Law & The Sacred: Competing Notions of Law in American Civil Religion

Derek H. Davis

The presence of a civil religion in America is now widely accepted. While its specific content is still debated, most agree that civil religion is essentially about those public rituals and myths that express for most Americans the nexus of the political order to the divine reality. According to Robert Bellah, who stimulated much of the discussion about civil religion with his seminal essay in 1967, civil religion in America is "an understanding of the American experience in the light of ultimate and universal reality" (18).

Much of the literature of recent decades exploring civil religion has centered on the definitional problem. By 1974, there were so many characterizations of civil religion that Russell Richey and Donald Jones were prompted to offer a useful five-category schema for the organization of civil religion literature. These categories were folk religion, transcendent religion of the nation, religious nationalism, democratic faith, and Protestant civic piety (1974: 14-17). Richey and Jones felt that all of the various descriptions of civil religion offered by scholars would readily fall under these five categories. Yet even this schema proved problematic at times because so many descriptions of civil religion contained overlapping elements of the Richey and Jones' categories. For example, each of their categories usually drew upon civil events such as the 4th of July, Memorial Day, and presidential inaugurations, documents such as the Declaration of Independence and the U.S. Constitution, personages such as Washington, Jefferson, Madison, and Lincoln, and common religious beliefs such as the belief in God and the chosen nation status of the United States. Moreover, it became increasingly apparent that not all civil religionists held to these common tenets. There seemed to be a less conservative version, one that drew upon a different set of religious values and portrayed the nation in a very different light. The traditional symbols seemed too often to grant the nation a unique identity in the world and legitimate its self-serving political, military, and economic interests. This form of civil religion raised questions about United States hegemony and challenged the nation to act on behalf of all humanity rather than solely its own interests. Even at presidential inaugurations, which Bellah believed were the primary ritual expression of American civil religion, [1] one could not help but notice the numerous dissidents protesting the diverse elements of the ceremony because of what they felt the events meant. What was needed was a more basic schema around which civil religion could continue to be analyzed and critiqued.

It was Robert Wuthnow (1988a) who provided the much needed, more simplified schema for the study of American civil religion. It was simple enough -- two categories: conservative and liberal. Wuthnow, in offering this two-category approach, probably could have claimed as his own the remark made by Bellah in 1967 concerning Bellah's own pathbreaking assertion that civil religion in America was an autonomous religion with its own set of rituals, myths, and symbols: "Why something so obvious should have escaped serious analytical attention is in itself an interesting problem" (Bellah 1967: 21 n.1). But while Wuthnow's two-category schema was unabashedly plain, his presentation of it was convincing. He asserted:

> The civil religion to which we so blithely pay homage has... become deeply divided. Like the fractured communities found in our churches, our civil religion no longer unites us around common ideals. Instead of giving voice to a clear image of who we should be, it has become a confusion of tongues. It speaks from competing traditions and offers partial visions of America's future. Religious conservatives offer one version of our divine calling; religious liberals articulate one that is radically different (1988a: 395).

Wuthnow's provocative article aptly described in general terms the basic frameworks of the conservative and liberal forms of American civil religion, but neither Wuthnow nor anyone since has sought to explore the specific tenets of each version. In particular, the moral aims of civil and criminal law, viewed from the perspectives of the two competing civil religions, has not been examined. This was the case even before Wuthnow offered his new schema; it was always assumed by most commentators that American civil religion included the belief that the nation's laws were imbued with biblical morality. But that there were two competing versions of what form this biblical morality should take did not become clear until the 1980s when the political activism of the Religious Right brought to light distinct differences in the way religious conservatives and religious liberals viewed the desired moral

dimensions of law. The civil religion of both groups assured them that God was using the nation to carry out a special work in the world, but the radical differences in this vision, as it related to the relationship of law and morality, could not be explained without the benefit of something like Wuthnow's two-category description of civil religion. It is now evident that the conservative and liberal versions of American civil religion include markedly different views, not only on the sources of law -- that is, the political theory or political theology that underlies the making of law -- but on the form the law should take relative to social issues such as abortion, homosexuality, pornography, and school prayer.

The aim of this essay is to use Wuthnow's two-category model to describe the source and moral content of law as envisioned by the competing conservative and liberal versions of American civil religion.

It is important to know something about the bases upon which conservative and liberal civil religionists legitimize law because it is the nation's commitment to law which in turn legitimizes the whole civil order for both groups. As is well-known, Max Weber devoted considerable attention to the problem of legitimacy and civil order. As Weber demonstrated, it is the citizens' belief in the legitimacy of a particular civil order that engenders confidence and loyalty and allows for peace and order. Absent this legitimacy, claimed Weber (1947), and an erosion of civil order occurs, leading to anarchy and/or revolution.

