killing of the neighbor. I would like to rule, but because I am committed to nonviolence I cannot coerce my neighbor to do what I would like them to do. The only alternative is called ‘politics.’”). Hauerwas’s response asks us to think carefully about the theological meaning of “theocracy,” but he risks introducing a category mistake. My point—and, I take it, his as well—is that his theological commitments prevent him from harnessing the power of the state to coerce his theological commitments upon others.

59. See, e.g., JEFFREY STOUT, *DEMOCRACY AND TRADITION* 140–61 (2004).

60. HAUERWAS, *supra* note 43, at 84–85.

61. *Id.* at 84.

62. Hauerwas, *supra* note 1, at 743.

63. ALASDAIR MACINTYRE, *THREE RIVAL VERSIONS OF MORAL ENQUIRY: ENCYCLOPEDIA, GENEALOGY, AND TRADITION* 230–32 (1990). Hauerwas advances similar arguments in STANLEY HAUERWAS, *THE STATE OF THE UNIVERSITY: ACADEMIC KNOWLEDGES AND THE KNOWLEDGE OF GOD* (2007).

Dworkin have written about abortion in a way that facilitates a comparison of their views and the theories that inform those views.⁶⁴ Third, and perhaps surprisingly, both agree that the debate over abortion is “religious” in nature.

V

DWORKIN ON ABORTION

Although Dworkin does not explicitly map his abortion argument to the four stages of his interpretive theory, we can construct such an account to reveal not only how his argument masks the semantic assumptions he claims to lay bare but also the consequences of those assumptions for the kinds of arguments Hauerwas makes. Dworkin identifies three values at issue in the constitutional debate over abortion: (1) law as integrity; (2) the rights and interests of persons; and (3) the sacredness of human life.⁶⁵

Dworkin applies the first value of law as integrity to any constitutional question. It demands coherence within the ongoing practice of legal interpretation.⁶⁶ His second value, the rights and interests of persons, comes in two forms: the right to procreative autonomy of a woman seeking an abortion and the right to equal protection from harm by the fetus *if* the fetus is a “person” in the constitutional sense. The threshold question of whether a fetus is a person to whom rights attach forms the basis of what Dworkin calls the “derivative” objection to abortion.⁶⁷ The objection is derived in the sense that the protections it demands from government come from the constitutional rights attributed to the fetus. Dworkin dismisses the derived objection in his most comprehensive consideration of abortion in *Life’s Dominion*.⁶⁸

64. Indeed, the issue of abortion is likely the one that provides the greatest topical overlap between Dworkin’s and Hauerwas’s scholarship. Dworkin’s most comprehensive discussion of abortion is DWORKIN, *supra* note 42. Hauerwas has written a number of essays focusing on abortion. See STANLEY HAUERWAS, *Abortion and Normative Ethics*, in STANLEY HAUERWAS, *VISION AND VIRTUE: ESSAYS IN CHRISTIAN ETHICAL REFLECTION* 127 (1974); STANLEY HAUERWAS, *Abortion: The Agent’s Perspective*, in *VISION AND VIRTUE: ESSAYS IN CHRISTIAN ETHICAL REFLECTION*, *supra*, at 147; STANLEY HAUERWAS, *Abortion, Theologically Understood*, in STANLEY HAUERWAS, *THE HAUERWAS READER* 603 (John Berkman & Michael G. Cartwright eds., 2001) [hereinafter HAUERWAS, *Abortion, Theologically Understood*]; HAUERWAS, *supra* note 43, at 196 (in particular, see chapters entitled *Why Abortion Is a Religious Issue* and *Abortion: Why the Arguments Fail*).

