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TEACHING MORAL VALUES IN PUBLIC SCHOOLS

Some Constitutional Considerations

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A renaissance is occurring in the theory, if not yet in the practice, regarding the appropriate function of teaching moral values in public elementary and secondary schools. The generally informed and prominent attention now focused on the pressing need to develop students' ability to make sound moral judgments in a very complex society is grounds for cautious optimism. Fortunately, the recently resurgent emphasis on teaching students how to make informed moral choice, as an indispensable ingredient of any civilized society, is much more than a reflexive backlash to pedagogical relativism.

Especially during the past twenty years, most public schools have taken great pains to avoid inculcation of ethics. This regrettable value-neutrality is partially attributable to increasing cultural relativism. It is also attributable to misunderstanding the religion clauses of the first amendment of the Constitution. Understandably, few public school officials are eager to endure the legal expense and controversy of becoming the Supreme Court's next major test case. However, the deliberate avoidance of moral values in public education transcended prudent legal considerations. Pandemic cultural relativism has afflicted all of society, with particularly disastrous consequences on an increasingly ignorant, uneducated, yet purportedly credentialed, population.[1] Court decisions and the

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[1] A. BLOOM, THE CLOSING OF THE AMERICAN MIND (1987); E.D. HIRSCH, JR., CULTURAL LITERACY (1987).

Constitution were misperceived as somehow mandating value-free, and, ultimately, valueless public education.

Within this decade, more responsible public officials from across the entire political spectrum and many influential public educators have endorsed the teaching of moral values in public schools.[2] This article will examine these recent positive developments through the prism of constitutional law. Hopefully, the discussion can move beyond single issue, simplistic no-win advocacy, mandating which particular ethical values should be taught, at the expense of the rights of other persons who do not share those same values.[3] Instead, the task is to base public education on sound moral values within the bounds of the Constitution, while simultaneously respecting the heterogeneity of our republic in this bicentennial year.

American law in the twentieth century is permeated with the secular philosophy of pragmatism. This empirical, "real world" perspective on the law has been the United States' distinct, and perhaps unique, contribution to jurisprudence. Legal pragmatism reflects the wisdom borne of our Civil War, our commercial expansion, and the broad legal developments generally consonant with the spirit of laissez-faire capitalism. Oliver Wendell Holmes, Massachusetts Brahmin, scion of Harvard, Civil War colonel, and eminent justice of both the Massachusetts and United States Supreme Court, is perhaps most responsible for integrating the jurisprudence of European positivism into American law. Perhaps his most famous pragmatic aphorism is that "the life of the law has not been logic — it has been experience."[4] Holmes, the intellectual grandfather of American legal realism,[5] unquestionably ushered overtly secular, empirical qualities into our jurisprudence. Concomitantly, the jurisprudence of pragmatism and realism deliberately deemphasized the theological, spiri-

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[2] *See* N.Y. Times, June 7, 1987, at A1, col. 1; N.Y. Times, May 24, 1987, § 4, at 7, col. 6; N.Y. Times, May 3, 1987, at § 4, at 27, col. 1; N.Y. Times, Apr. 28, 1987, at C9, col. 1; N.Y. Times, Apr. 19, 1987, at § 4, at 18, col. 1. *See also* N.Y. Times, May 12, 1987, at B6, col. 1 ("What concerns me is that we're becoming a bland society, valueless." (quoting White House Chief of Staff Howard Baker)); EDUCATION FOR DEMOCRACY: A STATEMENT ON PRINCIPLES (1987) (joint pamphlet project of the American Federation of Teachers, the Education Excellence Network, and Freedom House); M. Cuomo, *Religion, Belief, and Public Morality*, 31 N.Y. REVIEW OF BOOKS, Oct. 25, 1984, at 32. " 'I am for morality. In fact, I wish there were more of it taught in our schools.' " TIME, May 25, 1987, at 17 (quoting President Ronald Reagan).

[3] *See supra* note 2.

