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The Naked Public Square: Religion and Democracy in America

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BOOK REVIEW


CARL H. ESBECK**

A crisis of confidence in our institutions and talk about loss of life's purpose are everywhere. Sociologists describe the modern individual's sense of isolation, his so-called spiritual homelessness, his weakening sense of values, and his bewilderment in the face of seemingly impersonal forces before which he feels helpless and often victimized. Alarums recur over public education, which one highly publicized study described as in such shabby condition that if the damage had been inflicted by a foreign power it would rightly be regarded as an act of war.¹ Public welfare and health programs are said to have an insatiable appetite for funds, gobbling up the lion's share of government budgets, while the number of people slipping below the poverty line increases. Observations concerning the demise of marriage and the family are so familiar as to be trite. The rising incidence of divorce alters the make-up of what we call family and mocks our belief in the permanence of the marital bond. For lawyers the word "crisis" pervades matters of daily routine, and describes the metastasis within the legal system: increasing litigiousness, high crime, overburdened courts, overcrowded prisons, and recidivism. Americans have even come to placate themselves by romanticizing this perpetual crisis in prime-time "soaps" like "Hill Street Blues."

People have rightly become skeptical of this crisis labeling, a casualty of overuse. This same talk of crisis, as well as crisis mongering, have attended recent discussion of the role of religion and religious institutions in politics, government, and law. Because of growing public incredulity toward such

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¹ NAT'L COMM'N ON EXCELLENCE IN EDUCATION, A NATION AT RISK 5 (1983).
alarmism, it is with reluctance that Richard John Neuhaus sets forth his reasons for believing that the existence of American democracy is in jeopardy (p. viii). The principal cause of this peril, he argues, is the exclusion of religiously based moral values from the business of governance (p. 264). As to the forces behind this banishment, the churches, Neuhaus says, share equally with others in the blame, a result of theological self-alienation by some denominations and inept leadership by others (pp. 37, 216-47).

Neuhaus’ thesis is built around the sociological supposition that some unifying moral consensus, nurtured by a peoples’ religio-political understanding of themselves and their nation, is required to legitimize the authority exercised by the democratic state (p. 60). Where those deeper understandings are separated from the governing and lawmaking processes, the law, and the state which promulgates and attempts to enforce it, become unstable. “In the absence of a religio-cultural story line, the [state’s] political action is forced back upon itself, it must declare itself self-legitimating” (p. 138). Law is then reduced to little more than the latest political compromise. The nature of law becomes mere positive law, backed only by the coercive police power of the state. The threat of coercion is required when persons no longer obey the law out of self-discipline and self-restraint. As lawlessness increases and the government’s insecurity grows, the drift will inevitably be in the direction of greater control and planning. Eventually, sensing the imperative that a society have some integrating moral vision, the state offers up itself as supplying the faith binding the nation together. As this statism sets in, freedom wanes.2

The “naked public square” is Neuhaus’ metaphor for the relatively recent exclusion of religious discourse from the conduct of public policy and law formation in America (p. vii). It confines public officials, for example, to justifying legislation against child pornography as safeguarding the “mental health” of children. Everyone concerned, however, knows full well that this is not a matter about which physicians need be consulted. Rather, society is making a moral judgment. The free speech claims of film producers are outweighed by the utter perversity of depicting children engaged in eroticism.3

RECONSTITUTING AMERICA’S EXPERIMENT IN DEMOCRACY

2. The necessity of a socio-religious consensus undergirding and stabilizing the state’s political power has been advanced by a number of writers. See, e.g., C. Dawson, Religion and the Modern State (1940); J. Murry, We Hold These Truths (1960); Bellah, Cultural Pluralism and Religious Particularism, in Freedom of Religion in America: Historical Roots, Philosophical Concepts and Contemporary Problems 33 (H. Clark ed. 1981).

3. This wrongheaded notion that legislation may buttress community morals only if some therapeutic pretense can be advanced in support of the law recently found its way into the Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (to be codified at 18 U.S.C. § 2251). In toughening penalties against sexual exploitation of minors, Congress, in section 2(3) of the Act, felt the need to justify its action by a finding that “the use of children as subjects of pornographic materials is harmful to the
Neuhaus’ imagery is that the public square is in danger of becoming morally vacant. Since power abhors a vacuum, the public square will not and cannot remain empty for long (pp. 80-81). If the square does not bear symbols and ultimate meanings forged out of religious faith, new meanings will crowd in. If that happens, the American experiment with democracy will be a brief parenthesis in history, for, argues Neuhaus, a secular America is politically unsustainable.