65. See DWORKIN, *supra* note 42, at 148.

66. See generally DWORKIN, *supra* note 6.

67. DWORKIN, *supra* note 42, at 11.

68. Dworkin acknowledges the derived objection in *Justice in Robes*. Compare DWORKIN, *supra* note 42, at 111 (“The contention that Justice Blackmun and everyone else rejected, that on the best interpretation a fetus is a constitutional person, is easy to dismiss because it is so dramatically contradicted by American history and practice.”), with DWORKIN, *supra* note 4, at 253–54 (“The view that a fetus does not have interests and rights of its own is as much drawn from a comprehensive position as the view that it does, and we cannot reach a decision about abortion without adopting one of these two views. The Equal Protection Clause applies to all persons, and any argument that a woman has a constitutional right to abortion in the first trimester of pregnancy must deny that a fetus is a ‘person’ within the meaning of the clause.”). Dworkin’s dismissal of the derived objection is not uncontested. See, e.g., Gerald V. Bradley, *Life’s Dominion: A Review Essay*, 69 NOTRE DAME L. REV. 329 (1993) (book review). Dworkin’s construal and subsequent dismissal of Catholic theology seems

The final value that Dworkin considers in his interpretation of the abortion issue is the sacredness of life. He associates this value with the “detached” objection to abortion, by which he means that the duty of government to protect the fetus is not derived from constitutional rights.⁶⁹ Dworkin explains the value of sacredness:

The hallmark of the sacred as distinct from the incrementally valuable is that the sacred is intrinsically valuable because—and therefore only once—it exists. It is inviolable because of what it represents or embodies. It is not important that there be more people. But once a human life has begun, it is very important that it flourish and not be wasted.⁷⁰

Dworkin elaborates

[t]he sanctity of life is a highly controversial, *contestable* value. It is controversial, for example, whether abortion or childbirth best serves the intrinsic value of life when a fetus is deformed, or when having a child would seriously depress a woman’s chance to make something valuable of her own life.⁷¹

Dworkin’s appeal to the sacred leads him to conclude that “[w]e may describe most people’s beliefs about the inherent value of human life—beliefs deployed in their opinions about abortion—as *essentially* religious beliefs.”⁷² His philosophical authority for this turn to religious belief is the Supreme Court’s decision in *United States v. Seeger*,⁷³ which suggested that an atheist’s system of beliefs may have “a place in the life of its possessor parallel to that filled by the orthodox belief in God.”⁷⁴

Dworkin contends that we should classify a belief as religious “by asking whether it is sufficiently similar in content to plainly religious beliefs.”⁷⁵ For Dworkin, the category of religious belief is expansive: he “can think of no plausible account of the content that a belief must have in order to be deemed religious that would rule out convictions about why and how human life has intrinsic objective importance, except the abandoned notion that religious belief must presuppose a god.”⁷⁶

Having stipulated this broad interpretation of religious belief, Dworkin is now ready to assess the competing interpretive arguments about abortion on the basis of the three values he has identified: integrity, rights and interests, and the sacredness of life. His value of integrity reinforces both the right to procreative autonomy and the rejection of any notion of rights for a fetus. As for procreative autonomy, Dworkin writes,

[t]he law’s integrity demands that the principles necessary to support an authoritative

particularly misguided. *See id.*; *see also* Russell Hittinger, *Getting It Wrong*, *FIRST THINGS*, Dec. 1993, at 53 (book review).

69. DWORKIN, *supra* note 42, at 11.

70. *Id.* at 73–74.

71. *Id.* at 151.

72. *Id.* at 155.

73. 380 U.S. 163 (1965).

74. *Id.* at 184.

75. DWORKIN, *supra* note 42, at 155.

76. *Id.* at 163.

set of judicial decisions must be accepted in other contexts as well. It might seem an appealing political compromise to apply the principle of procreative autonomy to contraception, which almost no one now thinks states can forbid, but not to abortion, which powerful constituencies violently oppose. But the point of integrity—the point of law itself—is exactly to rule out political compromises of that kind. We must be one nation of principle: our Constitution must represent conviction, not the tactical strategies of justices eager to satisfy as many political constituencies as possible.⁷⁷

From Dworkin's perspective, the outcome that integrity demands is almost self-evident: "The right of procreative autonomy follows from any competent interpretation of the due process clause and of the Supreme Court's past decisions applying it."⁷⁸ Once the Court established the right of procreative autonomy, "it follows that women do have a constitutional right to privacy that in principle includes the decision not only whether to beget children but whether to bear them."⁷⁹ For Dworkin, integrity also provides a clear answer to the question of the personhood (and thus the rights) of the fetus. He believes that precedent interpreting the Equal Protection Clause clearly rejects the idea; even "all the responsible opponents" of Blackmun's opinion in *Roe* agree with this conclusion.⁸⁰

Most of Dworkin's legal arguments track the Supreme Court's not uncontroversial progression from *Griswold v. Connecticut*, which announced a constitutional right of privacy,⁸¹ to *Eisenstadt v. Baird*, which transformed that right to an individual right,⁸² to *Roe v. Wade*, which applied that right to abortion.⁸³ Dworkin's characterization of these decisions is not uniformly endorsed, and it leaves relatively undefended the original merits of *Griswold*.⁸⁴ As support for a right of procreative autonomy, it is hard to see how integrity adds much to existing arguments.