[4] O.W. HOLMES, THE COMMON LAW 1 (1881); *see* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

[5] For the representative scholarship of American legal realism, at its height in the late 1920's and early 1930's at the Yale and Columbia Law Schools, see J. FRANK, LAW AND THE MODERN MIND (1930); L. KALMAN, LEGAL REALISM AT YALE, 1927-1960 (1986); K. LLEWELLYN, THE BRAMBLE BUSH (1951); Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943).

tual values that had historically been at the heart of the Judeo-Christian natural law tradition. Thus, within the last century, jurisprudence was transmogrified from the propaedeutic to theology into instead the primary instrument of power in the service of the controlling elites of the secular state. Within the past decade, critical legal scholars,[6] the contemporary heirs of legal realism, have further attacked reliance on jurisprudential absolutes. The heavy integration of the European continental philosphy of Kant, Hegel, Husserl, and Marx into contemporary American legal philosophy,[7] and the increasing use of deconstructive linguistic techniques to critique legal texts,[8] have further contributed to the spread of intellectual, legal, and cultural relativism.[9]

Contemporary constitutional law has been deeply and profoundly affected by these important jurisprudential changes. The classic positivist position that law and morality must remain completely separate has understandably prospered in light of these contemporary jurisprudential developments. This makes it all the more imperative to remember the ringing words of Eugene Rostow, constitutional scholar and former Dean of the Yale Law School; by their very nature, law and morality are inextricably joined. Each mirrors the other. Rostow rhetorically queried, what does the law accomplish, and what is its purpose, if the law does not legislate morality?[10]

Never has this question been more apt, compelling, and timely. Law, if radically divorced from morality, ultimately becomes a contradiction in terms and makes a cruel mockery of assuredly then-unattainable justice. At its root, American law is grounded upon moral values. Fully consonant with classic natural law, American law and equity still form the synergy necessary to achieve justice. The Constitution is thoroughly grounded upon this rich natural law tradition. Rather than being antithetical to moral values, constitutional law is steeped in these considerations. It is not coincidental that the religion clauses begin the first amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[11] The Framers of the Constitution

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[6] For a comprehensive list of representative critical legal scholarship, see Kennedy & Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461 (1984).

[7] *See* Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685 (1985); Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151 (1985).

[8] Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987).

[9] A. BLOOM, THE CLOSING OF THE AMERICAN MIND (1987); *see also* P. SOPER, A THEORY OF LAW (1984) (arguing that positivism has been misdirected for divorcing law from moral theory).

[10] *See* POWER AND POLICY IN QUEST OF LAW: ESSAYS IN HONOR OF EUGENE VICTOR ROSTOW (M. McDougal & W. Reisman eds. 1985).

[11] U.S. CONST. amend. I. The Constitution's other reference to religion is the proscription

thoroughly learned the bitter and bloody lessons of Henry VIII and English history. They were determined to ensure that the secular government would never "establish" or impose a state religion upon the people of the United States. Further, the Framers also took equal pains to safeguard individual free exercise of religion.

Ultimately, neither the establishment nor the free exercise clause is absolute. There is often potential tension between the two religion clauses of the first amendment. Prominent constitutional law scholar Professor Laurence Tribe[12] of Harvard Law School, quoting former Chief Justice Warren Burger, has expressly noted that:

> [a] pervasive difficulty in the constitutional jurisprudence of the religion clauses has accordingly been the struggle to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.[13]

While it is possible that the Constitution's religion clauses may periodically conflict with one another,[14] neither clause prohibits the teaching of moral values in the public schools.

Catholics historically have been understandably and especially wary of the willingness of the non-Catholic political majority to fully protect Catholic religious rights. As victims of religious bigotry throughout much of the nation's history, Catholics have begun to come into proportionate national political power only during the past quarter century. Like other religious minorities, Catholics have thus had a deep mistrust of the judiciary's willingness to safeguard Catholic constitutional rights. United States Supreme Court Associate Justice Joseph Story, author of the influential multivolume *Commentaries On The Constitution*,[15] maintained that the First Amendment religion clauses protected only mainstream Protestants.

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that "no religious [t]est shall ever be required as a [q]ualification to any [o]ffice or public [t]rust under the United States." U.S. CONST. art. VI, cl. 3.

[12] *See* L. TRIBE, GOD SAVE THIS HONORABLE COURT (1985); L. TRIBE, CONSTITUTIONAL CHOICES (1985); L. TRIBE, THE AMERICAN CONSTITUTION (1978); Gregory, Book Review, 60 TUL. L. REV. 437 (1985). *See, e.g.*, Pennzoil Co. v. Texaco, Inc., 107 S. Ct. 1519 (1987). Professor Tribe successfully represented Pennzoil before the United States Supreme Court.

[13] L. TRIBE, AMERICAN CONSTITUTIONAL LAW 815 (1978) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970)).

[14] For thorough citations to the evolution of the history and the jurisprudence of the first amendment religion clauses, and for further elaboration of the tensions within the amendment, see Gregory, *The First Amendment Religion Clauses and Labor Employment Law in the Supreme Court, 1984 Term*, 31 N.Y.L. SCH. L. REV. 1, 2-13 (1986); *Religion and the State*, 27 WM. & MARY L. REV. 833 (1986); *Developments in the Law—Religion and the State: The Complex Interaction Between Religion and Government*, 100 HARV. L. REV. 1612 (1987).