Religion in some form, what Walter Lippmann termed a “public philosophy” (p. 90), seems to be required in a popular democracy. There must be some transcendent principles to which the state is held accountable and by which it is judged. Moreover, not any set of ultimate values will do. These principles must be the same ones which lay claim upon the deepest loyalties and sense of duty of the people, and which in their mind reserves to them certain inviolable civil rights (pp. 82, 204). The regime in Poland is but one example of what happens when power is exercised in contradiction to the people’s values. If America’s fragile experiment with democracy should fail, all of the successor candidates likely to fill the void are statists. Whether leftist or rightist, post-democratic America will be a place wherein individual freedoms are subordinated to an ambitious “national security” regime.

The understanding of “religion,” as used by Neuhaus, is not its narrow, sectarian meaning. Rather, religion is meant comprehensively: “It includes not just those ideas and activities and attitudes that we ordinarily call religious, but all the ways we think and act and interact with respect to what we believe is ultimately true and important” (p. 27). So defined, religion is equated to Weltanschauung or worldview (p. 250).

Neuhaus’ case is constructed on the proposition that Americans remain overwhelmingly theistic in their world view, and the polls and survey data support him (pp. 21, 95-98). Thus, he says, the popular dogma that the United States is a secular society is demonstrably false (p. vii). Repeated pronouncements by opinion makers that America has outgrown its primitive religious roots have everything going for them except empirical evidence (pp. 204-05).

4. For example, respondents in a Media General—Associated Press Poll conducted November 12-19, 1984 gave the following replies:

Which of the following statements comes closest to your belief about God?

—I know God really exists, and I have no doubts about it. 69%
—While I may have my doubts, I feel that I do believe in God. 12%
—I don’t believe in a personal God, but I do believe in a higher power of some kind. 8%
—I find myself believing in God some of the time but not at other times. 5%
—I don’t know whether there is a God, and I don’t believe there is any way to find out.
When Neuhaus says that America is religious, he does not mean that it is necessarily good or upright (p. 202). Rather, his point is that the typical American constructs reality in religious terms, indeed, overwhelmingly in traditional Judeo-Christian understandings. From those traditional understandings flow American notions of moral right and wrong, a sense of the nation's past, its meaning and destiny, and a personal God who acts with purpose in a history having beginning and end (pp. 79-80). Thus, however embarrassing such matters are to certain elitists who insist that America has outgrown these things, the majority of citizens concur with Justice Douglas that our "institutions presuppose a Supreme Being," and these same masses are unashamed to pledge allegiance to a nation constituted "under God" and instruct their children accordingly (p. 180).

The book is not a drumbeat for a return to flag-waving, "love it or leave it," bumper-sticker patriotism. Neuhaus' advocacy is for a critical patriotism, one that sees all the faults in America, a republic where much is still undone. But, paraphrasing Martin Luther King, Jr., to change America you must first
love her. Those critical patriots who qualify as "likely to play a part in redefin-
ing the American experiment" (p. 237) are those, says Neuhaus, who could
sign this carefully nuanced proposition: "On balance and considering the alter-
 natives, the influence of the United States is a force for good in the world" (p.

TOWARD A RECOGNITION OF THE AUTHORITATIVE

Neuhaus' call for readmission of particularist religion, most prominently
in the United States the Jewish and Christian religions, as a full participant in
the public square is not without considerable risk. Those who are fearful of
just such a reentry recall that the original cause of religion's banishment was
sectarian strife that came close to tearing civilization apart (pp. 8, 260).

It must be conceded that the role of religion in politics has been turbulent
and at times tragic. In a brief compass through history, Neuhaus suggests that
political theory has moved in increments from authoritarianism to a modern
liberalism centered on the individual (pp. 76, 248). He urges that America
leave the emptiness of moral autonomy and move onto a shared recognition of
what is authoritative. Realization of an authority higher than human con-
science and personal choice is the only sure guarantee of freedom.