Dworkin's sacredness of life language does more work but is ultimately unpersuasive. He first classifies all views about the sacredness of life as "religious" because "[o]nce the idea of religion is separated from the idea of a god . . . courts that accept the constraints of integrity face great difficulty in

77. *Id.* at 158.

78. *Id.* at 160.

79. *Id.* at 106. As Michael McConnell has argued, Rawls is similarly dismissive of challenges to a right of procreative autonomy: Rawls thinks that "any comprehensive doctrine that leads to a balance of political values excluding the right to an abortion by a 'mature adult' woman in the first trimester 'is to that extent unreasonable,' because the 'political value of the equality of women is overriding.'" Michael W. McConnell, *Religion and the Search for a Principled Middle Ground on Abortion*, 92 MICH. L. REV. 1893, 1893 (1994) (book review) (quoting RAWLS, *POLITICAL LIBERALISM*, *supra* note 31, at 176).

80. DWORKIN, *supra* note 42, at 116; *cf. id.* at 110 ("Blackmun decided that a fetus is not a constitutional person. Almost all responsible lawyers, including the political and academic critics of *Roe v. Wade*, agree that his decision on that point was correct.").

81. 381 U.S. 479 (1965).

82. 405 U.S. 438 (1972).

83. 410 U.S. 113 (1973).

84. See DWORKIN, *supra* note 42, at 107 ("Justice Blackmun's legal argument in *Roe v. Wade* was a strong one if we assume that the *Griswold* decision was right.").

distinguishing between religious and other kinds of conviction.”⁸⁵ Having framed these arguments as religious arguments whose expression is protected by the Free Exercise Clause, he declares that they fall beyond the competence of legal interpretation: “[A]ny government that prohibits abortion commits itself to a controversial interpretation of the sanctity of life and therefore limits liberty by commanding one essentially religious position over others, which the First Amendment forbids.”⁸⁶ Dworkin elaborates,

A state may not curtail liberty, in order to protect an intrinsic value, when the effect on one group of citizens would be special and grave, when the community is seriously divided about what respect for that value requires, and when people’s opinions about the nature of that value reflect essentially religious convictions that are fundamental to moral personality.⁸⁷

This semantic constraint arrives late in Dworkin’s argument (recall that Dworkin places semantic constraints at the first stage of his interpretive theory). But, having just classified even secular beliefs about the sacredness of life as “religious,” he must be careful to limit the constraint. Accordingly, he argues that “beliefs about the intrinsic importance of human life may be distinguished from more secular convictions about morality, fairness, and justice” because such “existential” questions cannot be answered “by showing that living in a given recommended way—observing some specified moral code, for example, or following a given theory of justice—will make people safer, freer, happier, or more prosperous, or that it will help them to fulfill or realize their human nature.”⁸⁸ In contrast, questions of justice “address themselves to the issues of how competing interests of people should be served or adjusted or compromised; they rarely reflect a distinctive view about why human interests have objective intrinsic importance, or even whether they do.”⁸⁹

Dworkin’s resolution of the abortion debate thus hinges on two semantic assumptions. First, he classifies secular beliefs “about the intrinsic importance of human life” as religious. Second, he classifies secular beliefs that a fetus lacks personhood as not religious. After this razor-thin distinction between religious and non-religious beliefs, the adjudicative stage of Dworkin’s interpretive theory is almost an afterthought: the precedents are clearly correct, religious arguments are wholly excluded, and the only permissible conclusion under a theory of law as integrity is to embrace *Roe v. Wade*. In Dworkin’s view, critics of Blackmun’s opinion on all sides of the issue have simply interpreted it poorly.⁹⁰ The key to resolving the abortion controversy is to broaden the scope

85. *Id.* at 162.