It should be stated at the outset that the content of the rival versions of civil religion to be investigated is distinguishable from the political advocacy engaged in by American communities of faith on various social issues. A number of studies have demonstrated that civil religion in the United States is sufficiently advanced to be clearly differentiated from the political stances of the various religious groups represented nationwide (Coleman 1970, Parsons 1971, Cherry 1971, Christenson 1978). Consequently, specific elements of civil religious belief, such as the belief that all law should conform to God's law, or the belief that laws regulating abortion should be determined without recourse to religious beliefs, can be correspondingly differentiated from the advocacy of such positions by religious lobbies. The two are closely related, of course, and it may be that the civil religious beliefs of each version are merely the result of the metamorphosis and consequent appropriation of views of religious conservatives and religious liberals that were not so widely accepted before they were developed through the political advocacy process over the last fifteen years or so. Civil religious beliefs, however, would seem to be more fundamental, more pervasive, than mere advocacy positions; serving more as an overall worldview and perhaps even forming the theoretical basis for advocacy positions on various issues. In any case, it is the position of this essay that civil religious beliefs are distinguishable from general religious beliefs on the issue of the source and moral content of law.

Before proceeding to a discussion of the nature, source, and content of law as envisioned by the conservative and liberal versions of American civil religion, it is necessary first to briefly describe the general tenets of these two versions of civil religion. [2] Such a description will provide a context for the discussion to follow concerning the theoretical and practical expectations of both versions regarding the formulation of law in America.

Conservative Civil Religion

The conservative version posits that America is a chosen nation. On this interpretation, our form of government enjoys lasting legitimacy because it was designed by founding fathers sensitive to God's leadership. While the framers omitted specific references to God in the Constitution, they made certain that the documents reflected biblical truths, such as the separation of powers which was intended as an auxiliary check on human sinfulness. As the late Francis Schaeffer, a popular evangelical author, asserted in *A Christian Manifesto*: "These men truly understood what they were doing. They knew they were building on the Supreme Being who was the Creator, the final reality... These were brilliant men who knew exactly what they were doing" (Schaefer 1981: 33). John Whitehead, head of the Rutherford Institute, says essentially the same thing: "The framers of our nation understood the need for Christian content in the system they were developing" (1982: 33).

Closely related to the chosen nation theme is the notion that America is the instrument that God will use to usher in his millennial reign. In the frantic days just before the Continental Congress issued its Declaration of Independence, Connecticut preacher Ebenezer Baldwin, for example, expressed the

widely held view that America might become "the principal seat of that glorious kingdom, which Christ shall erect upon earthen the latter days" (1776: 38). Herman Melville's nineteenth-century novel, *White Jacket*, described America as a "political Messiah" sent as an advance guard to "bear the ark of the liberties of the world" (quoted in Wuthnow 1988a: 396). In the twentieth century, two world wars and economic depressions dampened millennial expectations. Yet as America increasingly found itself in the forefront of world and economic affairs, much of the traditional zeal linking the nation with God's purposes continued to be voiced.

In 1953, Congress, under encouragement from President Dwight Eisenhower, sought to solidify the nation's religious moorings by adding the words 'under God' to the pledge of allegiance. A year later, it decreed the nation's motto to be 'One Nation Under God'. [3] Norman Vincent Peale (1972) was sufficiently enamored with the new motto to adopt it as the title of his book in which he argued that America had for all of its history enjoyed a unique calling from God which continued to be expressed in the Christian commitment of its people.

These themes have been important in recent political campaigns. In 1988, Pat Robertson mailed a letter to his constituents asserting that the Ten Commandments are the 'bedrock of America'. The letter further asserted that the essential truth upon which Robertson's candidacy for president was based was the conviction that "we must never forget -- and always remind those who will forget -- that we are ONE NATION UNDER GOD" (quoted in Wuthnow 1988a: 396). During his unsuccessful bid for the Republican nomination for president in 1992, Pat Buchanan called for the nation to 'return to God', lamenting that it is a "once Christian country that has been force-fed the poisons of paganism" (1988). His failed bid for the presidency in 1996 repeated the same message.

Many conservative civil religionists go beyond calling for a generic 'Nation Under God' to calling for a specifically 'Christian nation'. Pat Robertson, for example, recently called upon Americans to reaffirm their country's "identity as a Christian nation" (Robertson 1992: np). Evangelist Jerry Falwell asserts that "God promoted America to a greatness no other nation has ever enjoyed because her heritage is one of a republic governed by laws predicated on the Bible" (1980: 16). Religious Right author David Barton, in his widely circulated book, *The Myth of Separation*, argues that the founding fathers intended "that this nation should be a Christian nation; not because all who lived in it were Christians, but because it was founded on and would be governed by Christian principles" (1990 quoted in Boston 1993: 10). And Christian Reconstructionist Rousas J. Rushdoony unreservedly asserts, "The Constitution was designed to perpetuate a Christian order" (quoted in Barton 1990: 38).

Conservative civil religion also sanctifies the American economic order. Typically, capitalism is praised as being fundamentally biblical. Economist George Gilder, who identifies himself as an evangelical Christian, once argued,

> Give and you'll be given unto is the fundamental practical principle of the Christian life, and when there's no private property you can't give it because you don't own it... Socialism is inherently hostile to Christianity and capitalism is simply the essential mode of human life that corresponds to religious truth (quoted in Clapp 1983: 27).