An examination of the evolving political theory in the West and its inter-
action with the church is helpful. As the early nation-states emerged in medie-
val Europe they were, without exception, authoritarian. These states continued
to think that unity in religious matters, and thus one national, established
church was necessary for two reasons. First, religious conformity was believed
necessary to legitimize the state which claimed a divine commission to rule.
Second, religious unity was believed necessary to ensure the essential common-
ality of values for identity as one people, and thus one nation.6

The Protestant Reformation in the sixteenth century left this fusion of
church and state initially unchanged. The Protestant churches emerged as
privileged and entrenched institutions, supplanting the Roman Catholic
Church. But the Reformation introduced fault lines into the social foundation
of Western Europe that were soon to shake whole nations. Differences in reli-
gion were often used to rally people behind political revolts and to forge new
political alliances. In turn, ambitious clerics were not above using the offices
and powers of state to further ecclesiastical ends. Two consequences were the
long and bloody sectarian wars, conflicts as much political as theological, and
the religious persecutions of the sixteenth and seventeenth centuries.7

The eighteenth century witnessed a slow turning from authoritarianism to

6. Bellah, supra note 2, at 33-34; Derr, The First Amendment As a Guide to
Church-State Relations: Theological Illusions, Cultural Fantasies, and Legal Practi-
7. See generally R. Bainton, The Travail of Religious Liberty (1950)
(biographical studies on religious persecutions); R. Dunn, The Age of Religious
republicanism. It is now generally acknowledged that the republican state was the result of the influence of two quite diverse schools of thought, one philosophical and the other theological (p. 21). The philosophical influence was rationalism, which was characterized by the deism and skepticism of the Enlightenment. The religious view arose from growing theological perceptions concerning the necessity of religious tolerance, for religious faith was by nature consigned to the inward persuasion of the mind.

John Locke epitomized this synthesis of rationalism and religious toleration, and his writings were a heavy influence on America's founding fathers a century later. Locke's *A Letter Concerning Toleration* is a classic on religious freedom as a natural or inalienable right. Locke's arguments were not original for his time but were more a restatement of the period's emerging political theory and an apology for the toleration of some religious diversity in an England weary of sectarian strife. In Locke's words, "the care of souls is not committed to the civil magistrate" because, in striking the social contract, the people never conceded religious matters to the state. Locke's argument led to the recognition of religiously based conscience as a civil right, requiring recognition and protection by the state.

Locke and many others articulated a social contract theory, the forerunner of modern political theory. He postulated a model depicting the political order as a collection of individuals, distinct from the state, with the state holding sovereign powers voluntarily transferred to it by those individuals. The state was the holder of sovereign powers voluntarily transferred to it. That is, the people by social compact have, by exercise of free will, alienated certain rights to the state and retained certain other rights to themselves. Importantly, there are yet other rights which are inalienable, and thus could never be transferred to the state. Because the state can never hold such rights, it is thereby a state limited in power. Classical liberalism postulated that such inalienable rights were natural, self-evident truths that could be determined by human reason and experience. Rationalists had great confidence that the "science of reason," imbued in each individual, would lead society to agree on which rights were inalienable. From today's vantage, of course, this early optimism in reason and education has been shattered by the enormity of large-scale inhumanity in modern times.

The Lockean premise that certain rights are inalienable is an acknowl-

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9. R. Bainton, *supra* note 7, at 237. Locke wrote his letter immediately following the Glorious Revolution and the ascendency of William and Mary to the English throne. The English Act of Toleration was passed in 1689. *Id.*
11. *See P. Johnson, Modern Times: The World from the Twenties to the Eighties* (1983) (discussing such figures as Stalin, Mao, and Hitler, and concluding that during the twentieth century the power of the state to do evil has expanded with awesome speed, whereas, its power to do good grew slowly and ambiguously).
edgment of some authority higher than human will that existed prior to the formation of the state. It was this higher authority which estopped the human will from contracting away the most fundamental of rights and the state from accepting any such attempted transfer.\textsuperscript{12} There was, of course, never a particularized agreement on the nature of this higher authority. The American Declaration of Independence obliquely acknowledges the transcendent source as "the Laws of Nature and of Nature's God."