86. *Id.* at 165.

87. *Id.* at 157.

88. *Id.* at 156; *cf. id.* at 164 (“[T]he belief in life’s intrinsic objective importance (and other beliefs that interpret and follow directly from that belief) differs from opinions about political fairness or the just distribution of economic or other resources.”); DWORKIN, *supra* note 4, at 254 (distinguishing “moral convictions” from “religious convictions”).

89. DWORKIN, *supra* note 42, at 156.

90. Dworkin dismisses those who do not share his reasoning. He writes that “abortion on demand” in Europe has not been controversial “because Europe is not plagued with fundamentalist religious

of “religious” belief and then jettison those beliefs from the argument. Once the debate is recast in these terms, we will “see that a responsible legal settlement of the controversy, one that will not insult or demean any group, one that everyone can accept with full self-respect, is indeed available.”⁹¹

VI

HAUERWAS ON ABORTION

Hauerwas, like Dworkin, is interested in “shifting the terms of the debate about abortion.”⁹² He agrees with Dworkin that the relevant question is not when life begins: “When the debate is so limited [to the question of when life begins], it has already been uncritically shaped by the political considerations of our culture, the ‘moral’ has already been determined by the ‘political.’”⁹³ But, whereas Dworkin wants to frame arguments about abortion around the “detached” view about the sacredness of life, Hauerwas argues that an intelligible, Christian objection to abortion has nothing to do with whether human life has any sacred or intrinsic value. Arguments about the sacredness of life are rooted in an anthropocentric framework, which Hauerwas thinks has been absorbed into much of Christian theology through Protestant liberalism.⁹⁴ Against these ethical accounts, Hauerwas argues that the primary actor in the Christian narrative is God, not man:

[F]rom the perspective of Christian convictions about life as the locus of God’s creating and redeeming purpose, claims of life’s “value” or “sacredness” are but empty abstractions. The value of life is God’s value and our commitment to protect it as a form of our worship of God as a good creator and a trustworthy redeemer. Our question is not “When does life begin?” but “Who is its true sovereign?” The creation and meaningfulness of the term “abortion” gain intelligibility from our conviction that

movements or any serious fundamentalist sensibility.” DWORKIN, *supra* note 4, at 258. But “we are so plagued” and face “militant objection from fundamentalists.” *Id.* This caricature is an unfortunate dismissal of large numbers of people who object to abortion from perspectives that would not be deemed “fundamentalist.”

91. DWORKIN, *supra* note 42, at 10–11. The endorsements on the back cover of *Life’s Dominion* claim that “[o]ur politics would be far healthier if it had more of this kind of philosophy in it” and assert that Dworkin’s “brave undertaking” is “engaging but never patronizing.” *See id.* (endorsements). Those kinds of claims are only possible if religious arguments are silenced.

92. HAUERWAS, *supra* note 43, at 197. Hauerwas wrote in 1981, “It is my general view that Christians should regard abortion as a morally unhappy practice and should exert every effort to avoid it in their lives. Moreover they should also do all they can to help others avoid it in their lives. However, this does not mean that I think abortions must never occur, as there may well be circumstances when abortions are morally permissible if still morally tragic.” *Id.* This position is not shared by all opponents of abortion, nor does it point to a specific policy or law about abortion. Dworkin explicitly endorses the policy outcome in *Roe v. Wade*. Hauerwas rejects that outcome but does not specify the alternative legal regime that he would endorse. That is an interesting and important question for Hauerwas, but it is not the point of this article.

93. *Id.* at 213.

94. *See* HAUERWAS, *Abortion, Theologically Understood*, *supra* note 64, at 614 (“I want to know where Christians get the notion that life is sacred. That notion seems to have no reference at all to God. Any good secularist can think life is sacred.”); *cf.* HAUERWAS, *supra* note 43, at 225 (“The Christian prohibition of abortion derives not from any assumption of the inherent value of life, but rather from the understanding that as God’s creatures we have no basis to claim sovereignty over life.”).

God, not man, is creator and redeemer, and thus, the Lord of life.⁹⁵ The Christian respect for life is first of all a statement, not about life, but about God.