Pat Robertson draws directly on Gilder's work to arrive at the conclusion that "free enterprise is the economic system most nearly meeting humanity's God-given need for freedom" (1982: 151). And for Jerry Falwell, American capitalism enjoys divine sanction: "God is in favor of freedom, property ownership, competition, diligence, work, and acquisition. All of this is taught in the Word of God in both the Old and New Testaments" (1984: 102).

Liberal Civil Religion

The liberal version of American civil religion is also linked to religious values, but in a different way. As Wuthnow notes, few spokespersons for the liberal version make explicit reference to the religious views of the founding fathers or suggest that the United States is God's chosen nation. Indeed, the idea of one nation under God is rejected because all nations are considered to have the equal concern and affection of God.

America's role in world affairs is perceived much differently in the liberal version of civil religion. The

nation has a responsible role to play in the world not because it is a chosen people but because it is uniquely blessed with vast resources to be shared. Rather than focusing on issues of personal morality, liberal civil religion is likely to stress global issues such as human rights, nuclear disarmament, world hunger, and peace. The importance attached to these issues is generally not legitimated with reference to any particular secular mandate, but simply on the belief that these are matters of life and death. Nevertheless, religious faith is frequently the motivation for involvement, differentiating civil religion from purely secular or humanist beliefs. The cry of the Old Testament prophets for peace and justice is the authoritative directive for liberal civil religion (Wuthnow 1988a: 397).

A recent survey of Presbyterian clergy yielded results characteristic within liberal civil religion. When asked to rate various goals for the nation, respondents gave top priority to having America serve as an example of freedom and justice to all nations. Also ranked near the top were conserving the world's natural resources and wealth-sharing between rich and poor nations. Spreading American capitalism ranked near the bottom of the list. Eighty percent of the clergy polled thought national arrogance hindered Christian work in the world, while less than a third thought America was currently a blessing to humankind throughout the world (Hodge 1976). To many religious liberals, the United States is becoming a modern day Roman Empire, powerful, arrogant, and dominating the less developed world (Hertzke 1988: 107).

Liberal civil religionists typically show a greater concern than their conservative counterparts in seeking peace and justice. Feeding the world's poor is a central focus, as illustrated by liberal support for such organizations as Bread for the World, Lutheran World Relief, Catholic World Relief, and World Vision. And a recent survey by the American National Election Study indicated that liberal religious lobbies are more than twice as supportive of defense spending reductions as conservative religious lobbies (Hertzke 1988: 136).

The issue that perhaps most distinguishes the two versions of civil religion is church-state relations. On the one hand, the conservative version, in the classical and medieval tradition, is not reluctant to assign responsibility to the state for building the people's virtue through the promotion of religion. Thus public school prayer, parochiaid, and a general accommodation of religion -- especially Christianity -- are advocated. On the other hand, the liberal version, in Lockean fashion, seeks to cure the disruptive effects of religion in the public order by separating the two. The liberal version does not advocate the marginalization of religion, or even the separation of religion from society, but a policy of carrying out an institutional separation of religion and government in the belief that such a policy will enhance for both the pursuit and achievement of their essentially different goals.

Obviously, the conservative and liberal versions of American civil religion are fundamentally at odds. The conservative version offers divine sanction to America, legitimates its form of government and economy, explains its privileged place in the world and to some extent justifies a uniquely American standard of luxury. The liberal version raises questions about what Will Herberg called 'the American Way of Life' (1974: 77), scrutinizes its political and economic policies in light of transcendent concerns, and challenges Americans to act on behalf of all humanity rather than their own interests alone. Each side sees itself as the champion of higher principles and the spokesman for what America is and should be about (Wuthnow 1988a). This is no less true for their respective descriptions of what are the foundational bases for law in America and how law accordingly should be shaped.

Law and Morals in Civil Religion

There are essentially four frameworks for understanding how the law of any particular political society should be formulated. These four frameworks have arisen chronologically in history, but none have totally eclipsed the others, and thus each remains with us today as a viable paradigm in the public lawmaking process. Because law is always concerned to some extent with morality, each of these four frameworks offer a different vision of how law should relate to morality. These four frameworks are revealed law, natural law, utilitarianism, and what might be called Kantian liberalism. The conservative and liberal versions of American civil religion both draw on more than one of these frameworks, but the dominant frameworks for each are different and result in very different visions of how law should govern Americans.

It might be noted, too, that these four frameworks help to give meaning to the four types of civil

legitimacy which Weber identified: 'legality,' 'traditionalism,' 'charisma,' and 'natural law'. 'Legality' is, in Weber's view, the category most prevalent among today's pluralistic societies, and is "the readiness to conform with rules... which are imposed by accepted procedure". 'Traditionalism' would look to longstanding practice and custom as the ground for civil legitimacy. 'Charisma' would emphasize revealed, transcendent truth, i.e., religion, and 'natural law' would look, of course, to natural law for civil legitimacy (1947: 130-32). Weber did not elaborate extensively on these four kinds of legitimacy, but the four frameworks of law to be discussed might serve as a kind of elaboration thereon. Revealed law might inform Weber's 'charisma' category, natural law easily conforms to his 'natural law' category, and utilitarianism and Kantian liberalism seem to give definition to his 'legality' and 'traditionalism' categories. In other words, revealed law, natural law, utilitarianism, and Kantian liberalism, as competing visions of how law should be framed in America, are the means by which the American people evaluate the legitimacy of their civil order.

