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PROPHECY AND CASUISTRY: ABORTION, TORTURE AND MORAL DISCOURSE

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I. INTRODUCTION

IN his groundbreaking book, *After Virtue*, the philosopher Alasdair MacIntyre argues that “the most striking feature of contemporary moral utterance is that so much of it is used to express disagreements; and the most striking feature of the debates in which these disagreements are expressed is their interminable character.”¹ In support of his claim, he gives examples from three well-known and seemingly never-ending debates of our time: the debate over whether it is ever just to wage war, the abortion debate and the debate about the relative priority of social equality and individual liberty.² The consequence of this interminable disagreement, MacIntyre believes, is a widespread *emotivism*, which he defines as the view that “all evaluative judgments and more specifically all moral judgments are *nothing but* expressions of preference, expressions of attitude or feeling, insofar as they are moral or evaluative in character.”³

What has caused such disagreement? According to MacIntyre, it was the loss of a coherent tradition of moral reasoning. In the wake of the religious wars of the early modern era, the Enlightenment project aimed to provide the West with a rational, secular foundation for moral norms that was both universally applicable and universally acceptable. With its failure, we are left with bits and pieces of incompatible moral traditions, the flotsam and jetsam from the shipwrecks of innumerable attempts to

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1. ALASDAIR MACINTYRE, *AFTER VIRTUE* 6 (1981).

2. *Id.* at 6-7 (discussing idea that competing arguments within each debate may be logically valid, yet there is no rational way to weigh claims against each other).

3. *Id.* at 11.

formulate a coherent framework for moral reflection that have been proffered over the centuries in the West.⁴

What to do now? In the celebrated last chapter of this celebrated book, MacIntyre opines that “we are not waiting for Godot, but for another—doubtless very different—St. Benedict.”⁵ According to MacIntyre, the only hope that “morality and civility might survive the coming ages of barbarism and darkness”⁶ is to mimic the strategy that allowed them to survive the dark ages of the past: the creation of monastic environments dedicated to passing on the tradition of the virtues. In later books MacIntyre comes to identify this tradition more closely with the Christian tradition, particularly as exemplified in the thoughts of St. Thomas Aquinas.⁷

My fear, however, is that MacIntyre’s monastery will be far less harmonious than he hopes. Serious tensions may well arise between and among the dedicated neo-traditionalists committed to retrieving and preserving the possibility of coherent moral discourse within the monastery walls. Why? As I will argue in this Essay, the intractability of contemporary moral disagreement does not arise solely from the inevitable tension among fragments of moral argument plucked from incompatible moral theories. Our difficulties do not stem solely from the challenge of brokering the rival moral claims of Kantians and utilitarians, or from negotiating the tension between hedonists and stoics. In the United States at the turn of the twenty-first century, we also confront serious moral disputes among persons who see themselves as belonging to the same moral tradition, and as holding themselves accountable to the same values and same account of the virtues. Consider, for example, the 2004 American presidential election. It was widely perceived to be an election that turned to some degree upon “moral values.”⁸ Yet it generated bitter controversy among members

4. *Id.* at 238 (noting ramifications of failed Enlightenment project).

5. *Id.* at 245.

6. *Id.* at 244.

7. See generally ALASDAIR MACINTYRE, *THREE RIVAL VERSIONS OF MORAL ENQUIRY: ENCYCLOPAEDIA, GENEALOGY, AND TRADITION* (1990) (discussing three distinct methods of moral thought); ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (1988) (addressing questions raised by *After Virtue*).

8. *2004 Election Results*, CNN.COM (2004), <http://www.cnn.com/ELECTION/2004/pages/results/states/US/P/00/epolls.0.html>. The poll left unspecified what was meant by “moral values.” A question in a CNN Poll asked which issue was most important to voters in their selection for president. The options were: taxes, education, Iraq, terrorism, economy/jobs, moral values, health care. Kerry won 73% of the votes from voters who believed Iraq was the most important issue, 80% of those who said economy/jobs, and 77% of those who said health care. Those who thought terrorism or moral values voted for Kerry far less frequently (Kerry received 14% and 18%, respectively). Bush won 80% of the votes from voters who believed that moral values was the most important issue and 80% of those who said terrorism. In contrast, Bush received only 26% of those who said Iraq, 23% of those who said health care, and 18% of those who said economy/jobs. All of these categories implicate “moral values.” For example, the question of Iraq raises issues of when and under what conditions it is just to wage war, and both the economy

of the same religious communities, who presumably view the nature and purpose of human life in much the same way.⁹

In attempting to probe the nature of the disputes among co-religionists surrounding that election, we must tread cautiously. Some disagreements no doubt turned on factual questions: Did President Bush in fact have a reasonable basis for thinking there were weapons of mass destruction in Iraq? Other disagreements turned on narrowly prudential judgments regarding the intermediate and long-term consequences of various courses of action: What was the likely effect of the American presence in Iraq for the stability of the Middle East? In addition, it goes without saying that not everyone who self-identifies as a member of a particular moral or religious tradition will treat its resources as a significant component in their own moral deliberations.

Nonetheless, setting those cases to one side does not eliminate the problem. We continue to find ourselves faced with deep clashes of moral judgment among well-educated, committed adherents of the same religious tradition.¹⁰ They do not give rise to fruitful discussion about differences, but instead signal the breakdown of conversation, and frequently even the breakdown of community. My hypothesis is that at least some of these clashes—and some of these ensuing breakdowns—are not precipitated by factual disputes, or by the application of mutually inconsistent moral premises. Instead, they are driven by clashes in moral sensibility, which shapes and reflects clashes in *style* of moral discourse. More specifically, I believe that they are driven by tensions between the prophetic style

and health care raise issues of social justice. All these issues have been the subject of extensive reflection by moralists working within the Christian tradition, as well as other moral traditions. For an article putting the poll questions in a broader context, see Dick Meyer, *Moral Values Malarkey*, CBSNEWS.COM, Nov. 5, 2004, <http://www.cbsnews.com/stories/2004/11/05/opinion/meyer/main653931.shtml> (criticizing debate). For more extensive analysis, see *Moral Values: How Important? Voters Liked Campaign 2004, but Too Much 'Mud-Slinging'*, PEW RES. CENTER, NOV. 11, 2004, <http://people-press.org/reports/pdf/233.pdf> (reviewing voter opinions).

9. See John C. Green et al., *The American Religious Landscape and the 2004 Presidential Vote: Increased Polarization*, PEWFORUM.ORG (2004), <http://pewforum.org/publications/surveys/postelection.pdf> (discussing voter characteristics).

10. According to a CNN exit poll, Protestants comprised 54% of the voting population in the 2004 presidential election; 59% of them voted for Bush, while 40% voted for Kerry. Catholics, who constituted 27% of voters, gave 52% of their votes to Bush, and 47% to Kerry. Twenty-five percent of Jews, who comprise 3% of the population, voted for Bush, while 75% voted for Kerry. Among those who acquiesced to the description: white evangelical/born-again (23% of the population), 78% voted for Bush, while 21% voted for Kerry. Of those who did not accept this description, 43% voted for Bush, while 56% voted for Kerry. Sixty-one percent of those who attended church weekly voted for Bush, while 39% voted for Kerry. Breaking down this statistic by religion gives an interesting picture: 70% of Protestants who attend church weekly voted for Bush (29% voted for Kerry), while only 50% of Catholics who attend church weekly voted for Bush (43% voted for Kerry). See *2004 Election Results*, *supra* note 8 (describing proportions of population voting for Bush or Kerry based upon demographic and religious characteristics).

and the casuistical style—between prophecy and casuistry.¹¹ In testing this hypothesis, I would like to work inductively, attempting to describe and to map this clash, and perhaps to take a few small steps at managing it in a way that might prevent the breakdown of conversation, even while refusing to pretend to have reached a false truce.

Let me begin by forthrightly acknowledging my limitations; prophecy and casuistry are big topics, and I am just beginning this study: so I begin with what I know best, hoping to move outward from there; I am a moral theologian working in the Christian tradition, in particular the Catholic Christian tradition. I am also an American lawyer. The resources upon which I will draw are largely made available through those venues. But

11. My approach is similar to, but not identical with, the approach taken by the Jesuit John W. O'Malley in his important volume, *Four Cultures of the West*. O'Malley and I share a fascination with rhetoric. Regarding the disputes between Catholics and Protestants during the Reformation, he observes that: "[H]ow things were said was just as important as *what* was said, even though the *how* and the *what* could never be neatly separated." See JOHN W. O'MALLEY, *FOUR CULTURES OF THE WEST* 2 (2004). O'Malley argues that the West has produced four "cultures": the prophetic culture, the academic culture, the humanistic or poetic culture and the artistic culture. By culture he means a "configuration" of meaning; he goes on to say that:

The elements within the configuration are forms, symbols, institutions, patterns of feeling, patterns of behavior, and the like. Among such elements in culture two [academic culture], for instance, are lectures, examinations, academic gowns, and, most certainly, the diploma. Style of discourse is an especially important element in the configuration of any given culture, constitutive and revelatory of its design. Professors talk differently from poets. When taken together, the elements express a set of reciprocally dependent values and interpretations of reality. The artist has different priorities than the prophet. The different priorities suggest how the internal logic of the configuration makes it self-validating to those living within it and resistant to other such configurations. Prophets sound unrealistic, even dangerously reckless, to the statesman. I use the word *configuration* because it indicates relationships and proportions. Values central to one culture may be found in another but not so centrally as to give it shape.