It is important not to take the word “statement” too literally here. Hauerwas means a form of witness, not a proposition. Christians do not state their respect for God; they show it. But the very framing of the abortion debate resists this kind of showing. Most abortion arguments on both sides of the debate rely upon “fragments” of past moral positions that “have been torn from the social and intellectual contexts in which they gained their original intelligibility and from which they derive such force and validity as they continue to possess.”⁹⁶ Christians are complicit in this mode of argument:

We [have] failed to show, for ourselves or others, why abortion is an affront to our most basic convictions about what makes life meaningful and worthwhile. We tried to argue in terms of the “facts” or on the basis of “principles” and thus failed to make intelligible why such “facts” or “principles” were relevant in the first place. We have spent our time arguing abstractly about when human life does or does not begin. As a result, we have failed to challenge the basic presuppositions that force the debate to hinge on such abstractions.⁹⁷

Stated more succinctly, Hauerwas believes that “Christian opposition to abortion on demand has failed because, by attempting to meet the moral challenge within the limits of public polity, we have failed to exhibit our deepest convictions that make our rejection of abortion intelligible.”⁹⁸ Arguments that rely solely on the life of the fetus “develop an ethic for protecting the fetus as though the relationship between fetus and parent were that of a stranger to a stranger.”⁹⁹ Hauerwas contends that the fetus “is a child which may only later become a stranger to and for its parents.”¹⁰⁰

Hauerwas’s observations highlight the relationship between the child and its community.¹⁰¹ He elaborates,

[A] community’s willingness to encourage children is a sign of its confidence in itself and its people. For children are a community’s sign to the future that life, in spite of its hardship and tedium, is worthwhile. . . . More profoundly, children signal a community’s confidence because they are bound to change our society and their existence fortells inevitable challenge. Our stories and traditions are never inherited unchanged. Indeed, the very power and truth of a tradition depends on its adaptation by each new generation. Thus, children represent a community’s confidence that its tradition is not without merit and is strong enough to meet the challenge of a new generation.¹⁰²

Hauerwas explains that these arguments “indicate the background beliefs

95. HAUERWAS, *supra* note 43, at 225–26.

96. *Id.* at 215.

97. *Id.* at 221; *cf.* HAUERWAS, *supra* note 2, at 232 (2004) (“My ire is not against liberalism, but against Christians who have confused Christianity with liberalism.”).

98. HAUERWAS, *supra* note 43, at 212.

99. *Id.* at 207.

100. *Id.*

101. It is worth noting that Hauerwas emphasizes the entire community rather than the child’s parents.

102. HAUERWAS, *supra* note 43, at 209.

that make intelligible why abortion is generally a morally objectionable act.”¹⁰³

Hauerwas argues that “if Christians are to make their moral and political convictions concerning abortion intelligible we must show how the meaning and prohibition of abortion is correlative to the stories of God and his people that form our basic conviction.”¹⁰⁴ Intelligible convictions are thus inseparable from the practices of the community from within which those convictions proceed. But if these convictions are more about showing than arguing, then what role might Hauerwas’s arguments about abortion have within the practice of legal interpretation that currently situates abortion policy? Hauerwas recognizes the dilemma:

To some it may seem that I have argued Christians right out of the current controversy, for my argument has made appeals to religious convictions that are inadmissible in the court of our public ethos. But it has certainly not been my intention to make it implausible for Christians to continue to work in the public arena for the protection of all children; nor do I think that this implication follows from the position I have developed.¹⁰⁵

Still, one might conclude that the constraint on Hauerwas’s theological arguments in a theory of legal interpretation come from Hauerwas rather than from Dworkin, particularly in light of Hauerwas’s suspicions of law and state.¹⁰⁶ But I think this misreads Hauerwas’s ambiguity about “work in the public arena.” After all, he has himself participated in the practice of legal argument.¹⁰⁷ And writing about abortion in 1981, Hauerwas endorsed “political and legal strategies that are just beginning to have an effect on reversing our society’s current abortion stance.”¹⁰⁸ To the extent these strategies were and are embedded in questions of legal interpretation, Hauerwas seems to suggest that Christian convictions and the practices they reflect might have a role in our understanding of law and legal interpretation. Indeed, he believes that “the strongest arguments against abortion involve religious presuppositions.”¹⁰⁹ In Dworkinian terms, these arguments might be included among the authorities considered during the various stages of interpretation.