Revealed Law

Operation Rescue leader Randell Terry recently remarked that one of the goals of his pro-life organization was a Christian America, built on nothing less than on God's law, specifically the Ten Commandments (Loretta 1994: 24). Rousas J. Rushdoony likewise calls for the full implementation of biblical law into American society, since the Bible is "intended to be valid for all time and in every civil order" (1973: 10). And in 1988, at the Republic State Convention of Arizona, Pat Robertson supporters and other Christian activists passed a resolution declaring America to be a 'Christian nation' based on the absolute laws of the Bible, not a democracy (Frame 1976: 200). While these positions are considered extreme by most Americans, it must be realized that in the scope of human history, revealed law has more often than not been the source of civil and criminal law codes. In ancient Babylon, for example, the Code of Hammurabi was believed to have been given by the king's personal god to enable the king to rule effectively. The Code was comprehensive in its coverage, regulating everything from homicide and perjury to the fees received by surgeons and masons. Likewise, in the days of Egypt's earliest recorded history, the gods were believed to deliver all of the empire's laws to the Egyptian kings (Pfeffer 1967: 34).

In Western civilization, of course, it has been the Bible that has been most often looked to as the unassailable source for the formulation of human laws. Numerous societies, inspired by the covenantal relationship between God and Old Testament Israel, have sought to install theocratic frameworks that would make them God's most faithful servant and witness. Many have described the Holy Roman Empire in this way, but in truth, the Empire's legal framework always was laden with too much baggage from pre-Christian Greek, Roman, and Stoic natural law theory to be labeled a theocracy. The most notable attempts to build a civil order completely on the law of God have been Giralamo Savanarola's fifteenth-century Florence, John Calvin's sixteenth-century Geneva, and John Winthrop and John Cotton's seventeenth-century Massachusetts Bay Colony. Each of these experiments failed due in part to their autocratic tendencies, but this has not prevented some modern scholars, theonomists (Reconstructionists) in particular, from dreaming of a yet future Christian Utopia. For theonomist Gary North, the Massachusetts Bay Puritans come closest to successfully building a civil order based on God's law; their failures, such as the Salem Witchcraft trials in 1692, were mere minor violations of biblical principles that have received 'bad press' from 'secular humanist' historians (Rausch and Chismar 1983: 714).

Not all conservative civil religionists, to be sure, would side with theonomists who believe that the Bible offers a blueprint for the rebuilding of modern society. While theonomists would hold out for such things as capital punishment for all capital crimes listed in the Old Testament, including adultery, homosexual acts, apostasy, blasphemy, and incorrigibility of children, more moderate conservative civil religionists would be satisfied with a selective integration of biblical 'principles' such as the reinstatement of 'voluntary' public school prayer, the proscription of abortions, making illegal all homosexual acts (including marriage and adoptions by homosexual partners), and strict enforcement of pornography laws, especially those on selling illicit material to minors.

Liberal civil religionists are less prone to claim that there is only one 'biblical' perspective on the various social issues that divide America. They are more inclined to permit divergent religious choices at the level of the individual than to impose one mandated view at the level of government. They fear the

'Christian nation' rhetoric of the Religious Right, wishing for a nation instead that honors freedom, toleration, and religious and philosophical diversity.

Natural Law

Much of the history of political theory has been the attempt to structure human society according to the highest ruling principles of the universe. These ruling 'laws of nature,' which are accessible by reason to people of all races, classes, religions, and cultures, have usually been understood to exist by divine design, thus making it possible for humankind to live in harmony with God if only the natural laws can be ascertained and made the basis of positive law. While the roots of natural law theory extend to such classical theorists as Socrates, Plato, Aristotle, and Zeno, the Middle Ages were above all the centuries of natural law theory. In medieval Christendom, the laws of nature were thought to supplement Scripture as God's truth, and thus both served simultaneously as the foundation for canon law and civil law, the respective bodies of law of the two partners in the medieval world, church and state. Both bodies of law were constructed on the view that 'God is the source of all law'. Law is a part of the universal order and therefore unchangeable. Thus, humankind does not create law; it 'discovers' it. [4] Law needs merely to be identified and catalogued. The Justinian Code, the basis for much of medieval Europe's civil law, was nothing more than a sixth-century collection, compilation, and organization of pre-existing 'discovered' laws. Its canon law counterpart, the *Decretum*, assembled by Gratian in the twelfth century, was merely a systematization of scriptural, conciliar, imperial, decretal, and patristic laws that had almost imperceptibly developed alongside the civil law throughout the Middle Ages. Like Justinian's Code, there was nothing 'new' in it; its benefit lay in its organized presentation of the law as 'discovered' through God's instrument, the Church.