Id. at 29-30.

O'Malley's project is much broader than mine. As the foregoing quotation suggests, he is concerned with illuminating four ways of perceiving what amounts to reality as a whole. In contrast, my focus in this Essay is upon how a moral agent—or someone trying to influence a moral agent—grapples with the prospect of taking a morally controversial action or following a morally controversial program of action. The scope of my project is therefore more similar to that of James Gustafson in his *Varieties of Moral Discourse*. See generally JAMES GUSTAFSON, *VARIETIES OF MORAL DISCOURSE: PROPHETIC, NARRATIVE, ETHICAL, AND POLICY (THE STOB LECTURES)* (1988). As will become apparent below, I am indebted to Gustafson's discussion of prophetic discourse. What I term "casuistical discourse" or "practical reason" incorporates elements of what he terms ethical discourse and policy discourse. Nonetheless, my focus differs from Gustafson's in two respects. First, as my examples of abortion and torture in the last presidential election indicate, my focus is more upon live moral controversies than upon the more timeless reflection of academics. Second, I am more concerned with elaborating upon the stormy *relationship* between prophetic discourse and the discourse of casuistry or practical reason.

one cannot begin to talk either of prophecy or casuistry without honoring the foundational contribution made by the Jewish tradition. The Prophetic books of the Hebrew Bible are a gift to all peoples, particularly to Christians, for they form part of our "Old Testament." Moreover, the Jewish tradition has incorporated an extensive understanding of law and casuistry.¹² In addition, Islam offers its own prophetic resources in the *Qu'ran* and centuries of Qu'ranic commentary, as well as jurisprudential and casuistical resources in *fiqh*-literature.¹³ But I must begin where I can.

In Section II, I will briefly explain what I mean by "prophecy" and "casuistry," or more precisely, by the "prophetic" style of discourse and the "casuistical" style of discourse. In Section III, I will illustrate how the decision to use one or the other genre of moral discourse constrains the shape of the ensuing moral conversation, even among people who share the same moral and religious world view. My analysis will focus on two issues that provoked a tremendous amount of discussion in religious circles in general and in Catholic circles in particular both before and in the aftermath of the 2004 presidential election: abortion and torture. Let me assure those readers who are weary of the culture-wars that my primary objective is not to engage the arguments themselves. Instead, I want to take notice of the form—prophetic or casuistic—in which those arguments were cast around the time of the election, and to attempt to unravel the consequences of that form for the ensuing moral conversation among persons who share the same basic world view. How do we find a way beyond the tension between these two forms of moral discourse, even while preserving their respective *raison d'être*? I will grapple with this question in Section IV. After describing several less-than-successful attempts to overcome the tension between prophecy and casuistry, I will attempt to articulate a way in which they might be brought into a fruitful relationship of creative tension.

II. DEFINITIONS

Both casuistry and prophecy are discursive practices with long histories in Western moral discourse. Naturally, the meaning of either term cannot be fully understood apart from those stories. It will suffice here,

12. For a brief introduction to Jewish perspectives on the relationship of law and morality, see *Law and Morality*, in 10 ENCYCLOPAEDIA JUDAICA 1480-84 (1971). For an introduction to Jewish perspectives on prophecy, see *Prophets and Prophecy*, in 13 ENCYCLOPAEDIA JUDAICA 1151-82 (1971).

13. For a brief introduction to Islamic views of prophecy, see U. Rubin, *Prophets and Prophethood*, in 4 ENCYCLOPAEDIA OF THE QUR'AN 289-307 (2004). For an introduction to Islamic views of law, see W. Hallaq, *Law and the Qur'an*, in 3 ENCYCLOPAEDIA OF THE QUR'AN 149-72 (1993); M.B. Hooker, *Shari'a*, in 9 ENCYCLOPAEDIA OF ISLAM 321-28 (1997); J. Schacht, *Fikh*, in 2 ENCYCLOPAEDIA OF ISLAM 886-91 (1964); J. Schacht, *Hiyal*, in 3 ENCYCLOPAEDIA OF ISLAM 510-13 (1967). See also DUNCAN B. MACDONALD, *THE DEVELOPMENT OF MUSLIM THEOLOGY, JURISPRUDENCE AND CONSTITUTIONAL THEORY* 65-117 (Premier Book House 1964) (1903) (outlining development of Muslim jurisprudence).

however, to provide brief, working definitions that will facilitate my own analytical purposes. I hope that a fuller picture of the nature and scope of casuistry and prophecy, of casuistical discourse and prophetic discourse, will emerge during the course of my discussion.

A. *Prophetic Discourse*

To give a straightforward, but circular, definition of prophetic discourse is to say that it is the discourse characteristic of prophets. Some would call Nostradamus a prophet, and treat his predictions as prophecy.¹⁴ Others would deem Bob Dylan a prophet, and proclaim that his life and songs channeled something of a divine spirit.¹⁵ In my view, the use of the terms "prophet," "prophecy" and "prophetic" in both these contexts should be viewed as analogical extensions of their core meaning. As I am using them here, the paradigmatic meaning of the terms "prophet" and "prophecy" centers around the prophetic writings in the Old Testament or Hebrew Bible.¹⁶ The term "prophetic discourse" refers in the first in-

14. Michel de Nostradamus (1503-1566), was a French astrologer and physician whose prophecies created intense interest not only in his own time, but in much later times, including our own. *Nostradamus*, in 8 THE NEW ENCYCLOPAEDIA BRITANNICA 802 (2005) (describing Nostradamus).

15. Bob Dylan (1941-), an American folk singer whose life and songs helped to define the generation that came of age in the 1960s. *Dylan, Bob*, in 4 THE NEW ENCYCLOPAEDIA BRITANNICA 309 (2005) (discussing Bob Dylan).

16. How does one identify prophetic literature? As David Petersen argues, one can give at least two answers to this question: a canonical answer, which focuses on certain scriptural books, and an authorial answer, which focuses on the writings of those deemed to be prophets. DAVID L. PETERSEN, *THE PROPHETIC LITERATURE: AN INTRODUCTION* ch. 1 (2002) (suggesting possible definitions of prophetic literature).

The canonical answer would focus on the fact that both Jewish and Christian traditions divide the Hebrew Bible/Old Testament into three categories: Torah, Prophets and Writings. The Hebrew canon divides the prophetic books into the categories of those attributed to the "Former Prophets" (the book of Joshua, the book of Judges, the first and second books of Samuel and the first and second books of Kings) and those attributed to the "Latter Prophets" (the books of Isaiah, Jeremiah, Ezekiel and the "Twelve," which include the books of Hosea, Joel, Amos, Obadiah, Jonah, Micah, Nahum, Habakkuk, Zephaniah, Haggai, Zechariah and Malachi). The Hebrew canon places the book of Daniel, as well as the book of Lamentations, under the category of the "Writings." Protestant Christians recognize the Hebrew canon as their canonical Old Testament, while Roman Catholics and Orthodox Christians include an additional seven books in the Old Testament, including Baruch among the prophetic books, as well as additional passages in the book of Daniel. Donald Senior, *General Introduction*, in THE CATHOLIC STUDY BIBLE, RG 2-4 (Donald Senior ed., 1990) (describing Biblical texts and background). As Petersen notes, the difficulty with this approach is that it is difficult to think of the books of the "Former Prophets" as prophetic literature. PETERSEN, *supra*, at 2 (noting problems with identifying prophetic literature).

The prophets' writings are also frequently divided according to the categories of "major prophets" and "minor prophets," which division refers to the length of the writings, not to their importance. The major prophets include Isaiah, Jeremiah, Ezekiel and sometimes Daniel. The books of Lamentations and Baruch are attached to the book of Jeremiah. Lamentations purports to be written by Jer-

stance to the rhetorical forms and substantive concerns that are characteristic of the biblical prophet.

What sort of discourse is characteristic of the biblical prophets? Here, it is helpful to note that four terms are commonly used to describe them in the Hebrew Bible: *hōzeh* ("seer"), *rō'eh* ("diviner"), *'iš hā' ēlō hēm* ("man of God") and *nābī'* ("prophet").¹⁷ In general, the first term refers to someone who receives divinely ordained visions, while the second refers to someone who can discern helpful information from the divine world.¹⁸ Broadly speaking, these two terms account for the fact that we sometimes use the term prophet to refer to someone with the power to predict future events, such as Nostradamus. The third term, which is prominent in the stories of Elijah and Elisha, refers to men who "possess the power of the holy and hence are dangerous, powerful, and due appropriate respect."¹⁹ In my view, the use of the term "prophet" with respect to Bob Dylan evokes the sense that he was in some sense as a holy man of his time, that is, as a man with a mysterious and potentially dangerous contact with the divine.

The fourth term, *nābī'*, is the most common term used in the Hebrew scriptures for a prophet. What does it mean? Scholars note that it came to have a very broad range of meanings that came to overlap in time with the meaning of the three other terms. Nonetheless, the root meaning of this term, *nab*, which means "to call," appears to be significant.²⁰ A prophet is someone who is called and commissioned by God, usually to

emiah after the fall of Jerusalem to the Babylonians, and Baruch was Jeremiah's scribe. The minor prophets are identical with the "Twelve" identified with respect to the Hebrew Canon above. *Prophet*, in 11 NEW CATHOLIC ENCYCLOPEDIA 764 (2d ed. 2003) (explaining history and development of term).