Dworkin’s insistence to the contrary—that “religious convictions or goals . . . cannot figure in an overall comprehensive justification of the legal

103. *Id.* (“When institutionalized and regarded as morally acceptable or at least morally indifferent by society, abortion is an indication that a society is afraid of itself and its children.”).

104. *Id.* at 222.

105. *Id.* at 228.

106. *See Inazu, supra* note 1, at i.

107. *Id.* at ii (discussing Hauerwas’s participation in amicus briefs, expert witness testimony, and law teaching).

108. HAUERWAS, *supra* note 43, at 214. Hauerwas suggested that “a constitutional amendment that would not prohibit states from protecting unborn life if it is the will of their legislatures . . . would at least provide the possibility of a more refined moral debate on this issue in our society.” *Id.* at 288 n.6. In his written remarks in this symposium, Hauerwas suggests the possibility of a child allowance for every woman who finds herself pregnant, which “would at least suggest that we are a people who understand that the willingness to bring new life into our work is a common good” and would “not make abortion an economic necessity.” *See Hauerwas, supra* note 58, at 243–244.

109. HAUERWAS, *supra* note 43, at 284 n.1.

structure of a liberal and tolerant pluralistic community”¹¹⁰—would worry Hauerwas to the extent that it “render[s] strong Christian convictions politically irrelevant and impl[ies] that such convictions have no purchase on the way things are.”¹¹¹ But Hauerwas is equally concerned about a Christian political and legal strategy about abortion that alters policy “without changing the presuppositions of the debate.”¹¹² This worry may be set in motion by Rawlsian and Dworkinian rhetoric to exclude “religious convictions or goals,” but it is exacerbated by a Christian response to these exclusions that attempts to comply with the rules of the game in order to be “strategic” or “effective.” Hauerwas cautions:

[A]s Christians we must not confuse our political and moral strategies designed to get the best possible care for children in our society with the substance of our convictions. Nor should we hide the latter in the interest of answering the former. For when that is done we abandon our society to its own limits. And then our arguments fall silent in the most regrettable manner, for we forget that our most fundamental political task is to be and to point to that truth which we believe to be the necessary basis for any life-enhancing and just society.¹¹³

Hauerwas’s arguments about abortion are complex on a number of fronts. His ambiguity as to what Christian participation in “legal strategies” might entail makes it difficult to state with specificity how his arguments would fit within the interpretive practice of law that Dworkin posits.¹¹⁴ His insistence on the connection between arguments and practices raises questions about translation.¹¹⁵ His articulation of the relevant legal issues may be unclear or undertheorized.¹¹⁶ And, as he well recognizes, some of his arguments will have no purchase on non-Christians.¹¹⁷ In short, Hauerwas’s arguments may not

110. DWORKIN, *supra* note 4, at 254.

111. HAUERWAS, *supra* note 2, at 215.

112. HAUERWAS, *supra* note 43, at 214.

113. *Id.* at 229.

114. Most of Hauerwas’s arguments are directed toward the Christian church rather than the American polity. *See id.* Hauerwas wants Christians to “develop forms of care and support, the absence of which seem to make abortion such a necessity in our society.” *Id.* Christians must recognize that “the role of parent is one we all share” and that “the woman who is pregnant and carrying the child need not be the one to raise it.” *Id.* Hauerwas continues, “We must be a people who stand ready to receive and care for any child, not just as if it were one of ours, but because in fact each is one of ours.” *Id.*

115. *See, e.g.,* STANLEY HAUERWAS, WITH THE GRAIN OF THE UNIVERSE: THE CHURCH’S WITNESS AND NATURAL THEOLOGY 17 (2001) (explaining that “ethics cannot be separated from theology” and that “the truthfulness of theological claims entails the work they do for the shaping of holy lives”).

116. For example, Hauerwas offers little consideration of the roles or interests of pregnant women (either inside or outside of the church) in his reflections about abortion. On the other hand, he insists on linking abortion to the ethics of sex and power and on recognizing that “sexual relations are relations of power.” HAUERWAS, *Abortion, Theologically Understood*, *supra* note 64, at 617.