In classical and medieval societies, the 'natural laws' virtually always served to subordinate the individual to the major communal institutions, church and state. Individuals had few 'rights', only 'duties' to submit oneself to the more important interests of God, the Church, an empire, a king, or a feudal lord. Divorce, for example, both under civil and canon law, was thought to violate natural law (and Scripture too) since it caused social disruption; laws preventing most divorces were therefore strictly enforced, less for the benefit of the individuals involved as for the preservation of the equilibrium of society. As medieval institutions began to break down in the High Middle Ages, however, giving way to newly developing nation-states, the individual began to win a new respect and autonomy, and by the fourteenth century, was widely considered to possess basic rights. The mediator in the shift from a state-defined to an individual-defined political identity of the human person was natural law (Wiltshire 1992). By the seventeenth century, rights were possessed by individuals as a part of the God-created natural order. There might be disagreement as to the identity of humankind's natural rights, but the overall importance of these developments was clear: autonomous man was the constituent element in human society.

The most clearly articulated list of rights, however brief, was John Locke's: life, liberty, and property. These became the foundation not only for the Declaration of Independence, but much of America's early political discourse. But natural law theory had two fundamental faults. First, it was a theory too vague to identify adequately the natural rights it produced. Natural law theory justified in the nineteenth century everything from slavery to the exclusion of women from the legal right to practice law to the right of churches to tax exemptions. Natural law could be called upon to justify any practice not covered explicitly by Scripture. Natural law's second fault was its linkage to the transcendent. Many utilitarian thinkers considered the religious foundations of natural law to be a major source of humankinds' inability to formulate laws that were pragmataic and effective. As American moral and jurisprudential theory sought to remove once and for all the unity of ethics and politics under the banner of utilitarianism, the assumptions of liberal individualism which natural law theory embodied remained the premise of much political discourse.

U.S. Supreme Court Associate Justice Clarence Thomas discovered in his 1991 Senate confirmation hearings just how little regard many Americans have for natural law. When he suggested that judges might be free to appeal to natural law to decide cases, a torrent of disapproval flowed from the pens of legal commentators and editorial writers. The usual objection was that natural law might have been relied upon in past days when the fabric of precedent and statute was more loosely woven and judges had to make some general moral appeal to fill in gaps in the law, but that today, such makeshift decisions should almost never be required (Lovin 1991: 869).

Yet, while many would warn of the threats to civil liberty and constitutional integrity that are posed by the doctrine of natural law, the simple fact is that most Americans have difficulty rejecting it completely. Justice Thomas himself admitted that he used it at his Senate hearings mostly as a piece of political rhetoric designed to appeal to political conservatives. And, too, anyone who believes in the Bible as God's revelation would be inclined to believe in natural law in one form or another as a means of explaining humankind's awareness of universal truths not specifically set forth in Scripture. One might argue that Catholics, whose faith is immersed in a rich tradition of natural law, maintain a firm foothold in its doctrines, whereas Protestants, who are prone to look to Scripture alone for faith and practice, do not. But this would not be accurate because many Protestants, especially fundamentalists, are sufficiently well-versed to know that the natural law dimensions of the Declaration of Independence are essential to their aim of making America a Christian nation.

Although natural law may be only a very loose set of ideals for most Americans in the late twentieth century, it is so much a part of the history and fabric of American life that it is embraced to one degree or another by both the conservative and liberal wings of American civil religion. This should come as no surprise, since natural law is a traditional religious doctrine and both the conservative and liberal versions of American civil religion are in fact profoundly 'religious' in traditional ways. Natural law is, however, embraced in different ways by the two competing versions of American civil religion. Conservative civil religion focuses on the belief that natural law is synonymous with religion, and cites natural law to support political positions in opposition to abortion, homosexuality, right-to-die, school prayer, and the like. As already mentioned, it assumes that the natural law framework of Jefferson's Declaration, which allowed for four references to the deity, is lasting proof of the Christian vision that the founders had for the nation. There is little awareness that the same natural law framework shaped Lockean liberalism's commitment to individual rights, including religious freedom and its concomitant notion of a secular state. Baptist fundamentalist pastor W.A. Criswell expressed such a contradiction by declaring: "there is no such thing as the separation of church and state. It is merely a figment of the imagination of some infidel" (quoted in Dunn 1994: 3).

For liberal civil religionists, the appeal to natural law remains more important to international issues, such as the prosecution of war crimes, the protection of human rights, and the pursuit of world peace. In domestic terms, the appeal to natural law is less frequent, since modern statutory and judicial law are thought to provide a detailed framework in which most questions can be decided without recourse to larger and more ambiguous ideas about what persons want and require. For example, since large claims about women's roles, sexuality, human reproduction, and racial superiority have often been the basis for oppression and discrimination, liberal civil religionists are grateful for the expansion of positive law that makes recourse to natural law infrequent and unnecessary. Even though the law regarding abortion, sexuality, or termination of life-support issues is less settled, liberal civil religionists would tend to argue that law in these areas should develop through consensus, not because some vague notion of natural law would support a particular outcome (Lovin 1991: 870).

Utilitarianism

It is not really surprising that utilitarianism's day in America has largely come and gone. It made no allowance for religion and therefore had no wide appeal to the American populous. For the same reason it has never been a major tenet of American civil religion. While it remains for some a viable political theory and moral philosophy, it is discussed here only to show how its assault upon natural law led to the enshrinement of a political philosophy in late twentieth-century America of what in many ways was a compromise between the thoroughly religious outlook of natural law and the equally thoroughly nonreligious outlook of utilitarianism. We shall later refer to this compromise as Kantian liberalism.