As Petersen notes, another way of identifying prophetic literature is by saying that it is literature spoken or written by the Hebrew prophets. There is, however, a clear difficulty with this approach. Not all of the literature pertaining to the prophets is written by or attributed to them. For example, the prophet Elisha is written about in the book of 2 Kings; he did not write it. Someone other than Jeremiah, probably his scribe Baruch, wrote about certain aspects in Jeremiah's life (e.g., Jeremiah 28). Scholars generally agree that the book of Isaiah cannot be attributed entirely to the prophet known by the name Isaiah bin Amoz, because many sections of that book refer to events that took place long after his death. PETERSEN, *supra*, at 3-4 (explaining difficulties of definition).

Petersen himself opts for a more general, "generative" definition of prophetic literature. It is "that [which] attests to or grows out of (i.e., is generated by) the activity of Israel's prophets." *Id.* at 4.

17. PETERSEN, *supra* note 16, at 5 (discussing terminology). Specialists in the field emphasize the impossibility of pinning mutually exclusive univocal meanings on these terms. See *id.* at 6-8 (defining terms). For a more specialized historical discussion, see JOSEPH BLENKINSOPP, A HISTORY OF PROPHECY IN ISRAEL 26-30 (Westminster John Knox Press 1996) (1983) (examining historical labels).

18. PETERSEN, *supra* note 16, at 6 (explaining terminology).

19. *Id.*

20. See, e.g., BLENKINSOPP, *supra* note 17, at 28-29 (noting development of *nab*); PETERSEN, *supra* note 16, at 6 (discussing terminology); Bruce Vawter, C.M., *Introduction to Prophetic Literature*, in THE NEW JEROME BIBLICAL COMMENTARY 188-89 (1990) (providing history of Israelite prophecy).

deliver a message to God's people.²¹ That message frequently pertained to God's perspective on the relationship between God and Israel, and more specifically to the ways in which His chosen people were fulfilling—or failing to fulfill—the obligations of their covenant at a particular time and place in their history.

It is this aspect of prophetic discourse that is of particular interest to us here, for it is the aspect which strives to function as an impetus for social critique and reform. As the great Jewish thinker Abraham Joshua Heschel stated:

The prophet was an individual who said No to his society, condemning its habits and assumptions, its complacency, waywardness, and syncretism. . . . His fundamental objective was to reconcile man and God. Why do the two need reconciliation? Perhaps it is due to man's false sense of sovereignty, to his abuse of freedom, to his aggressive, sprawling pride, resenting God's involvement in history.²²

One can, however, speak "prophetically" in the sense described by Heschel without appropriating for oneself the mantle of a prophet. To put the point another way, persons who do not claim actually to be delivering particular messages from God can and do draw upon the forms and the themes of prophetic discourse preserved in the Hebrew Bible/Old Testament in order to call attention to the moral and political challenges confronting their respective societies. Such persons do not believe God has directly conscripted them to communicate a new message to the community on his behalf. They do, however, tend to see themselves as following in the footsteps of the biblical prophets; as illuminating the moral dangers of the current situation by drawing upon the themes and style of discourse of the biblical prophets.

What are the basic characteristics of prophetic discourse more generally, particularly as invoked in contemporary discussion of moral issues? In the Stob Lectures at Calvin College, the distinguished Protestant

21. As stated in *A History of Prophecy in Israel*:

The standard introductory formula 'thus says Yahweh' is taken from the protocol used in official oral and written communications emanating from a royal court, which suggests that the prophets understood themselves as emissaries of Yahweh. The royal messenger was an important official, often a member of the court, whose task was to relay a message or command from the ruler verbatim, though he might add some words of an exhortatory, comminatory, or explanatory nature of his own. This provides a simple but important clue to the way in which prophets conceived of their task, since several of them claimed to have access to the presence of Yahweh as divine ruler and to have been sent out on a mission by Yahweh. . . . The conviction of acting under such a mandate is essential for understanding how prophets thought theologically of their authority and right to a hearing.

BLENKINSOPP, *supra* note 17, at 29-30 (footnotes omitted).

22. ABRAHAM J. HESCHEL, *The Prophets* vol. I (1969).

ethicist James Gustafson maintains that prophetic discourse characteristically "takes the form of moral or religious indictments. It is the word of the Lord proclaimed *against* the moral evil and apostasy of the world and societies. It shows in dramatically vivid language just how far the human community has fallen from what it ought to be."²³ Gustafson believes these indictments have two characteristics. First, "they usually, though not always, address what the prophet perceives to be the *root* of religious, moral, or social waywardness, not specific instances in which certain policies are judged to be inadequate or wrong."²⁴ Second, prophetic discourse "use[s] language, metaphors, and symbols that are directed to the 'heart' as well as to the 'head.' The prophet usually does not make an argument; rather he demonstrates, he shows, he tells."²⁵

An additional characteristic of prophetic discourse identified by Gustafson is its utopian nature. Gustafson does not use this term technically, but merely to indicate that "prophets sometimes proclaim and depict an ideal state of affairs which is radically in contrast with the actual state of affairs in which we live together in society."²⁶ As Gustafson also notes, the path from the real to the ideal is not necessarily clear: "Of itself, the utopian vision does not precisely show how we are to get . . . to the fulfillment of the alluring ideal future."

Of what use are the Hebrew prophets to us here and now? As the scholar of rhetoric James Darsey tells us, the use of prophetic rhetoric has a long tradition in American political and social controversies.²⁷ Borrowing from Matthew Arnold, Darsey argues that reform movements either conform to the ideal of "sweetness and light" (from Greek ideals of rhetoric) or to the ideal of "fire and strength," which come from the Hebrew prophets. Arguing that the "'fire and strength' of the prophets is as much a part of our cultural inheritance as is the 'sweetness and light' of the Greeks,"²⁸ he maintains that our inability to grapple with it has led to an inability to understand our own social plight. The prophets, as Darsey notes, were radicals: "Radicalism . . . is defined by its concern with the political roots of a society, its fundamental laws, its foundational principles, its most sacred covenants. It is common for radicals to claim to be the true keepers of the faith; they oppose society using its own most noble expressions and aspirations."²⁹ Both so-called "liberals" and so-called "conservatives" can be radicals in this sense; Darsey's case studies in the use of prophetic rhetoric include the abolitionist Wendell Phillips,³⁰ the

23. GUSTAFSON, *supra* note 11, at 7-8.

24. *Id.* at 8.

25. *Id.* at 11.

26. *Id.* at 13.

27. See generally JAMES DARSEY, *THE PROPHETIC TRADITION AND RADICAL RHETORIC IN AMERICA* (1997) (outlining American prophetic history).

28. *Id.* at 7.

29. *Id.* at 9.

30. *Id.* at 61-84 (noting Phillips's position as orator).

socialist Eugene Debs,³¹ the communist hunter Joseph McCarthy³² and the founder of the John Birch Society, Robert Welch.³³

Prophetic discourse, as Darsey reminds us, is rarely "polite" or "civil"; in fact, it is frequently perceived by its audience as corrosive of communal bonds. Nonetheless, its presuppositions and its ultimate purpose are not ultimately negative. Those who engage in prophetic discourse (or prophetically symbolic activity) are attempting to break through a community's entrenched habits of apathy and injustice in order to prevent them from smothering the fundamental values and commitments upon which that community is founded, so that it might flourish in the years to come.³⁴ Nonetheless, it cannot be denied that these constructive intentions frequently remain unrealized, and that attempts to invoke prophetic language only exacerbate moral balkanization and even moral cynicism. The use of prophetic discourse is risky business, both for the prophet and for the community.

B. *Casuistical Discourse*

The word "casuistry" comes from the Latin word "casus" meaning case. For a definition of casuistry, I will turn to another distinguished Protestant moralist of the second half of the twentieth century, my teacher, Paul Ramsey. Without using the term itself, he offered this account of casuistry in *Nine Modern Moralists*:

Casuistry is the exercise of man's capacity to make moral decisions in the face of concrete, particular circumstances and cases, by his knowledge of the human essence through its basic inclination in him and the choices he is impelled to make, leaving in the wake of his acts of judgment a deposit of "natural" law, that first becomes visible, not to abstract reason but in *jus gentium*.³⁵

31. *Id.* at 85-108 (noting Debs's skill as orator).

32. *Id.* at 128-50 (explaining McCarthy's demagoguery).

33. *Id.* at 151-74 (noting that member of far right was powerful rhetorician).

34. For instance:

Rosa Park's refusal to surrender her seat on a bus in Montgomery, Alabama, is not the same as the belligerent occupation of a seat for two by a disaffected youth on a Chicago el [train] at rush hour, and a critique of incivility that fails to recognize this distinction misses an essential difference between the threats to comity of the 1960s and those of the 1980s and 1990s. Further, I will argue, it misses the lessons that the American radical tradition holds for our current disquietude.

Id. at 5.

35. PAUL RAMSEY, *NINE MODERN MORALISTS*: PAUL TILlich, KARL MARX, H. RICHARD NIEBUHR, FYODOR DOSTOEVSKY, REINHOLD NIEBUHR, JACQUES MARITAIN, JEAN-PAUL SARTRE, EMIL BR 4 (1983).

Influenced by Edmund Cahn³⁶ and Jacques Maritain,³⁷ Ramsey here seems to plump for an inductive (and significantly intuitive) account of casuistry, which he opposes to a model based on the deduction of solutions to particular cases from invariable general principles or rules.³⁸ In my view, however, this account is incomplete. Casuistry does have inductive aspects, and even intuitive aspects, but they relate in complicated ways to two other aspects with which Ramsey grappled a little later on in his career.