[15] *See* J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (5th ed. 1891).

Fringe groups, such as Catholics and Jews, were not intended to be protected, according to the single most influential constitutional commentator of the nineteenth century. In his dissent in the recent school prayer case of *Wallace v. Jaffree* in 1985,[16] Justice Rehnquist resurrected and cited the Story position with express approval, maintaining that the first amendment permitted state preferences for religion, short only of official state establishment of any particular religion.[17] If this ominous accommodationist view persuades a majority of the Court, the specter of state-sanctioned and constitutionally protected Protestant majoritarianism and the concomitant debilitation of the free exercise rights of Catholics and other religious minorities will again haunt this country.

Despite the nation's history of considerable anti-Catholic prejudice, the Supreme Court has also been a champion of protecting Catholic religious rights. In the landmark decision *Pierce v. Society of Sisters* in 1925,[18] the Court upheld the right to provide elementary education via private religious schools. The Court thus forcefully repudiated the virulent anti-Catholic attempt to eradicate Catholic elementary and secondary schools and to force all Catholic children to attend only public schools. However, the popular perception is that *Pierce* is the rare exception, proving the rule of value-neutral, almost anti-religious, public education effectuated under the establishment clause pretext of respecting the proper "wall" of separation between church and state.[19]

Perhaps the single most controversial, lightning-rod decision popularly representing Court-endorsed antagonism toward moral values in public education is *School District of Abington Township v. Schempp.*[20] Brought, in part, by the notorious atheist Maddlyn Murray O'Hare, *Schempp* represented the supposed judicial ban on bible reading in public schools. This perception was reinforced by the ban on the bare posting

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[16] 472 U.S. 38 (1985).

[17] *See id.* at 104 (Rehnquist, J., dissenting).

> The true meaning of the Establishment Clause can only be seen in its history . . . The Framers intended the Establishment clause to prohibit the designation of any church as a "national" one. The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others. Given the "incorporation" of the Establishment Clause as against the States via the Fourteenth Amendment . . . , States are prohibited as well from establishing a religion or discriminating between sects. As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means.

Id. at 113 (citations omitted).

[18] 268 U.S. 510 (1925).

[19] For extensive discussion of the metaphor of the "wall" of separation between church and state, originally attributed to Thomas Jefferson, see Gregory, *supra* note 14, at 7-9, n.14.

[20] 374 U.S. 203 (1963).

of the Ten Commandments in a Kentucky public school in *Stone v. Graham* in 1980.[21] Further, in 1985, the Court struck down an Alabama statute that had expressly encouraged voluntary prayer through the statutory moment of silence at the beginning of the public school day in *Wallace v. Jaffree*.[22]

None of these decisions was inherently antithetical to the inculcation of moral values in public school education. The Court recognized that the Bible could be taught in the context of a literature, history, or comparative religion class in public school.[23] Likewise, the Ten Commandments could also be taught in such a broader context. Contrary to the popular misconceptions surrounding many of its very scrupulous establishment cases,[24] the Court has never banned religious values *per se* in public schools. Rather, due judicial regard for the first amendment establishment clause has only prohibited state-sponsored "voluntary" prayer.[25] No teacher or student has ever been constitutionally prohibited from individual and personal silent prayer in the public school. In *Bender v. Williamsport Area School District* in 1986,[26] the Supreme Court endorsed the free exercise right of a Christian student prayer group to meet on public school property and during school hours, without violating the establishment clause.

For the forthcoming 1987-1988 term, the Court has granted certiorari to hear a "moment-of-silence" case emanating from New Jersey.[27] Unlike the Alabama statute struck down in *Wallace v. Jaffree*, the New Jersey statute, similar to those present in about half the states, simply provides for a moment of silence at the beginning of the school day. The statute does not expressly encourage prayer, although it is likely that many students may individually choose to pray in silence during this statutory moment. Thus, the New Jersey statute's respect for cultural and religious heterogeneity may sufficiently protect everyone's free exercise rights while simultaneously not running afoul of the establishment clause. In

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[21] 599 S.W.2d 157 (Ky.), *rev'd*, 449 U.S. 39 (1980).

[22] 472 U.S. 38 (1985).

[23] *See* School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963).

[24] *See* N.Y. Times, July 10, 1985, at A13, col. 1 (Attorney General Meese called the decisions " 'bizarre.' "). *E.g.*, N.Y. Times, July 3, 1985, at A19, col. 2 (Secretary of Education Bennett criticized the Supreme Court's 1985 decisions striking down public aid programs to private schools as a " 'ridiculous' expression of the court's 'fastidious disdain for religion that is hard to fathom.' " He called the decisions " 'crazy,' 'terrible,' and 'badly reasoned.' ").