Classical republicanism is an example of what Neuhaus characterizes as a system in which citizens manifest some coherent recognition of that which is of ultimate authority, an external referent for judging both the individual and the state. Although individuals have considerable freedom, they also recognize and voluntarily submit to certain authoritative principles that transcend all else. This is the theonomous state—a state that acknowledges accountability to truth, a truth nearly always expressed in religious terms (p. 173). It was thought prudent to draw up constitutions and bills of rights, making explicit the powers delegated to rulers and limiting even the power of the majority to affect certain enumerated rights. These documents thereby sought to memorialize those inviolable laws which can be known.

In nineteenth century America, the banner of the liberal-religious alliance was carried by the mainline Protestant churches as fundamental creed (pp. 208-12).\textsuperscript{13} It was this notion of a "Redeemer Nation"\textsuperscript{14} which shaped its public piety, discourse, polity, and policies. The liberal-Protestant synthesis underwent considerable strain as the nation moved into the twentieth century. The lived experience of the American founding heritage is presently said to be gone (p. 61). It is certainly altered. Learned circles now characterize America as pluralistic, a seeming admission that a least-common-denominator civic piety can no longer describe the American "melting pot" (p. 23).

The "Redeemer-Nation" meaning of America is now supplanted by modern instrumental liberalism, argues Neuhaus (p. 235). Instrumentalism as a political model orients society to the satisfaction of individual "interests" and "wants" rather than pursuit of higher ideals or virtues. It postulates humans as radically autonomous, as contrasted with a view of persons as moral actors accountable to something greater than themselves. To instrumentalists freedom is an end unto itself; freedom is not held as a means to achieve higher ends (p. 92).

Instrumentalism reduces moral discourse to a contest over personal interests. One's moral judgments are considered mere preferences, admissible in public debate only insofar as they reflect the "interests" of those who hold

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\item 13. See R. Handy, A Christian America: Protestant Hopes and Historical Realities 24-100 (2d ed. 1984).
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them. Since the possibility of knowing any normative truths is denied, no external standard is available by which to judge public policy (p. 179). Instrumentalists are willing only to impose proper procedures on the decision-making process, such as prior notice that a decision is to be made and a right to have one's interests considered (p. 110). The Lockean conception of inalienable rights stands in stark contrast to this modern notion of rights as self-interests, wherein a knowledge of the good, however incomplete, or of human duty transcending the social contract, are denied (pp. 136-37).

Modern instrumental liberalism, argues Neuhaus, cannot sustain democracy and human rights (p. 153). The pragmatist's hope that continued American economic prosperity will give everyone a stake in holding the nation together has limited validity (p. 260). When all the process and procedure which are due are exhausted, society still must make moral choices. Instrumentalism, with its adversarial clash of interests, will not yield the sure standard by which the United States must make unavoidable moral choices concerning public issues such as abortion, welfare, teaching values in public schools, job racial quotas, nuclear military defense, and the wars in Central America. These issues raise elementary questions of right and wrong, justice, equality, and fairness (pp. 110-11, 134-40).

A society cannot remain in a perpetual state of fragmentation with respect to these fundamental choices and continue to claim that it is one society. Instrumentalism's answer, namely the pell-mell pursuit of individual self-interest, does not heal the disintegration in society but hastens it.15

THE NATURE OF LAW

If the authority of the American state to exercise power is in question, as Neuhaus believes, then the law which is administered by the state should be facing its own crisis of legitimacy. Anyone even casually acquainted with the current literature of jurisprudence in the West, indeed discovers that there is little agreement among legal scholars and moral philosophers as to the nature and source of law.16 The jurisprudential topic which has generated the most scholarly commentary in America is the United States Supreme Court's power


of judicial review when construing the Constitution. The 1973 decision of *Roe v. Wade*, announcing a right to "privacy" that includes a woman's choice to have an abortion, is recognized as having set off the most recent round of debate.