The first additional aspect is the recognition that casuistry has to grapple with the question how to describe human acts in a way that will facilitate moral analysis. Of all the possible true things we can say about an agent's action, what counts from a moral perspective, and what is irrelevant? We know, for example, that an agent's immediate and more remote purposes in acting are relevant to our moral analysis of her action. How do we identify those purposes, how do we take into account other morally relevant circumstances of the act?³⁹ We know, as well, that other features of an action can be relevant, at least under some circumstances. The challenge is to identify features of a human act that trigger the application of our moral rules or principles, as well as to describe features that are important for other reasons, perhaps for the sake of justifying an exception to the relevant rule or principle. Ramsey began looking at these issues systematically in a book called *Deeds and Rules in Christian Ethics*. He is far, however, from the first Christian moralist to do so. Most notably, St. Thomas Aquinas systematically analyzed the morally relevant components of the human act in the *Summa Theologica*.⁴⁰

The second of these additional aspects has to do with the relationship between principles, rules, and exceptions in deciding particular cases, a topic which Ramsey explored in *Deeds and Rules in Christian Ethics*⁴¹ and in a long article, *The Case of the Curious Exception*.⁴² How do we think about cases in which a normally applicable rule does not seem to apply? How are exceptions generated? Some theorists suggest we articulate exceptions to the application of a particular moral or legal rule for reasons entirely

36. EDMOND N. CAHN, *THE MORAL DECISION: RIGHT AND WRONG IN THE LIGHT OF AMERICAN LAW* (1955); EDMOND N. CAHN, *THE SENSE OF INJUSTICE* (1949).

37. JACQUES MARITAIN, *MAN AND THE STATE* (1951); JACQUES MARITAIN, *THE RIGHTS OF MAN AND NATURAL LAW* (1943).

38. ALBERT R. JONSEN & STEPHEN TOULMIN, *THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING* (1988) (setting up same dichotomy).

39. RAMSEY, *supra* note 35, at 192-99.

40. THOMAS AQUINAS, 2 *SUMMA THEOLOGICA* pt. I-II, q. 18 (Fathers of the English Dominican Province trans., Christian Classics 1981) (1911) [hereinafter *SUMMA THEOLOGICA*].

41. See PAUL RAMSEY, *DEEDS AND RULES IN CHRISTIAN ETHICS* 192-225 (1967) (exploring relationship between rules and exceptions).

42. See Paul Ramsey, *The Case of the Curious Exception*, in *NORM AND CONTEXT IN CHRISTIAN ETHICS* 67-138 (Gene Outka & Paul Ramsey eds., 1968) (discussing exceptions to rules and how they form).

extrinsic to that rule. Ramsey argued that in some cases, it is more accurate to say that we are deepening, extending and qualifying the meaning of that rule as it confronts circumstances not included in the central cases of its application. In my view, that argument reflects a key aspect of legal reasoning in the Anglo-American tradition, as well as in good moral casuistry.

Needless to say, the task of identifying morally salient features of human actions draws upon and reinforces basic convictions regarding the nature of human flourishing, and the relative worth of human beings. For example, consider the statement: "A shot and stabbed four people who were ahead of him in the Starbucks' line." If the circumstance "A is the king's son" is relevant to the moral analysis of A's action in a given society, we learn a great deal about the way that such a society is organized and what its values are. Or to strike closer to home, consider the claim, "An American hospital has an obligation to provide life-saving care and treatment to B, who appears broken, bloodied and bruised at the bay of its emergency room." If the circumstance "B is an illegal alien" creates a valid exception to the claim, we learn a great deal about our own society's organization and values.⁴³

In addition to careful attention to description of the action under consideration, and the application of rules and principles to the situation at hand, what are some of the other characteristic tools of casuistry? As Richard Miller notes, casuists often make use of paradigmatic cases, a set of presumptively applicable rules and principles drawn from and reflecting those cases, as well as analogical reasoning by which the case under consideration is compared to the paradigmatic cases.⁴⁴ Importantly, especially for law, and for types of casuistry situated within well-defined authoritative traditions, it also makes use of precedent. The manner in which similar cases have been resolved in the past has significant weight in the resolution of the case at hand. This is not to say that authoritative decisions of past cases trigger blind deference. No two cases are precisely the same, and it is the task of the decision-maker in the case at hand to decide if its factual differences from the relevant precedent justify a different outcome.

43. Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd (2003), requires hospitals that receive federal funds and that offer emergency services to provide a medical screening examination to any person who presents for treatment of an emergency medical condition, including active labor. If a patient does indeed have such a condition, the hospital is required to provide treatment designed to stabilize that condition, regardless of the patient's ability to pay, and regardless of the patient's immigration status. In 2004, the House of Representatives rejected a bill that required hospitals to obtain information on the immigration status and employment of a person presenting for emergency medical treatment, and which mandated the Homeland Security Department to initiate deportation proceedings against those found to be illegal aliens. H.R. 3722, 108th Cong. (2004).

44. See RICHARD B. MILLER, *CASUISTRY AND MODERN ETHICS: A POETICS OF PRACTICAL REASONING* 5 (1996) (noting use of paradigmatic cases among casuists).

Who engages in casuistry? As the foregoing analysis suggests, lawyers and judges in common law countries such as the United States and the United Kingdom engage in casuistical reasoning. In addition, Roman Catholic moral theology from the time of the Council of Trent (1545-1563) to the time of the Second Vatican Council (1962-1965) was dominated by casuistical reasoning, largely because of the intimate relationship between moral theology and canon law.⁴⁵ More specifically, the function of Catholic moral theologians during that time period was largely to provide priest-confessors with sufficient information so that they could accurately assess the nature and gravity of the sins confessed by penitents, in order to apply the appropriate penance. While Protestantism abolished the sacrament of penance, several important Protestant moralists (particularly those working in the Anglican tradition) appropriated and extended the casuistical tradition for their own purposes.⁴⁶

Yet casuistical discourse is not employed exclusively by these professional casuists, any more than prophetic discourse is the exclusive province of those whom God has called by name to be prophets. We all employ casuistical discourse to the extent to which we deliberate about the rightness or wrongness of a particular action using some or all of the analytical tools described above. Casuistry is a way of engaging in practical reasoning—it is a form of our day-to-day moral discourse, in which we consider the rightness or wrongness of particular actions in light of applicable moral principles, particular features of the action and particular characteristics of the agent performing it.

C. *Terminology and Its Limits*

In the remainder of this Essay, I will use the term “prophet” to refer to a person engaging in prophetic discourse, unless it is clear from the context that I mean to refer to the biblical prophets themselves. I will use the term “casuist” to refer to a person engaging in casuistical discourse. It is important to note, however, that the terms do not describe fixed personal attributes. More specifically, those who are “prophets” with respect to one moral issue, or even with respect to one context in which that issue is discussed, can be “casuists” with respect to another moral issue, or with respect to the same issue in a different context. Furthermore, the two types of discourse are not entirely parallel. Casuistical discourse is our normal mode of practical reasoning. Prophetic discourse, on the other hand, is anything but normal. It is a clarion call to respond appropriately to what the prophet believes to be a moral crisis. While it is conceivable

45. For a widely used account of the history of Catholic moral teaching, see JOHN MAHONEY, *THE MAKING OF MORAL THEOLOGY: A STUDY OF THE ROMAN CATHOLIC MORAL TRADITION* (1987).

46. For a helpful overview, see the articles in *CONSCIENCE AND CASUISTRY IN EARLY MODERN EUROPE* (Edmund Leites ed., 1986). See also LOWELL GALLAGHER, *MEDUSA'S GAZE: CASUISTRY AND CONSCIENCE IN THE RENAISSANCE* (1991); THOMAS WOOD, *ENGLISH CASUISTICAL DIVINITY DURING THE SEVENTEENTH CENTURY* (1952).

that a person could approach each and every moral issue they faced with the tools provided by casuistical discourse, it is virtually inconceivable that someone might be similarly devoted to prophetic discourse. No one can treat every decision they face as a moral crisis; to attempt to do so destroys the very concept of a crisis. Consequently, the fact that a person engages in prophetic discourse in some circumstances but not in others does not in itself count as a sign of moral incoherence or hypocrisy. Prophecy by its nature is an episodic form of discourse.

D. *Potential Tensions*

Where might prophecy and casuistry clash with respect to their respective approaches to moral reflection? In my view, a clash is possible on five levels. First, prophecy and casuistry can clash with respect to the priority they assign to certain issues. For example, prophets and casuists can agree that abortion or torture is morally unacceptable; prophets, however, are more inclined to see the issue as dwarfing every other issue on the horizon, while casuists generally tend to see it in as situated within a broader range of issues deserving moral attention.

Second, prophets and casuists can clash with respect to first-order moral analysis of a given action. Generally speaking, prophets tend to be impatient with the analytically nuanced descriptions of human actions proposed by casuists, as well as with casuistical attempts to identify and justify exceptional situations that warrant a departure from the general moral rule. No doubt some of their impatience is due to the constraints of prophetic discourse. For example, the rhetorical power of a prophetic denunciation of idolatry or abortion would be significantly diluted if the prophet devoted significant attention to the precise features that an action must exhibit in order to fall under the moral prohibition of abortion⁴⁷ or idolatry.⁴⁸ In addition, prophets are not likely to be sympathetic with the attempts of casuists to justify exceptions to a general moral rule by probing its rationale and tacit assumptions. A prophet is likely to view such attempts as a morally bankrupt effort to "get around" the rule for one's own venal purposes. Furthermore, to the extent that the prophet views the moral rule as directly or indirectly given by God, she is less likely to believe

47. For example, does a medical procedure designed to end the burdens of pregnancy upon a woman with a failing heart count as a morally prohibited "abortion" if it is done foreseeing, but not intending, the death of her unborn child? For a conservative Roman Catholic casuistical approach that makes moral distinctions along these lines, see GERMAIN GRISEZ, *THE WAY OF THE LORD JESUS VOL. 2: LIVING A CHRISTIAN LIFE* 498-504 (1993).