[25] It is dubious whether any voluntary prayer is ever fully "voluntary," especially given peer influence in the lower grades. One law school constitutional law class has been the setting for demonstrating that "voluntary" prayer may be something substantially less than truly voluntary. Day, *Teaching Constitutional Law: Role-Playing the Supreme Court*, 36 J. LEGAL EDUC. 268 (1986).

[26] 475 U.S. 534 (1986).

[27] May v. Cooperman, 780 F.2d 240 (3d Cir. 1985), *cert. granted*, 107 S. Ct. 946 (1987).

1985, Justice O'Connor expressly suggested in *Wallace v. Jaffree* that such a statute may pass constitutional muster.[28]

From this battery of case law, it is clear that neither the Constitution nor the Supreme Court is inherently antithetical to the inculcation of moral values in public education. The establishment clause mandates that such religious or value based education must be effectuated in a broader educational context. The schools must carefully avoid government sponsorship of any particular set of values to the exclusion of anyone else's religious or moral values. No one's free exercise of religion right can be fostered to the detriment of any other citizen's equally important and constitutionally protected free exercise right. Obviously, this is a very delicate and difficult, but not impossible, objective for responsible public educators to implement. Respect for cultural and religious heterogeneity under the auspices of the Constitution is the key to whether the public schools may teach moral values in an effective and constitutional manner.

Catholics must be particularly sensitive to the critical importance of constitutionally respecting both the establishment and free exercise clauses of the first amendment. Were it not for the Court's appreciation of cultural and religious heterogeneity over a half century ago in *Pierce v. Society of Sisters*,[29] private Catholic elementary and secondary schools could have been abolished and all Catholic children forced to attend public school. Fortunately, the free exercise clause of the Constitution protected the Catholic minority from the virulent anti-Catholic prejudice of the Know-Nothings and cultural isolationists. Catholics must now accord the same constitutional safeguards to all other persons, without abandoning the effort to teach moral values in public schools.

The contemporary necessity of according sufficient constitutional respect for everyone's free exercise rights, while avoiding establishment of religion, is obvious. If the Ten Commandments are starkly posted on a public school bulletin board, which version of the Ten Commandments would be displayed—Protestant, Catholic or Jewish? If each different version were posted, would public school teachers be able to explain the theological differences sufficiently in response to students' questions?

And what of the constitutional rights of the Buddhist or Moslem child? Can agnostic or atheist children be made the subtle targets for religious proselytizing, under the guise of teaching moral values? The same questions are raised if the Bible is read or if school-sponsored prayers are said aloud, apart from a broader educational context of a literature, history, or comparative religion class. What sort of prayers would be said? Which holy scripture would be read? The Torah? The

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[28] Wallace v. Jaffree, 472 U.S. 38, 67 (1985) (O'Connor, J., concurring).
[29] 268 U.S. 510 (1925).

Koran? The Protestant or Catholic Bible? Again, what of the constitutional rights of other students? Assuming even that the public school reading from a Catholic Bible began the public school day, should not Catholics be wary of a stark Bible reading without the presence of a faculty sufficiently versed in Catholic theology to address student questions that the scriptural reading may inspire? Thus, even in an "ideal" context, public school-sponsored prayer or scripture reading is deeply problematic, especially for the Catholic minority. Few, if any, want to witness their religion debased by a tepid state-sponsored Christianization political agenda.

These difficult questions must not derail the ethical renaissance of teaching moral values in public schools. It may be possible to teach morality without simultaneously teaching overt religious values. For most Americans, religion and morality are closely and properly bound. But it is precisely for this reason, the synergy, indeed the near-fungibility of overt religious and moral values, that the Constitution compels meticulous regard for both the establishment and free exercise clauses of the first amendment.

Teaching moral values in public schools can be accomplished within the bounds of the Constitution. It is a constitutionally permissible, and, given the rich natural law tradition reflected in the constitutionally antecedent Declaration of Independence, a constitutionally endorsed pedagogical agenda. However, moral values must be taught with care, respect, and concern for the rights of all the public. This requires constitutional regard for cultural heterogeneity, and care to ensure against exclusive promulgation of any particular set of religious values to the exclusion of all other values. Anything less will probably violate the religion clauses of the Constitution. If done with constitutional prudence, moral values can be taught without ineluctably sliding down the dangerous slippery slope of accommodationism.[30]

It is unnecessary and irresponsible to mistakenly yield the high moral ground and to succumb to raw value neutrality. The Constitution does not require such abdication of responsibility by public educators. Moral values can be legitimately taught without becoming unconstitutionally transmogrified into a political agenda for a particular religious view. However, without due regard for both of the Constitution's religion clauses, efforts to teach moral values in schools are doomed. Teaching moral values must not be equated with ambitious proselytizing for a particular religion, to the exclusion of all other values. This unconstitutional parochialism ineluctably leads to the repugnant intellectual terrorism of banning

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[30] *See* Gregory, *supra* note 14.

certain books[31] on various purported objectionable grounds, and, ultimately to mass home schooling and de facto disavowal of legitimate public education.