The nineteenth century was very much the age of liberalism, but the underlying philosophical assumptions of the doctrine -- especially its foundation in natural law -- were radically altered in the early part of the century by thinkers who came to be known as utilitarians. [5] The thinker most responsible for first changing the natural law foundations of liberalism was David Hume (1711-1776). Hume's moral philosophy was based on a "new" insight into the psychology of human behavior. That which people claim is morally good or bad, said Hume, is really nothing more than sentiment. Sentiment, in turn, is simply a reflection of what people find agreeable or disagreeable. That which they

find agreeable is good, disagreeable, bad. In short, people's moral rules are utilities -- morality is determined by the amount of pleasure or pain an experience brings.

Hume's utilitarianism was directed against the whole natural law tradition of ethical discourse. In place of that tradition, Hume wanted to create a strictly naturalistic ethics that could be scientifically validated, for he believed that there is simply no way to prove scientifically the existence of natural law or any other ethical standard. Natural law, thought Hume, is simply a moral sentiment, a utility, that people have historically but mistakenly taken to be an objective moral standard. Likewise, Hume believed, natural rights such as life, liberty, and property, which spring from natural law theory, are nothing more than moral sentiment. Rights and liberties have no moral foundation; they exist as utilities, plain and simple.

Jeremy Bentham (1748-1832) found Hume's ideas to his liking, especially the removal of transcendence from moral philosophy. Bentham sought to extend utilitarian ideas into political theory and law. Taking Hume's pleasure/pain principle, he theorized that government ought to maximize pleasure and minimize pain for the greatest number possible. In Bentham's famous formulation, the principle applied at the legislative level must be 'the greatest happiness of the greatest number'. Here at last, thought Bentham, was a political theory built on genuine science with no relation to Scripture or some larger ethical order.

Bentham's utilitarian science was remarkably popular in late nineteenth-century America. It became a conventional rule designed to control behavior by creating pleasure or, in the case of criminal law, by inflicting pain. It has lost its appeal in the twentieth century, however, not only because its application has not always produced good results, but more particularly because it was increasingly criticized as a product of the Darwinian revolution against time-honored religious truths.

The late twentieth-century has not seen fit to return, however, at least completely, to natural law theory. What has developed has been a rights-based ethic over the utilitarian one, due in large part to the powerful influence of John Rawls's *A Theory of Justice*, published in 1971. Rawls's theory lays emphasis on the protection of basic human rights, not those that are theoretically God-given as under natural law, but those that are so fundamental that the members of any start-up society would automatically choose them. Rawls' ideas are an application of Kantian liberalism, which itself had seemed to have been forging its way into the American system long before Rawls appeared on the scene, and is now so well entrenched (though hardly by the name 'Kantian liberalism') that it must be said to have ties to American civil religion.

Kantian Liberalism

Utilitarianism's greatest weakness was that it failed to provide adequate protections for individual rights. While serious questions are being asked whether America has allowed its liberal principles to extend too far in the protection of individual rights, very few are calling for a wholesale return to utilitarian principles as a solution to this problem. The Kantian critique of utilitarianism remains valid two hundred years later. Kant (1785) argued that strictly empirical principles, such as utility, not only leave rights vulnerable, but fail to recognize the inherent dignity of persons. The utilitarian calculus, he thought, treats persons as the means to the happiness of others, not as ends in themselves, worthy of respect.

Today's liberals are well known for defending what they oppose -- pornography, for example. They state that the state should not impose a preferred (religious or otherwise) view of life, but should leave its citizens as free as possible to choose their own values and lifestyles, consistent with a similar liberty for others. This commitment to freedom of choice requires liberals constantly to distinguish between allowing a practice and endorsing it. It is one thing to allow pornography they argue, something else to affirm it. Whether or not aware that they are acting in the Kantian tradition, their goal is to respect the dignity of the other person, to respect his rights without necessarily affirming his choices. [6]

Conservatives sometimes balk at this approach to life, arguing that it is just compromise. They charge that those who allow pornography favor pornography, those who allow abortion favor abortion, that opponents of school prayer oppose prayer. And in a pattern of argument familiar in our politics, liberals reply by invoking higher principles; freedom is all about respecting differences, they say. But does the liberal response extend beyond moral relativism? Is there a moral basis to the liberal resolve not to

favor any particular ends, or to impose on American's citizens a preferred way of life? Is this approach an improvement on utilitarianism, which denies all moral foundations? Kantians would reply, yes, on all counts.

Modern-day Kantians argue that such an ethic is superior to utilitarianism not only because it takes rights seriously, but because it is an ethic that, unlike utilitarianism, can be morally justified. They draw a distinction between the 'right' and the 'good' -- between a framework of basic rights and liberties, and the conceptions of the good that persons may choose to pursue within that framework. It is one thing for the state to support a fair framework, they argue, something else to affirm some particular ends. For example, it is one thing to defend freedom of religion so that people may make their own decisions about ultimate things, but quite another thing to support it on grounds that a religious life is preferable to a nonreligious one. Neutrality is at the center of the Kantian perspective. In fact, the achievement of a framework neutral among ends is itself its moral justification. The value of this moral justification consists precisely in the neutral framework's refusal to affirm a preferred way of life or a conception of the good. It is a framework within which individuals and groups can choose their own values and ends, consistent with a similar liberty for others.