Agreeing with many modern jurists and political theorists, Neuhaus dismisses legal realism as simply a boast, not a school of thought (p. 253). There is nothing more unrealistic than the realist's proposition that laws are created and will be obeyed apart from a societal ethos concerning what is morally right and wrong. In America, that societal consensus is largely articulated in religious terms. To the realist's objection that religious aspects of law are obscurantist mystification, Neuhaus candidly responds that the "origins and sustaining force of law are indeed obscure and mysterious" (p. 253). With help from Harold Berman, Neuhaus proposes a definition of law that accounts for a people's historical, sociological, and metaphysical understanding of themselves and their nation:

Laws issue from and participate in "the law." The law is more than a body of rules; it is the historical, living process of people legislating, adjudicating, administering, and negotiating the allocation of rights and duties. Its purpose is to prevent harm, resolve conflicts, and create means of cooperation. Its premise, from which it derives its perceived legitimacy and therefore its authority, is that it strives to anticipate and give expression to what a people believes to be its collective destiny or ultimate meaning within a moral universe. (p. 253)

Neuhaus is careful to add that he is not rejecting the Enlightenment's contributions to legal theory. He values the notion that law aspires to be "scientific" in the sense that one thinks of the social sciences as scientific (pp. 253-54). Most legal questions can be answered without resort to discourse about ultimate meanings. However, there are recurring "hard cases," such as those involving racism and abortion, often concerning fundamental human rights. These difficult cases cannot be successfully resolved by the courts unless jurists first respond to the question, "By what authority do we judges pronounce this as The Law?" The American public is no longer satisfied by John Marshall's *ipse dixit*, "It is emphatically the province and duty of the judicial department to say what the law is." The law is not the law because the Court says it is


21. Marbury v. Madison, 5 U.S. (1 Cranch) 368, 389 (1803) (establishing the...
the law. Law is not self-legitimating. In short, argues Neuhaus, "if law is not also a moral enterprise, it is without legitimacy or binding force" (p. 255).

The works of jurists, such as Alexander Bickel, and political philosophers, like John Rawls, are praised by Neuhaus but ultimately found inadequate (pp. 80-81, 256-58). He praises them as thoughtful persons addressing the legitimacy crisis of modern law by searching for "higher law" meanings that can rescue law from the tyranny of positivism and pragmatic instrumentalism. They fail, however, for as modern rationalists they bow to the secularist hegemony that excludes traditional religion from all consideration (pp. 80-81). But it is no easy task for Bickel or Rawls to discourse about moral theory, justice, rightness, fairness, and the like, in a way not "contaminated" by religion (p. 80). Modernists end up describing a religious society but dare not call it religion. Others end up fictionalizing about a people without history, tradition, vested interests, self-knowledge, loves, hates, fears, dreams of purpose, or the acknowledgement of duty. There are, of course, no such people. The modernist's theory is thus impossibly exotic, a mere parochialism of prejudices and noble promptings by a handful of intellectuals. The law of Bickel, Rawls et al., is law isolated from cultural context in which the legitimacy of The Law is tested and must be renewed. The legitimacy of law in a democratic society depends upon the popular recognition of the connections between law and what people think life is and ought to be" (p. 258). In an open society, the law and the people must draw from the same moral well (p. 150). However chagrined certain intellectuals might be concerning the matter, America is so intractably religious, says Neuhaus, that particularist religion must be accounted for in any responsible attempt to theorize about what law really is.


24. Pragmatic instrumentalism is presently the dominant legal theory in American law. It is an amalgamation of utilitarianism, sociology, and certain ideas inherited from legal realism. The principal elements of pragmatic instrumentalism postulate as follows: law should seek to maximize the satisfaction of the wants and interests of citizens; forms of law are essentially instruments that serve goals external to law; lawmakers ought to turn mainly to social science and democratic processes in fashioning law's means and goals; valid law is whatever has been enacted or an official's actions; the law ultimately reduces to predictions of official behavior; law and morals are sharply separable; forms of law should not be interpreted and applied formally but in light of "policy;" law accomplishes what it does mainly through coercive force; and the use of law is to be judged mainly by its effects. See R. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY (1982).