117. *See, e.g.,* HAUERWAS, *supra* note 43, at 2 (“Because I contend that Christian ethics is distinctive, I make no pretense to be doing ethics for everyone.”). By way of example, consider these comments from Hauerwas about bodily integrity: “[Christians] do not believe that we have a right to do whatever we want with our bodies. We do not believe that we have a right to our bodies because when we are baptized we become members of one another; then we can tell one another what it is that we should and should not do with our bodies. . . . In the church we tell you what you can and cannot do with your genitals. They are not your own. They are not private.” HAUERWAS, *Abortion, Theologically*

prevail as the best interpretation of the law pertaining to abortion in the United States. But this article is not about assessing the merits or clarity of Hauerwas's abortion arguments. The goal has simply been to show how the religious convictions and goals embodied in his approach to abortion might fit within the process of legal interpretation. Hauerwas offers a perspective—with religious goals and convictions—that should be part of the conversation.

VII

CONCLUSION

Dworkin faces a choice. He could include voices like Hauerwas (and Yoder and Skillen) in the conversation about the meaning and content of law—after all, “in a genuinely free society, the world of ideas and values belongs to no one and to everyone.”¹¹⁸ Or he could exclude the theological perspectives that complicate his policy arguments. The former will prevent him from insisting that his “solution” to the abortion debate is “a responsible legal settlement of the controversy, one that will not insult or demean any group, one that everyone can accept with full self-respect.”¹¹⁹ The latter inches his legal theory closer to the aspects of Rawlsian political theory he disavows and makes the appeal to integrity just another narrative of contemporary liberalism.¹²⁰ Either

Understood, *supra* note 64, at 609. That claim is likely so foreign as to sound offensive to many secular liberals. (To Hauerwas's dismay, it will sound equally foreign to many Christians.) The point in flagging this language is to illustrate that Hauerwas makes different kinds of claims in his writing. Some of them are directed exclusively toward Christians; others are not. Some may effectively enter the conversation surrounding the legal regime of abortion; some will not. Elizabeth Mensch and Alan Freeman make a related point in commenting on some of Hauerwas's earliest essays on abortion: “Not every religiously rooted moral position translates, even from a theological perspective, into a demand for secular enforcement through legislation. On the other hand, the mere fact that a moral position is deeply rooted in religious belief does not preclude the assertion of that position in the secular public realm.” Elizabeth Mensch & Alan Freeman, *The Politics of Virtue: Animals, Theology and Abortion*, 25 GA. L. REV. 923, 1093–94 (1991).

118. DWORKIN, *supra* note 34, at 89.

119. DWORKIN, *supra* note 42, at 10–11. Dworkin's abortion arguments also reveal how his normative aspirations are deeply embedded in his interpretive theory. Indeed, this may be an inescapable predicament of contemporary political thought. But it raises the important question why the burden to disprove the anti-theological bias of public reason or law as integrity should rest on those like Hauerwas who make theological arguments. As Steven Smith has recently argued, public reason may not be so public after all, and its proponents may in fact be “smuggling” deeper notions into their arguments. STEVEN D. SMITH, *THE DISENCHANTMENT OF SECULAR DISCOURSE* (2010). Smith focuses his critiques on Rawls and Martha Nussbaum. Both are “vulnerable to the criticism that [they are] not actually arguing or reasoning but merely stating [their] own opinions and hoping that readers will join [them] in those opinions.” *Id.* at 173. The same could be said of Dworkin.

120. Cf. STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH: AND IT'S A GOOD THING, TOO* 137–38 (1994) (“[L]iberalism doesn't have the content it believes it has. That is, it does not have at its center an adjudicative mechanism that stands apart from any particular moral and political agenda. Rather it is a very particular moral agenda (privileging the individual over the community, the cognitive over the affective, the abstract over the particular) that has managed, by the very partisan means it claims to transcend, to grab the moral high ground, and to grab it from a discourse—the discourse of religion—that had held it for centuries.”); Stephen L. Carter, *Liberal Hegemony and Religious Resistance: An Essay on Legal Theory*, in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* 41 (Michael W. McConnell, Robert F. Cochran, Jr. & Angela C. Carmella eds., 2001) (“Liberalism, as a political

Law's Empire or *Life's Dominion* has overreached—Dworkin has yet to tell us which it is. But the arguments Hauerwas raises show us why the question cannot go unanswered.