48. St. Paul, for example, is casuistical in his approach to the question whether a Christian may eat meat sacrificed to idols. On the one hand, he recognizes that doing so will not harm the "strong"—those who clearly recognize that there is only one true God. On the other, he cautions that eating such meat may be spiritually dangerous to the "weak"—those whose commitment to monotheism is tenuous. He urges the strong to be solicitous of the spiritual well-being of the weak in deciding how to proceed in such cases. See *1 Corinthians* 8:1-13.

that its rationale and scope can or should be probed by human reason. Casuists, for their part, believe that prophets are intellectually crude and even self-indulgent in issuing broad condemnations without taking care to specify precisely the range of activity to which those condemnations apply.

Third, prophets and casuists can clash with respect to the manner in which they assess the character of those who engage in the morally troublesome practices in question. Prophets generally take an agent's engagement in the acts in question (and sometimes, even her toleration of such acts) as conclusive evidence of bad character. More specifically, they tend tacitly to apply a tightly focused conception in the "unity of the virtues."⁴⁹ They perceive a person who engages in an action such as abortion or torture as so conclusively lacking in the virtue of justice that it is impossible for her to possess more than the simulacra of the other virtues. Casuists are more likely to assess character more holistically, in light of a broader scale of virtues and vices; they are more likely to be sympathetic to the claim that a generally good person engaged in or authorized morally unacceptable acts for mistaken, but understandable reasons.

Fourth, and relatedly, prophecy and casuistry can clash with respect to the proper response of the society to the practices in question, particularly if those practices are already entrenched. Prophets are more likely to think that the immorality of a practice such as abortion or torture calls for its immediate and total abolition, while casuists are more likely to regard the question of societal response to an immoral practice as deserving of separate moral analysis.

Fifth, and finally, prophets experience the temporal horizon of their moral decision-making in a very different way than casuists. Prophets experience themselves and their society as held within a moment of crisis (*kairos*),⁵⁰ as facing a decisive turning point about whether to pursue a path toward salvation or toward damnation. Casuists, in contrast, tend to see even very important moral decisions as occurring in a long, drawn-out span of history (*chronos*)⁵¹ in which analogous decisions have arisen before and will arise again. The idea that any one moral issue can, by itself, constitute a turning point in history is not one to which casuists are naturally attracted.

49. This controversial position has been advocated by a number of the philosophical luminaries of the West, including Plato, Aristotle and Aquinas. See, e.g., ARISTOTLE, *Nicomachean Ethics* Bk. VI, Sec. 13 (Martin Ostwald trans., 1962); *SUMMA THEOLOGICA*, *supra* note 40, at pt. I-II, q. 65; Plato, *Protagoras* 329b5-334c3, in *THE COLLECTED DIALOGUES OF PLATO* 324-29 (Edith Hamilton & Huntington Cairns eds., 1963).

50. See Paul S. Minear, *Time and the Kingdom*, 24 J. RELIGION 77, 80-86 (1944) (discussing critical moment of decision notion of time).

51. See *Time (In the New Testament)*, in 14 NEW CATHOLIC ENCYCLOPEDIA 84 (2d ed. 2003) (discussing linear notion of time).

III. ABORTION AND TORTURE IN CONTEMPORARY DEBATES

The foregoing reflections suggest that prophetic discourse and casuistical discourse often do not make tranquil companions. In fact, the choice to use one or the other mode of moral reflection to frame a particular topic sets one down a path that is virtually guaranteed to make it difficult to have a fruitful conversation with someone who has chosen to use the other mode, *even if* the prophet and the casuist share the same basic moral and religious values. This claim, it seems to me, is supported by public discussion of abortion and torture in the 2004 American election and its aftermath.

Why did these two issues become flash points? Briefly, abortion became an issue because President Bush intimated that he would appoint judges to the United States Supreme Court who would overturn *Roe v. Wade*,⁵² the 1973 decision conferring constitutional protection on a woman's right to choose an abortion.⁵³ His Democratic opponent, Senator John Kerry, was an unequivocal supporter of the rights conferred by *Roe*, and pledged to appoint only judges who would uphold the decision. Torture rose to public attention because the revelation of the atrocities at Abu Ghraib Prison in Iraq in the spring of 2004 coincided with the leaking of legal memos from the Attorney General's Office and the Office of the Counsel to the President which seemed to facilitate, if not entirely to endorse, torture practices.⁵⁴

52. 410 U.S. 113 (1973) (conferring constitutional protection on right to abortion).

53. To my knowledge, President Bush never actually made the appointment of anti-*Roe* judges an explicit campaign promise (although he did promise to appoint judges similar in philosophy to Justice Antonin Scalia and Justice Clarence Thomas). As I write, he has had the opportunity to make two appointments to the Court: Chief Justice John Roberts, a judge on the United States Court of Appeals for the D.C. Circuit, was originally nominated to replace Associate Justice Sandra Day O'Connor, who resigned her position on July 1, 2005. After the death the late Chief Justice William H. Rehnquist on September 3, 2005, President Bush nominated Roberts for the position of Chief Justice. Although Roberts is often described as a devout Catholic, it is not clear whether he would vote to overrule *Roe* should the opportunity present itself. Roberts was sworn in as Chief Justice on September 29, 2005. On October 3, 2005, President Bush nominated Harriet Miers, White House Counsel and his former personal attorney, to serve as Associate Justice; on October 27, 2005, he accepted her letter withdrawing her nomination after intense controversy about her qualifications. On October 31, 2005, President Bush nominated Samuel Alito, a judge on the United States Court of Appeals for the Third Circuit, in her stead. Alito was sworn in as an Associate Justice on January 31, 2006.

54. Shocking photographs of the abuse of Iraqi prisoners by American soldiers were first published by Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER, Apr. 30, 2004, at 42. More photographs were broadcast on May 4, 2004 by CBS on the news show *60 Minutes*. *Newsweek* broke the story of the Torture Memos in a special report. See John Barry et al., *The Roots of Torture*, NEWSWEEK, May 24, 2004, at 26 (describing government memoranda seemingly approving torture tactics). The article argues that the Torture Memos, which explicitly concerned only al-Qaeda operatives and members of the Taliban, constituted the first step "on the

Abortion and torture are problematic practices within Christian circles generally, and within Roman Catholic circles in particular. Both practices are condemned as “unspeakable crimes” by the Second Vatican Council, the most recent ecumenical council of the Roman Catholic Church.⁵⁵ More broadly, whether or not they are believers, few people indebted to Western culture for their moral framework consider abortion and torture unambiguously good. Nonetheless, both practices are often engaged under color of “necessity.” In a perfect world, women would not need to seek abortions. We do not, however, live in a perfect world. Women sometimes find themselves pregnant when they are not physically, emotionally, financially or socially equipped to raise a child. Under such circumstances, many will seek abortions. In a perfect world, no government would be faced with a choice between complying with the laws of war and safeguarding its people. We do not, however, live in a perfect world. Nations sometimes find themselves faced with ruthless adversaries who will stop at nothing in order to achieve their political objectives. Under such circumstances, many of their agents will engage in torture and similar practices in order to preserve their way of life.

Neither prophets nor casuists, in my judgment, will dispute the foregoing statements as empirical descriptions. They will differ fundamentally, however, in their basic strategy regarding how to respond to the complex reality those statements describe. Prophets tend to emphasize the need for radical and unambiguous compliance with the patterns of action appropriate for denizens of the kingdom of God—no matter what the circumstances. Casuists, on the other hand, tend to focus on the fact that God’s kingdom is not yet perfectly instantiated in our midst, and that our responsibilities to those made in God’s image and likeness require we take due account of this fact. What is “due account”? That depends. In some cases, for example, it may mean attempting to define the prohibition in question as precisely as possible, in order to take into account the other values at stake. In other cases, it may mean demanding that other values,

road to Abu Ghraib.” *Id.* The first article in the *New York Times* about the memos appeared on May 21, 2004. Neil A. Lewis, *The Reach of War, Geneva Conventions: Justice Memos Explain How to Skip Prisoner Rights*, N.Y. TIMES, May 21, 2004, at A10.

55. Vatican Council II, *Pastoral Constitution on the Church in the Modern World* ¶ 27, in 1 THE CONCILIAR AND POST CONCILIAR DOCUMENTS 928 (Austin Flannery ed., 4th prt. 1998). The Vatican Council stated:

The varieties of crimes are numerous: all offenses against life itself, such as murder, genocide, abortion, euthanasia and willful suicide; all violations of the integrity of the human person, such as mutilation, physical and mental torture, undue psychological pressures; all offenses against human dignity, such as subhuman living conditions, arbitrary imprisonment, deportation, slavery, prostitution, the selling of women and children, degrading working conditions where men are treated as mere tools for profit rather than free and responsible persons: all these and the like are criminal: they poison civilization; and they debase the perpetrators more than the victims and militate against the honor of the creator.