Few would argue that the Kantian rights-based ethic just described is the dominant political philosophy now operating in America. It is indeed a compromise between natural law theory and utilitarianism; it yields to natural law by allowing for religious perspectives in the lives of American citizens, but yields also to utilitarianism by not requiring religious perspectives. It is an ethic that has always had a place in American public philosophy, but is now more firmly in place than ever before.

The Kantian ethic enjoys popularity with the liberal version of American civil religion. It places a high priority on fundamental rights without requiring agreement as to what those rights are. It favors a scheme of civil liberties, including rights to welfare, education, and health care, and allows choice on such controversial issues as abortion, sexuality, and school prayer. It makes room for persons who hold any range of positions on all kinds of issues, thereby acknowledging the racial, ethnic, and religious pluralism that is the great source of division in America.

The Kantian liberal ethic's greatest weakness, conservatives would argue, is its neutral stance, its absence of conviction on any of the moral issues that really matter like abortion, prayer, homosexuality, pornography, and that which guides one to the correct views on all these issues, the Judeo-Christian ethic. And this critique is affirmed, conservatives would say, by the position of church-state separation that is mandated by the Kantian ethic. Perhaps Jerry Falwell's sentiments on church-state separation express the feelings of many religious conservatives: "The idea that religion and politics don't mix was invented by the Devil to keep Christians from running their own country" (Falwell 1987:100). Indeed, under the Kantian ethic, no religious viewpoint is given preferential treatment, none is supported, and all are granted the right to the free exercise of religion.

Kantian rights-based liberalism, now an integral part of the American political way of life, has played a significant role in recent decades in crystallizing the differences between the two forms of American civil religion. Kantian liberalism refuses to affirm Christianity or even religion in general as the ethic that should guide law and legislation in America. It generates little support among conservative civil religionists for whom the destiny of the nation is tied to Christianity's remaining the country's guiding moral force. The Kantian ethic, however, finds favor with liberal civil religionists because it assigns to the state a limited role in directing the moral forces that guide the nation.

Concluding Remarks

Many might be inclined to argue that the content of the two forms of civil religion embraced by American citizens does not extend as far as what has been presented in this paper. That may be true if we are speaking of the vocabulary or language with which the content of a particular form of civil religion is defined in popular terms. Certainly less formal language would be employed by the average American civil religionist -- he is unlikely to articulate his views, for example, in terms of the distinction between utilitarianism and Kantian liberalism -- but that does not alter the reality or the more sophisticated recognition of that reality within the academic community and its immediate reaches. The tenets of each form of civil religion should not be denied on the theory that those who are civil religious cannot articulate their beliefs in a particular way.

The two versions of American civil religion both have a vision of what America is all about and where it should be heading. These two visions are fundamentally at odds. Neither can claim a consensus about the nation's founding ideology, the core values that define America, and what should be preserved or changed in America. The conservative version claims for America a divinely bestowed uniqueness unlike that enjoyed by any other nation in the world, and seeks to preserve the values it believes warranted its blessing in the first place. The liberal version appreciates the nation's blessings and privileged place in the world, rejoices in the diversity of people enjoying its benefits, and seeks to extend its enjoyments to the rest of the world..

The two forms of civil religion also differ, specifically, on the political theory that should guide the nation and the kind of law that should in turn be generated. The conservative version looks to revelation and natural law to produce a set of laws that reflect biblical morality. The liberal version combines these two with political theories derived from utilitarianism and Kantian liberalism to produce laws that treat all Americans on equal terms and allow for maximum choice among the citizenry.

At one level, the coexistence of two versions of civil religion is probably unhealthy for American society. Because both sides are prone to criticize each other, Americans as a whole are often left doubting the credibility of either. This minimizes civil religions' highest goal and benefit -- unity among the nation's citizens. The result is increased polarization among the citizenry in a nation that could use some union and solidarity. Moreover, the consequent lack of credibility for two civil religions that both uphold religious values further opens the gates for secular ideologies to flourish. If the conservative version of American civil religion is largely composed of Christian fundamentalists and evangelicals, and the liberal version of religious moderates -- which seems accurate enough -- then perhaps both versions need to be less concerned with each other and more concerned about the growth of naturalist ideologies which espouse only excessive materialism, radical individualism, and the further marginalization of religion.

At another level, however, the presence of two competing versions of civil religion might be healthy for American society. Weber did not speak systematically to the matter of combinations of his four types of civil legitimacy coexisting simultaneously, but it seems that they are at once all present in the American situation. Likewise, the four frameworks for law previously discussed, as the substantive elements of Weber's categories, are certainly at once all present in today's America. While some might argue that this situation augurs for dissensus, even chaos, I would suggest that it preserves the political dynamism which is the lifeblood of the American system and encourages cooperation as a much-needed and essential ingredient of life in a pluralistic society.