26. Because Neuhaus acknowledges "ongoingness" in the nature of law (pp. 76,
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CHURCH-STATE RELATIONS

If the broken conversation between religion and the business of the public square is to be restored, one must consider how this can be done without casting into doubt that most original and invaluable of America's inventions: the institutional separation of church and state. Neuhaus repeatedly reaffirms his commitment to the first amendment's tasks of religious toleration and the differentiation between church and state (pp. 52, 116-20, 130, 165). Moreover, he recognizes the need for the giving of repeated and sincere assurances to those outside of Christianity, especially and understandably the American Jewish community, that a first-principled reexamination of the role of religion in American public life would not entail any loss of full religious freedom (pp. 122, 124, 144). The fundamentalist's hope of restoring America to the idea of a "Christian nation" is threatening to Christians and non-Christians alike, and is discouraged by Neuhaus.

Nonetheless, the enduring problem persists: just how can the lawmakers—judges and legislators—state the presumed religio-cultural foundation of American democracy without compromising religious liberty? "In other words, the goal is to acknowledge the 'only firm basis' of democracy without running into the difficulties of a government establishment of a particular way of expressing that religious basis" (p. 100). The answer to that question must in turn influence how the Supreme Court construes the first amendment's establishment clause. That clause should not be interpreted to disqualify full consideration of religiously based morality in public policy and law formulation. Rather, the establishment clause requires that government remain neutral on matters of religious worship, as well as the propagation and inculcation of confessional beliefs of particular denominations. Democracy

124, 258), it can be surmised that he would reject the strict constructionism or interpretivist model of constitutional judicial review as erring on the side of moral skepticism. Further, John Hart Ely's widely circulated DEMOCRACY AND DISTRUST, supra note 17, would be regarded by Neuhaus as an outgrowth of misguided process-based instrumentalism. The only transcendent principle of law in Ely's model is the increased participation of individuals in the decision making processes of the political community.

27. Complete religious liberty was indeed an American experiment, for the colonies were the first to separate church and state. The development took place differently in each of the colonies and spanned a hundred year effort. Rhode Island, Delaware, Pennsylvania, and New Jersey never had established churches, although certain religions were favored in their laws. In a well-known struggle, Virginia disestablished the Anglican Church in 1786, but the Old Dominion had been preceded in this reform by disestablishments in North Carolina (1776), New York (1777), and Vermont (1779). The Puritans' Congregational Church was not affected by the Revolutionary War and did not yield to disestablishment pressures until 1818 in Connecticut and finally 1833 in Massachusetts. A. STOKES, CHURCH AND STATE IN THE UNITED STATES 151-69, 358-446 (1950).

28. U.S. CONST. amend I. The establishment and free exercise clauses together read: "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof . . . ." Id.
does not require as its "only firm basis" a unifying religious dogma or common catechism. Such a domineering credo is not possible in a pluralistic democratic state, and is proscribed by the first amendment.29

Nevertheless, some transcendent integrating beliefs which operate at the political and social level are needed to define and sustain the commonweal. This common belief would not destroy the freedom to express no religious faith or even to oppose all religion (p. 101). However, a few secularists, argues Neuhaus, are driven by a brooding, even dogmatic devotion to a pseudo pluralism. It is a false pluralism because they equate pluralism with secularism. Secularists do not seek to engage our differences in civil discourse, not where religion is involved. They should not be able to uproot a society's visible expressions of religion (p. 148). In our communal conversation about the immutable principles to which the state is held accountable, we should not read the establishment clause to give veto power to the morally handicapped. Musicians do not defer to the tone deaf, nor painters to the color blind. An absolutist separation of religion and state would make the normal subservient to the pathological (p. 250). For secularists to carry the first amendment to the extreme, requiring removal of "In God We Trust" from our currency or "one nation under God" from the Pledge of Allegiance, is ludicrous and without public support (pp. 146-47). The only firm foundation for complete religious liberty is to be found in the Judeo-Christian beliefs of toleration and faith out of free will (pp. 146, 163).

The prediction that American democracy may very well vanish like a brief Indian summer into a colder and darker world, will understandably appear quite implausible to many readers. Conceding, however, the persuasiveness of Neuhaus' argument that the connection between positive law and higher law, and between law and life, must be reattended to, the reader is still left wanting. Just how would Neuhaus propose stating that "vital center" of these American peoples, still very much a ragtag collection of the world's throwaways? He does not explicitly say how he would have lawmakers—judges and legislators—speak the unspeakable. At one point Neuhaus suggests the vital center is "that to which Judeo-Christian religion points . . . the promises and judgments revealed in the biblical story" (p. 123), and at another, he suggests that the civic consensus is to be espoused by people who pass a minimalist test of those who "on balance . . . consider the United States a force for good in the world" (p. 72).