Id.

including the persistence of sin, be taken into account in the formulation of legal efforts to impose prohibitions on such practices, even if they do not affect one's judgment of their moral status.

Moreover, abortion and torture are prime examples of two areas in which there has been increasing tension between traditional Christianity and modern Western society. Consider, for example, the relationship between the Catholic Church and the United States. During the early years of the Second Vatican Council, which began during the presidency of John F. Kennedy, American Catholics were buoyed by the hope that American values and Catholic values would reflect and reinforce one another.⁵⁶ Yet thanks to fateful decisions on both sides, the optimistic mood dissipated. Abortion and torture represent two areas in which the tension between magisterial teaching and American mores have diverged most sharply.

Consider first the tensions in the realm of sexuality and procreation. In 1965, the U.S. Supreme Court declared that married couples had a constitutionally protected right to use contraception.⁵⁷ In 1968, Pope Paul VI reaffirmed the church's traditional prohibition of artificial contraception, as well as all sexual activity outside of marriage.⁵⁸ In 1972, the Supreme Court extended constitutional protection to the use of contraception by unmarried couples,⁵⁹ and in 1973 found that the Constitution protects a pregnant woman's right to obtain abortion,⁶⁰ a right which it steadily protected and expanded over the next fifteen years.⁶¹ While most

56. In particular, the development and articulation of a more positive assessment of religious liberty owed a great deal to the American theologian John Courtney Murray. See VATICAN COUNCIL II, DECLARATION ON RELIGIOUS LIBERTY (1965).

57. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (declaring married couples' right to use contraception).

58. See POPE PAUL VI, *HUMANAE VITAE: A CHALLENGE TO LOVE* (1968).

59. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (extending right to use contraception to unmarried couples).

60. See generally *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

61. See, e.g., *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) (invalidating parental and spousal consent provisions, prohibition of saline abortions and requirement of physicians performing abortions to exercise professional skill to attempt to save life of fetus); *Bellotti v. Baird*, 443 U.S. 622 (1979) (requiring states mandating parental consent to provide judicial bypass procedure); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983) (invalidating requirement that information about fetal development, abortion risks and alternatives to abortion be provided to women seeking abortions, twenty-four hour waiting period requirement, parental consent requirement with no parental bypass, requirement that all abortions after first trimester be performed in hospitals and requirement governing "humane and sanitary" disposition of fetal remains); *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (reaffirming positions articulated in *Bellotti* and *Akron*).

The line of cases expanding abortion rights came to an end in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), where the Court upheld a prohibition on the use of public facilities for abortions as well as the requirement that tests for

other Western democracies were also liberalizing their laws related to contraceptives and abortion, the Vatican not only stood firm in its rejection of both practices, but also increased the forcefulness of its opposition under the long papacy of John Paul II, which extended from 1978 to 2005.

More specifically, in his 1995 encyclical *Evangelium Vitae*, John Paul II framed the moral tension between Western democracies and the Catholic Church as a conflict between "the culture of death" and the "culture of life." The "culture of death" is characterized by its support of such practices as abortion, infanticide and euthanasia in the name of what the Pope believes to be a false freedom; in contrast, the "culture of life" is characterized in part by its implacable opposition to such practices as utterly inconsistent with respect for human dignity.⁶² Because it involves the taking of innocent and utterly helpless human life, many Catholics (and other Christians) see abortion as the paradigmatic issue exposing the tension between secular values and Christian values on human sexuality and reproduction.⁶³

A second area in which there has been significant tension between the evolving teaching of the Roman Catholic Church and American culture is the arena of war and peace.⁶⁴ Before the end of the Cold War,

viability be performed on fetuses of at least twenty weeks gestation. The current framework for the Supreme Court abortion jurisprudence was set in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), which affirmed *Roe's* core holding while abandoning its trimester framework and adopting a new "undue burden" test, which appears less hostile to restrictions on abortion than *Roe's* "strict scrutiny" test.

62. See POPE JOHN PAUL II, *EVANGELIUM VITAE* ¶¶ 18-21 (1995) (explaining roots of Catholic Church's opposition to abortion and euthanasia). Pope John Paul II writes:

To claim the right to abortion, infanticide, and euthanasia, and to recognize that right in law, means to attribute to human freedom a *perverse and evil significance*: that of an *absolute power over others and against others*. This is the death of true freedom: 'Truly, I say to you, everyone who commits sin is a slave to sin' (Jn. 8:34).

Id. ¶ 20.

63. See *id.* ¶ 58 ("Abortus neconon infanticidum nefanda sunt crimina." (citing VATICAN II, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD ¶ 51 (1965))). John Paul II writes: "Among all the crimes which can be committed against life, procured abortion has characteristics making it particularly serious and deplorable. The Second Vatican Council defines abortion, together with infanticide, as an 'unspeakable crime.'" *Id.*

64. While official Catholic teaching has never advocated pacifism, it also has never treated the waging of war as free from significant moral constraints. More specifically, it has contributed to the development of a Christian "just war" tradition, which has held that it can be morally just to wage war under certain circumstances, provided that certain conditions are fulfilled. Rooted in the reflections of St. Ambrose and St. Augustine upon the obligations of a Christian empire, that tradition has long placed significant limitations upon a nation's decision to go to war (*ius ad bellum*) and what constitutes proper conduct during a war (*ius in bello*). See ROLAND H. BAINTON, *CHRISTIAN ATTITUDES TOWARD WAR AND PEACE: A HISTORICAL SURVEY AND CRITICAL RE-EVALUATION* 89-100 (1960). Beginning in the 1960s, with the specter of total nuclear destruction precipitated by the Cold War, Chris-

nuclear deterrence symbolized the potential conflict between American values and Christian values in the realm of statecraft. Deterrence policies based upon mutual assured destruction and other counter-population targeting strategies ultimately depended upon the conditional willingness to engage in an action utterly inconsistent with respect for human beings as made in the image and likeness of God. Deterrence policies based upon counter-force targeting strategies were acknowledged to be morally superior to counter-population strategies. At the same time, it was widely feared that the destructive power of nuclear weapons could not be contained or controlled once the taboo against their use was broken. Paradoxically, the Russians and the Americans designed a system in which the preservation of their respective societies depended upon the specter of mutual annihilation.

Christian moralists working within the just war tradition were in general agreement that the actual infliction of indiscriminate destruction would be radically immoral. Some made powerful arguments that the deterrence policy itself was radically immoral, on the grounds that it is illicit to threaten to do that which it is illicit to do.⁶⁵ Others, cognizant of the likely consequences of immediate unilateral disarmament, argued that the system of nuclear deterrence was (barely) tolerable while efforts to develop a morally superior alternative were underway.⁶⁶ In short, in the Cold War era, the dilemma of nuclear deterrence constitutes an acute reminder that there is no easy way to harmonize one's commitment to the values embedded within a Christian moral framework with the exigencies of preserving the American way of life.

In my judgment, the use of torture in order to obtain information concerning potential terrorist activity will come to symbolize the tension between American values and Christian values in the political sphere in our own era. In the first decade of the twenty-first century, the war on terrorism has become America's paradigmatic battle to defend its way of life. In his speech before Congress less than two weeks after al-Qaeda attacked the country on September 11, 2001, President George W. Bush proclaimed to the nation:

Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated. (Applause.)

tian moralists began to rethink the application of the doctrine of just war in light of the exigencies of a nuclear age. For an influential and accessible recent articulation of the application of the nuclear age, which also attempts to grapple with the insights provided by Christian pacifism, see NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *THE CHALLENGE OF PEACE: GOD'S PROMISE AND OUR RESPONSE* (1984).

65. See generally JOHN FINNIS ET AL., *NUCLEAR DETERRENCE, MORALITY, AND REALISM* (1987).

66. The most notable articulation of this position was in the pastoral letter on war and peace written by the National Conference of Catholic Bishops. See *supra* note 64, ¶¶ 162-98.

Americans are asking, why do they hate us? They hate what we see right here in this chamber—a democratically elected government. Their leaders are self-appointed. They hate our freedoms—our freedom of religion, our freedom of speech, our freedom to vote and assemble and disagree with each other.⁶⁷

The most powerful—and indispensable—advantage of terrorists is the element of surprise regarding the timing and location of their attacks. Correlatively, the greatest imperative for those battling terrorists is to obtain information about their future plans. In the midst of the distress precipitated by the September 11, 2001 attacks, some American intelligence officers made the judgment that captured members of al-Qaeda and allied groups would be unlikely to respond to normal methods of interrogation.⁶⁸ Consequently, they began to contemplate the possibility that the only reliable way to obtain useful information would be to use methods of interrogation long thought to be inconsistent with fundamental American values such as respect for human beings as embodied souls.⁶⁹

Some of these methods were thought to amount to torture. What is torture? According to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, “torture” is defined as follows:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It

67. *President's Address Before a Joint Session of the Congress on the United States Response to the Terrorists Attacks of September 11*, 37 WEEKLY COMP. PRES. DOC. 1347 (Sept. 20, 2001).

68. See *Memorandum from Joint Task Force 170, Guantanamo Bay, Cuba to Commander, Joint Task Force 170* (Oct. 11, 2002), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 227 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter *THE TORTURE PAPERS*] (requesting approval of more aggressive interrogation plan because “current guidelines . . . limit ability of interrogators to counter advanced resistance”). The legal brief attached to this October 11, 2002 memorandum further amplifies and justifies this request. See *id.* at 229.