Those who object to teaching moral values in public schools argue that it is the ominous pretext for effectuating religious proselytization, and thus violates the establishment clause. This is a potentially legitimate concern. However, as has been demonstrated, moral values can and must be carefully taught without violating the Constitution. It is not appropriate for critics to argue that those who wish to teach moral values should instead exercise the option of attending private religious schools. Parochial schools have done an excellent job of opening their doors to the indigent, unable to afford private school tuition, and even to those not of the same religious faith who nevertheless seek the highest quality education available.[32] However, the ability of private religious schools to waive tuition for those unable to pay is not limitless. It is facile and transparently specious for those opposed to the teaching of moral values in public schools to argue that private religious schools are automatically available as the alternative means for those who desire an education expressly incorporating moral values. For reasons of both geographic and potential economic inaccessabilty, this counterargument fails. Meanwhile, students unable to attend private religious schools retain their constitutional right to have their free exercise of religion respected in the public school context. Although students in public schools may be exposed to a panorama of values antithetical to their own religious beliefs as the heavy price of constitutional protection against establishment of religion, they must not thereby be relegated to a debased, value-neutral, or anti-religion public education. Their free exercise constitutional right provides the effective counterbalance to ensure that moral values, if taught in an appropriate context, can be a constitutional part of public education.

Our Constitution and our public schools must be both open and principled enough to accommodate the teaching of moral values in public education within the scope of the first amendment. If neither the Constitution nor public schools are open to morality-based pedagogy, society will

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[31] *See* Board of Educ. v. Pico, 457 U.S. 853 (1982); Smith v. Board of School Comm'rs, 655 F. Supp. 939 (S.D. Ala. 1987); N.Y. Times, May 10, 1987, at § 7; Trends in the Law, *War Between the Faiths: "Secular humanist" Books Banned*, 73 A.B.A. J. 128 (June 1987). *See also* Nat'l L.J., July 27, 1987, at 6, col. 1 (Upon hearing *Mozert v. Hawkins County Board of Education*, Nos. 86-6144, 86-6179, 86-6180, 87-5024, slip op. (6th Cir. Aug. 24, 1987), Sixth Circuit panel appeared "highly critical" of claim that elementary school children have right to skip reading classes when texts conflict with their religious beliefs).

[32] Laycock, *Towards A General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1387 (1981) ("[T]he . . . success of Catholic schools [is] in educating disadvantaged children. These children are frequently black Protestants whose public schools have failed them.").

be gravely and perhaps irreparably debilitated by such a craven, unwarranted bar. Concomitantly, those fanatics who would sweep aside the Constitution in order to promulgate their particular religious agenda to the exclusion of other perspectives should take heed from the example of the quintessential lawyer and Catholic saint, Thomas More. Recall More's response to his son-in-law, Roper, in Bolt's timeless play, *A Man For All Seasons*. Roper was puzzled when More let an enemy go because he violated no law. Roper claimed he gladly would "cut down every law in England" to get at the Devil. As More rhetorically queried, what would then protect Roper when, the laws having been swept aside in the ambitious political chase, the Devil then turned and faced Roper?[33] Analogously, what will protect the Catholic minority? If, in ill-advised haste, we derogate the constitutional rights of others in order to advance our own religious agenda in the public schools, we then have no constitutional guarantee that we will be legally protected from discrimination against us by a secular, morally-neutral, and perhaps even anti-Catholic, political and public majority. Now, as then, the law protects perhaps even the Devil, in order to protect us ultimately from the Devil. Today, the Constitution also protects our Catholic right to insist upon the informed teaching of moral values in public school education. Ultimately, a morally sensitive and educated public citizenry will be best protected against, and best prepared to frustrate, evil in the modern world.

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[33] And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws being flat? This country's planted this with laws from coast to coast—Man's laws, not God's—and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then?

R. MARIUS, THOMAS MORE (1984); Gregory, Book Review, 29 CATH. LAW. 344 (1985).