Quite rightly, Neuhaus says that an attempt to be inclusive of all world

29. For a full discussion concerning the construction of the establishment clause and its interplay with legislation inspired by religious-based morality in a society, see Esbeck, Religion and a Neutral State: Imperative or Impossibility?, 15 Cum. L. Rev. 67 (1984). The establishment clause has two tasks. First, the clause requires that government be neutral toward the confessional differences among religions, but not indifferent to religion and never hostile. Second, the establishment clause prohibits government action that compromises the independence or integrity of a religious organization, absent some truly exigent threat to public health, safety, peace, and order. Id. at 86.
views, or even most, in a heterogeneous society, means one has nothing. A least-common-denominator moral consensus is no longer possible. Americans are simply too different.\textsuperscript{30} The task of describing a public theology is to define the center that must not fail to hold. Neuhaus stops short of doing so.\textsuperscript{31}

An additional pitfall remains, and that is the danger of "civil religion."\textsuperscript{32} Civil religion occurs when predominant religious groups have identified so closely with government and politics that patriotism and nationalism go hand-in-hand with spirituality. Civil religion co-opts the role of the church. It can depreciate the integrity and independence of churches, that, by their self-understanding, have callings that go beyond domestic politics and national boundaries. The role of the church is global; it must never become a department of state to serve the aims of state.

There are several voices at large who would marshal the force of religion to achieve a task which they, and perhaps most of us, believe is one of the day's compelling problems. They would have the church become a tool to avert nuclear destruction, save the family, eliminate unemployment, or revitalize the schools. Neuhaus' aim is to rescue American democracy. But it is a mistake to suppose that a transcendent public consensus, informed by religious Americans, can be shaped like a tool to accomplish some job. That thinking is just another form of instrumental utilitarianism. Any societal consensus "created purely to do some social job will for that very reason almost certainly be inca-

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\item For an excellent essay sketching seven principal themes which comprise a public philosophy, at least in the West, see Stackhouse, An Ecumenist's Plea for a Public Theology, THIS WORLD, Spring/Summer 1984, at 47. The themes are as follows: nature is not the product of chance but created by a God, behind and beyond nature and more important than nature itself; care for the well-being of the poor and oppressed; each human is placed in the world for a purpose, which we call vocation; humans are called into communities of responsibility, e.g., familial, political, economic, which set forth terms and limits for our lives together; there is a transcendent and universally valid moral law; things are not as they should be in the world because of human failing and evil; and there must be religious freedom in both the voluntariness of faith and the institutional separation of church and state. Id. at 58-68. The Stackhouse paper is followed by responses from five prominent and diverse students of religion, making the discourse particularly rich. Id. 80-110. See generally J. Gustafson, Ethics from a Theocentric Perspective (1981); M. Marty, The Public Church (1981); W. Sullivan, Reconstructing Public Philosophy (1982); J. Wilson, Public Religion in American Culture (1979); The Religion of the Republic (E. Smith ed. 1971).
\item On the matter of civil religion, see generally R. Linder & R. Pierard, Twilight of the Saints: Biblical Christianity & Civil Religion in America (1978); American Civil Religion (R. Richey & D. Jones eds. 1974); Bellah, Civil Religion in America, 96 Daedalus 1 (1967); Linder, Civil Religion in Historical Perspective: The Reality That Underlies the Concept, 17 J. of Church & State 399 (1975).
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pable of doing that job.” Such a manufactured consensus is simply not “high” enough to commend itself to ultimate public commitment. Particularist religion, which is sufficiently transcendent to capture the loyalty of large numbers of citizens, resists being “used” to achieve someone’s social agenda.

Neuhaus recognizes the civil religion danger when he states that the church does not exist primarily to sustain political order (pp. 92, 235-36), but he does not stress it. His argument could be stronger here. Neuhaus should say unequivocally that democratic freedoms are a by-product of Judeo-Christian faith, and a valuable one at that; but perpetuation of democracy is incidental to the principal purpose of the church. The dangers of civil religion are just as real and present as a public square devoid of religion. If the church’s price for reentry into the public square is harlotry to someone’s political agenda, the admission fee is too high.