69. As Al Gore puts it: “[O]ne of the clearest indications of the impending loss of intimacy with one’s own soul is the failure to recognize the existence of a soul in those over whom power is exercised” Brian Ross & Richard Esposito, *CIA’s Harsh Interrogation Techniques Described* ABCNEWS.COM, Nov. 18, 2005, <http://abcnews.go.com/WNT/Investigation/story?id=1322866&page=1>.

does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁷⁰

Why, precisely, is torture morally wrong? I have found no more persuasive account than that given by Elaine Scarry in *The Body in Pain*. Scarry argues that the precise objective of torture is to "unmake" the victim, to destroy his or her identity through the infliction of severe pain:

[W]hat the process of torture does is to split the human being into two, to make emphatic the ever present but, except in the extremity of sickness and death, only latent distinction between a self and a body, between a "me" and "my body." The "self" or "me," which is experienced on the one hand as more private, more essentially at the center, and on the other hand as participating across the bridge of the body in the world, is "embodied" in the voice, in language. The goal of the torturer is to make the one, the body, emphatically and crushingly *present* by destroying it, and to make the other, the voice, *absent* by destroying it. It is in part this combination that makes torture, like any experience of great physical pain, mimetic of death; for in death the body is emphatically present while that more elusive part represented by the voice is so alarmingly absent that heavens are created to explain its whereabouts.⁷¹

Like nuclear deterrence, torture has been perceived by some governmental officials as necessary to protect American society from an implacable enemy's devastating terrorist attacks. At the same time, like nuclear deterrence (in counter-population forms), it is a practice that is inconsistent with respect for the dignity of a human being as an integrated unity of body and soul. Whereas nuclear deterrence involved the (conditional) willingness to destroy the physical integrity of other human beings, torture involves the unconditional willingness to destroy their psychic integrity by (almost) destroying their physical integrity. To will either type of destruction, even conditionally, is not consistent with respect for human dignity.⁷²

70. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1(1), June 26, 1987, 1465 U.N.T.S. 113.

71. ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 48-49 (1985).

72. Does it matter that our nuclear deterrence policy targeted ordinary citizens going about living their day-to-day lives, while our torture practices seem to be targeted at persons who belong to terrorist cells? The Catholic Church has drawn a sharp distinction between combatants and non-combatants, long teaching that it is always impermissible intentionally to kill non-combatants, although their deaths may be foreseen and accepted as the side-effect of an operation directed against a legitimate military target. While mainstream Catholic thought has taught that it is permissible to intentionally kill combatants, it has also taught that once a combatant has been disarmed, so that he is no longer a direct physical threat, he regains the immunity of a non-combatant. Moreover, torture is not an activity that is per-

Abortion and torture, then, are moral issues of the highest importance, raising fundamental questions about the nature and the scope of our obligation to respect human dignity. At the same time, there are significant practical pressures leading to the decision to engage in both these practices, which means that they will not be easy either to ban or to eradicate. Consequently, both abortion and torture are issues ripe for the confrontation between prophecy and casuistry.

A. *Abortion, Prophecy and Casuistry*

1. *Prophetic Voices*

In my view, prophetic discourse on the issue of abortion in the context of the 2004 presidential election is characterized by several features, all of which reflect Gustafson's definition of prophecy.⁷³ First, we find a broad use of the language of moral indictment. Legalized abortion is portrayed as the gravest of all moral issues facing our generation.⁷⁴ Vivid words are deployed to evoke revulsion and horror at how the practice of abortion has destroyed millions of unborn lives. Legalized abortion is analogized to Nazi genocide,⁷⁵ the enslavement of

mitted in the case of either combatants or non-combatants, no matter what good may be obtained by so doing.

73. A helpful list of the writings—mainly from what I have termed the prophetic perspective on abortion and the election—can be found at *Senator John Kerry, Abortion and the Relation Between Church & State*. See *The Church and the Liberal Tradition*, http://www.ratzingerfanclub.com/liberalism/john_kerry_catholic_election.html (last visited Feb. 20, 2006) (cataloguing websites expressing opinions about John Kerry's political views and their impact on Catholicism). Another helpful list from the same perspective can be found on the website of *Women for Faith and Family*. See *Catholics and Political Responsibility*, http://www.wf-f.org/Catholics_and_Politics.html (last visited Feb. 20, 2006) (listing documents pertaining to Catholicism and roles religion plays in politics).

74. See Bernard W. Schmitt (Bishop of Wheeling-Charleston), *Pastoral Letter on Abortion*, Oct. 20, 2004, <http://www.dwc.org/news/oct2104.shtml> (quoting POPE JOHN PAUL II, *THE GOSPEL OF LIFE (EVANGELIUM VITAE)* 62 (1995)). Schmitt stated:

Therefore, I want to say, clearly and distinctly, as your brother and your Bishop, that abortion is the greatest moral evil of our age. As the deliberate killing of an innocent human being, there is "no circumstance, no purpose, no law whatsoever" that can justify or excuse abortion. "It is contrary to the Law of God which is written in every human heart, knowable by reason itself, and proclaimed by the Church.

Id.

75. Archbishop Raymond Burke began a pastoral letter about the election by invoking Nazi Germany. Raymond Burke, *On Our Civic Responsibility for the Common Good*, Oct. 1, 2004, <http://www.ewtn.com/library/bishops/burkecom.htm> (depicting Nazism as emblematic of importance of Catholics being their "brother's keeper"). In an interview he gave to reporter Thomas A. Szyszkiewicz from *Inside the Vatican* (ITV) he articulates his purpose in so doing:

ITV: In your pastoral letter you begin with a story about a Bavarian sacristan's remembrance of the Nazi era. Are you making an equation here between what's happening in the U.S. and what happened then? Or are you saying we're headed down that path or possibly headed down that path?

African-Americans⁷⁶ or the perpetuation of racist practices such as segregation.⁷⁷ Those who support legalized abortion, like John Kerry, are compared to Nazi leaders⁷⁸ or anti-abolitionists.⁷⁹ To Roman Catholics

Archbishop Burke: What I'm doing here is I'm saying this situation is instructive for us because here was a situation in which a government was attacking a whole class of people, actually several classes of people, and somehow the general citizenry became cooperators in that. And we have to recognize that in the question, for instance of abortion, embryonic stem cell research, euthanasia, whatever it might be, a class of people are being excluded from the care for the common good. And we're responsible for that. And that's the reason I use that example.

I don't think it's a question of if we're heading down that way. I mean, it's a fact that 40 million unborn children have been aborted since 1973. In some way, and I make the point at the end of the letter, too, even as Catholics we have to ask ourselves, "What have we done?" If all Catholics would join those Catholics and other people of good will who were working to promote the respect for human life, this situation wouldn't be what it is.

Interview with Archbishop Raymond Burke, Oct. 5, 2004, <http://www.wf-f.org/Burke-ITV.html>.

76. See John J. Meyers (Archbishop of Newark), *A Time For Honesty*, May 5, 2004, http://www.rcan.org/archbish/jjm_letters/ATimeforHonesty.htm. Meyers argued:

But with abortion (and for example slavery, racism, euthanasia and trafficking in human persons) there can be no legitimate diversity of opinion. The direct killing of the innocent is always a grave injustice. One should not permit unjust killing any more than one should permit slaveholding, racist actions, or other grave injustices. From the perspective of justice, to say "I am personally opposed to abortion but . . ." is like saying "I personally am against slavery, but I can not impose my personal beliefs on my neighbor." Obviously, recognizing the grave injustice of slavery requires one to ensure that no one suffers such degradation. Similarly recognizing that abortion is unjust killing requires one—in love and justice—to work to overcome the injustice.

Id.

77. See generally Michael J. Gaynor, *Holy Communion Should Be Denied To Kerry*, May 25, 2004, <http://www.catholic.org/featured/headline.php?ID=999> (opining that John Kerry is ineligible to receive Holy Communion because of his pro-choice beliefs).

78. See, e.g., Valerie Mierzwa, *Could Kerry Be the "Hitler of the Unborn"*, Oct. 31, 2004, <http://www.catholic.org/featured/headline.php?ID=1483> (comparing John Kerry to Adolph Hitler for his pro-choice beliefs); see also Barbara Kralis, *John Kerry Was an Altar Boy—So Was Adolf Hitler*, Oct. 25, 2004, <http://www.renewamerica.us/columns/kralis/041025> (criticizing John Kerry's purported devout Catholic beliefs and his attempts to convince voters his beliefs are sincere).

79. See Robert P. George & Gerard V. Bradley, *Not in Good Conscience*, http://www.nationalreview.com/comment/george_bradley200410120849.asp (last visited Feb. 20, 2006). The authors stated:

To vote for John Kerry in 2004 would be far worse, however, than to have voted against Lincoln and for his Democratic opponent in 1860. Stephen Douglas at least supported allowing states that opposed slavery to ban it. And he did not favor federal funding or subsidies for slavery. John Kerry takes the opposite view on both points when it comes to abortion. On the great evil of his own day, Senator Douglas was merely John Kerry-lite.

Id.

adopting this stance, legalized abortion is portrayed as the most indisputable mark of the United States' pervasive complicity in what the late Pope John Paul II called a culture of death.