References

Baldwin E 1776 *The Duty of Rejoicing Under Calamities and Afflictions* Hugh Gaine New York

Barton D 1990 *The Myth of Separation* Wallbuilder's Press Aledo Texas

Bellah R N 1967 'Civil Religion in America' *Daedalus* 96

Boston R 1993 'The 'Christian Nation' Debate' *Church and State* 46/10 7-10

Buchanan P J 1988 *Right From the Beginning* Little Brown & Co Boston

Cherry C 1971 *God's New Israel* Prentice-Hall Englewood Cliffs N J

Christenson J A 1978 'Who is Civil Religious?' *Sociological Analysis* 39/1

Clapp R 1983 'Where Capitalism and Christianity Meet' *Christianity Today* 27 4 Feb 1983 27-33

Coleman J A 1970 'Civil Religion' *Sociological Analysis* 31/2 67-77

Dunn J 1994 'Decide for Yourself' *Report from the Capital* 49, 20 Sept 1994

Falwell J 1980 *Listen America!* Doubleday & Co Inc Garden City New York

--1984 *Wisdom for Living* VictorBooks Wheaton Ill

--1987 *Strength for the Journey* Simon and Schuster New York

Frame J M 1976 'The Institutes of Biblical Law: A Review' *The Westminister Theological Journal* 38/2 195-217

Grant S M 1997 'Making History: Myth and the Construction of American Nationhood' in *Myths and Nationhood* eds G Hosking and G Schopflin Routledge New York

Herberg W 1974 'America's Civil Religion: What It Is and Whence It Comes' in *American Civil Religion* eds R E Richey and D G Jones

Hertzke A D 1988 *Representing God in Washington: The Role of Religious Lobbies in the American Polity* The University of Tennessee Press Knoxville TN

Hoge D R 1976 'Theological Views of America Among Protestants' *Sociological Analysis* 37/2 127-39

Kant I 1785 *Groundwork of the Metaphysics of Morals*

Kern F 1970 'The Lack of Legislative Power' in *The Middle Ages* ed Brian Tierney Alfred A Knopf New York

Lovin R W 1991 'The Persistence of Natural Law' *Christian Century* 108/27

Nelson B R 1982 *Western Political Theory: From Socrates to the Age of Ideology* Prentice-Hall Inc Englewood Cliffs N J

Neuhaus R J 1990 'Why Wait for the Kingdom? The Theonomist Temptation' *First Things* May 1990 13-21

Parsons T 1971 *The System of Modern Societies* Prentice-Hall Englewood Cliffs N J

Peale N V 1972 *One Nation Under God* Foundation for Christian Living Pawling N Y

Pfeffer L 1967 *Old World Antecedents* rev edn Beacon Press New York

Rausch D A & Chismar D E 1983 'The New Puritans and Their Theonomic Paradise' *Christian Century* 100/23 712-15

Rawls J 1971 *A Theory of Justice* Harvard University Press Cambridge Mass

Richey R E and Jones D G eds 1974 *American Civil Religion* Harper and Row New York

Robertson P 1982 *The Secret Kingdom: A Promise of Hope and Freedom in a World of Turmoil* Thomas A Nelson Nashville TN

--1992 *Fund-raising letter*

Ross L J 1994 'Anti-abortionists and White Supremacists Make Common Cause' *The Progressive* 58/10 24-25

Rushdoony R J 1973 *The Institutes of Biblical Law* The Craig Press Philadelphia

Sandel M 1984 *Liberalism and Its Critics* NYU Press New York

Schaeffer F 1981 *A Christian Manifesto* Crossway Books Westchester Illinois

Semonche J E 1998 *Keeping the Faith: A Cultural History of the United States* Rowman and Littlefield Lanham

Weber M 1947 *The Theory of Social and Economic Organization* trans A M Henderson and T Parsons The Free Press New York

Whitehead J H 1982 *The Second American Revolution* David C Cook Elgin Illinois

Wiltshire S F 1992 *Greece, Rome, and the Bill of Rights* University of Oklahoma Press Norman Oklahoma

Wuthnow R 1988a *The Restructuring of American Religion* Princeton University Press Princeton New Jersey

--1988b 'Divided We Fall: America's Two Civil Religions' *The Christian Century* 105/13 395-99

Footnotes

1 A recent work by John E. Semonche (1998) challenges Bellah's thesis that presidents are the high priests of American civil religion, pointing instead to members of the Supreme Court.

2 Much of the discussion to follow tracks Professor Wuthnow's description in 'Divided We Fall'. Wuthnow's description is expanded in his book *The Restructuring of American Religion* (1988: 241-67).

3 Susan-Mary Grant (1997: 90) observes that 'In God We Trust' was first proposed, but rejected, by Congress as the national motto in 1861 in the face of the impending Civil War.

4 For a brief, but insightful account of the merit of medieval law being measured by its age, see Fritz Kern 1970: 235.

5 For an excellent treatment, from which much of the following discussion has been drawn, see Nelson 1982 ch. 11, 'Classical Liberalism'.

6 For my discussion in this regard I am much indebted to Professor Michael Sandel and his excellent introduction to *Liberalism and Its Critics* (1984).