History has shown the difficulty for religious people of loving both God and country without getting the two confused. The trick is to walk a tightrope, avoiding both the denial of religious liberty to minority sects and the entrapment of the faith of Christian majorities by the allure of nation worship.

**Toward a New Civility**

One of the many creative observations in this substantial book is the important role played by the religious new right, the politicized fundamentalists of the Moral Majority and the like. Neuhaus pictures them as a core of two to four million who have kicked a tripwire which awakened a much larger segment of church-going Americans to the dangers of secularization (pp. 38-41, 109). Neuhaus believes these fundamentalists have helped restore genuine democracy to America—albeit inadvertently (p. 177). He does not think their “camp revival” politics can contribute to the hard work of civil discourse. He neither thinks nor hopes their political ambitions will be successful (p. 264). But they crashed into the public square in the late seventies with Bible-toting religion, and that clumsy entrance may have been just the shock needed to arouse a slumbering religious America.

The religious right will not be effective in shaping the public’s business until and unless they play by the rules, maintains Neuhaus. The rules of public discourse have in the past wrongly expelled religion, and that must stop. However, politicized fundamentalists must still obey the rules of civility. Revivalist politics is not good at compromise, and some compromise is essential to democratic politics.

Compromise is odious to many in the Christian right. They abhor compromise because they fail to distinguish between the several communities of

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which they are a part. Compromises that their religious convictions would not permit in family or church, can be agreed to in the larger political community (pp. 114-15). A compromise can be made in a political matter, by nature an interim arrangement, without yielding principles (pp. 55, 112). Such "fudging is anathema to the fanatic" (p. 114) and thus disqualifies the religious right from any significant moral persuasion among most Americans.

Neuhaus' call to a new civility also places the duty on those carrying religious-based values into the public square to "translate" the basis for their values so that others who do not share their religious faith can understand (p. 125). Thus, for example, religious groups that oppose antidiscrimination legislation protecting homosexuals should not pepper their case with verses about the destruction of Sodom. Rather, they should explain their belief that human sexuality is a gift, a physical act to be sure, but a gift which goes beyond the merely physiological. Sexuality, so easily debased, is by the very nature of humankind intended to be exercised only between a man and a woman. Thus, in their view, society has a compelling interest in not appearing to sanction homosexual unions as moral or an acceptable "alternative lifestyle." Antidiscrimination laws in employment or housing would not only decriminalize homosexuality but suggest its moral acceptability, if not community approval.35 This sort of approach by religious groups may not extract agreement from others, thinks Neuhaus, but at least their position is heard and understood.

Neuhaus is correct that argument in the political realm must be put in terms that can be debated, rather than framed as nonnegotiable biblical absolutes. But there is a danger that persons "translating" their beliefs drawn from religious authority must feign another rationale in order to receive a hearing.

CONCLUSION

The reader should not embark upon The Naked Public Square with the idea of giving it a "quick read." Neuhaus' many subthemes leap to the surface and as quickly dive, only to reappear several pages further along, like a school of porpoises playing the ocean's surface. The subthemes addressed in this review are those of interest to lawyers. There are many others. Trying to keep hold of these several strands of the argument all at once is difficult but worth the effort. The style at least demonstrates the interrelatedness of the problems.

This wide ranging book is an important contribution to the growing national debate on the role of ethics and values in American society. It is rich in provocative ideas for lawyers, political theorists, theologians, historians, and all who care about politics. In order to appeal to so broad an audience, however, the book suffers from shallow treatment of some of the subthemes.

The right questions are asked, and the book is at its best in describing the predicament in which we find ourselves. Thus, Neuhaus' ideas are corrective,

35. On the undoubted interplay between positive law and morality, see P. DEVLIN, THE ENFORCEMENT OF MORALS (1965).
but he does not offer us a clear direction out of this conundrum which he so fairly describes. But then, if Neuhaus is right, no one person can see the way clear to restoring the American democratic experiment. In this age, and given the imperfect nature of humanity, that can take place only in an open public square.