Consequently, to the advocates of this position, it was not only legitimate, but urgently necessary, to cast one's vote in the presidential election with primary reference to the issue of legalized abortion. By "primary reference" I do not mean to suggest that abortion was the only issue that was morally relevant to the choice of a President. I mean, rather, to suggest that prophets employ a lexical ordering: a candidate who supports abortion rights (particularly with the dedication that Kerry has devoted to the cause) has, in essence, morally disqualified himself from the race. From their perspective, he has shown himself to be fundamentally mistaken about a morally prismatic issue;⁸⁰ his fitness to lead the nation cannot be rehabilitated by his stands on a number of other issues, no matter how morally superior they may be to Bush's.⁸¹ Several Catholic bishops sug-

80. Some American Catholic bishops declared that they would not give Holy Communion to Catholic politicians who were pro-choice. The majority of bishops did not follow this course of action. See Kevin Eckstrom, *Cardinal Says "Majority" of Bishops Wouldn't Deny Communion*, July 11, 2004, http://www.beliefnet.com/story/170/story_17061_1.html (reporting Cardinal Theodore McCarrick of Washington's belief that politicians should not be denied Communion merely because their political beliefs differ from those of Catholic Church). A document adopted by the United States Conference of Catholic Bishops at their meeting in June 2004 explicitly left it up to each individual bishop to decide what to do in his own diocese:

The question has been raised as to whether the denial of Holy Communion to some Catholics in political life is necessary because of their public support for abortion on demand. Given the wide range of circumstances involved in arriving at a prudential judgment on a matter of this seriousness, we recognize that such decisions rest with the individual bishop in accord with the established canonical and pastoral principles. Bishops can legitimately make different judgments on the most prudent course of pastoral action. Nevertheless, we all share an unequivocal commitment to protect human life and dignity and to preach the Gospel in difficult times.

Catholics in Political Life, <http://www.usccb.org/bishops/catholicsinpolitical-life.shtml> (last visited Feb. 20, 2006). After some conservative Catholics charged that this document was inconsistent with Catholic teaching, Joseph Cardinal Ratzinger, then Prefect of the Sacred Congregation for the Doctrine of the Faith, gave his explicit approval. See Jerry Filteau, *Cardinal Ratzinger Says He, U.S. Bishops "In Harmony" on Politics*, July 14, 2004, <http://www.catholicnews.com/data/stories/cns/0403830.htm> (reporting Cardinal Ratzinger's declaration of support for American bishops decisions on withholding Communion from pro-choice Catholics).

81. See Frank Pavone, *You Wouldn't Even Ask*, <http://priestsforlife.org/elections/wouldntask.htm> (last visited Feb. 20, 2006) ("If a candidate who supported terrorism asked for your vote, would you say, 'I disagree with you on terrorism, but where do you stand on other issues?' I doubt it.").

gested that a Catholic would commit a serious sin if he or she voted for Kerry.⁸²

82. A few Catholic bishops proclaimed that one could not vote for a pro-choice politician without committing a mortal sin. For example, Bishop Michael Sheridan wrote:

There must be no confusion in these matters. Any Catholic politicians who advocate for abortion, for illicit stem cell research or for any form of euthanasia *ipso facto* place themselves outside full communion with the Church and so jeopardize their salvation. Any Catholics who vote for candidates who stand for abortion, illicit stem cell research or euthanasia suffer the same fateful consequences. It is for this reason that these Catholics, whether candidates for office or those who would vote for them, may not receive Holy Communion until they have recanted their positions and been reconciled with God and the Church in the Sacrament of Penance.

Michael Sheridan (Bishop of Colorado Springs), *A Pastoral Letter to the Catholic Faithful of the Diocese of Colorado Springs on the Duties of Catholic Politicians and Voters*, May 1, 2004, http://www.wf-f.org/Sheridan_May1Letter.html.

Archbishop Charles Chaput of Denver seemed to take much the same position in an interview with a reporter from the *New York Times*:

In an interview in his residence here, Archbishop Chaput said a vote for a candidate like Mr. Kerry who supports abortion rights or embryonic stem cell research would be a sin that must be confessed before receiving Communion.

"If you vote this way, are you cooperating in evil?" he asked. "And if you know you are cooperating in evil, should you go to confession? The answer is yes."

David D. Kirkpatrick & Laurie Goodstein, *Group of Bishops Using Influence to Oppose Kerry*, N.Y. TIMES, Oct. 12, 2004, at A1. In response to the widespread controversy Chaput's remarks generated, the Archdiocese of Denver published a full transcript of the interview, available at www.archden.org/images/nyt_transcript.pdf. It does not appear to me that the full transcript undermines the accuracy of the position attributed to Chaput in the *New York Times* article.

John Myers, the Archbishop of Newark, voiced a similar approach in an op-ed in the *Wall Street Journal*:

As Mother Teresa reminded us on all of her visits to the U.S., abortion tears at our national soul. It is a betrayal of our nation's founding principle that recognizes all human beings as "created equal" and "endowed with unalienable rights." What evil could be so grave and widespread as to constitute a "proportionate reason" to support candidates who would preserve and protect the abortion license and even extend it to publicly funded embryo-killing in our nation's labs?

John J. Myers, *A Voter's Guide: Pro-Choice Candidates and Church Teaching*, WALL ST. J., Sept. 17, 2004, available at <http://www.opinionjournal.com/taste/?id=110005634>.

Archbishop Raymond Burke of St. Louis issued statements along the same lines, but then appears to have qualified his position. In a June interview with a reporter for the *St. Louis Post-Dispatch*, he suggested that knowingly voting for a pro-choice candidate would be a sin, no matter why one voted for him. Later, he stated that he meant to say that it was only a sin to vote for a pro-choice candidate because that candidate was pro-choice. See Tim Townsend, *Burke Gives Catholics Leeway in Voting for Abortion-Rights Supporter*, ST. LOUIS POST-DISPATCH, Sept. 6, 2004, at 3 (characterizing nature of Archbishop Burke's statements).

Why the equivocation? In my view, because Chaput, Burke and Meyer are attempting to address the issue of abortion and the law prophetically. For example, the prophetic orientation of Archbishop Burke is exemplified by the title of an article that he published in *America Magazine*. See *Prophecy for Justice: Catholic Poli-*

Second, there is a type of utopianism at work in the arguments of the prophetic opponents of abortion. To be sure, it is a particular kind of negative utopianism; these prophetic voices frequently proceed as if overturning *Roe v. Wade* will make a dramatic, almost total difference in the way unborn life is treated in America. Moreover, as Gustafson suggests, we find relatively little concentrated analysis of the steps likely to lead to this negative utopia. Bush is good because he is opposed to *Roe*; Kerry is bad because he supports *Roe*. Very few prophetic opponents of abortion spent a great deal of time soberly considering whether either candidate was likely to make much of a difference in the legal status of abortion if elected President.⁸³ Utopias, even negative utopias, are not built on the soft sands of differential policy analysis, but on the stony ground of radical commitment.

In my view, an additional aspect of the prophetic approach to abortion and the election is worth mentioning: its sense of urgency. The pro-life movement had been struggling without success for over thirty years to reverse *Roe* and the widespread practice of legalized abortion that the decision has enabled. At the time of the 2004 election, the elements at last seemed aligned in their favor: a Republican House, a Republican Senate and a country recoiling from too much emphasis upon autonomy and individuality and experiencing a renewed concern for the fragile connec-

cians and Bishops, AMERICA, June 21, 2004, at 11. They are soon brought up short by the fact that Ratzinger framed the issue in a more casuistical way, with the analytical tools used to analyze "cooperation with evil," discussed in more detail below. A casuistical approach draws distinctions that are not seen as immediately obvious—or helpful—to those advocating a prophetic approach so they have to find ways to preserve the prophetic insight within a casuistical framework of analysis—generally by insisting *ab initio* that no reason could possibly be sufficiently "proportionate" to justify electing a pro-choice politician.

83. Glen Stassen, a Professor of Theological Ethics at Fuller Theological Seminary, wrote an op-ed arguing that abortion rates were actually more likely to fall under a Kerry presidency than a Bush presidency, because he would provide social services that would make it more attractive for women to choose childbirth rather than abortion. See Glen Stassen, *Pro-Life? Look at the Fruits*, Oct. 13, 2004, <http://www.sojo.net/index.cfm?action=sojomail.display&issue=041013#5> (opining that historical data suggests because of democratic-favored social policies, abortion rates would continue to increase under President Bush). Stassen later admitted that some of the statistics he had presented were erroneous, but did not back away from his general point that it was important to focus on providing assistance to women facing crisis pregnancies in order to reduce the abortion debate. He argued that Bush had not done so, with the result that abortion rates had been declining more slowly under his presidency than under Clinton's. See *Author Admits Flaws in Abortion Rate Study, but Challenges Critics*, CHRISTIAN CENTURY, June 28, 2005, available at http://www.findarticles.com/p/articles/mi_m1058/is_13_122/ai_n14727053 (admitting to data errors but challenging critics to disprove his hypothesis). What interests me here is the hostility with which those adopting a pro-life prophetic stance treated those prepared to consider the idea that there might not be perfect convergence between re-electing a President who had voiced opposition to legalized abortion and actually reducing the abortion rate. See, e.g., George & Bradley, *supra* note 79 (comparing abortion supporters to slavery supporters in eighteenth century).

tions between family, friends and community. The likelihood was high that at least one vacancy would occur on the Supreme Court during the upcoming presidential term; with the right appointments—which President Bush implied that he would provide—*Roe* could be reversed. By contrast, if Kerry were elected, it would be likely that the next round of Supreme Court appointments would support a broad constitutional right to an abortion, thereby settling matters for the next generation, if not indefinitely. The notion of this particular moment in time as *kairos*, as a unique opportunity to make an important and decisive change in the course of events, controls the prophetic approach to abortion and the election.

2. *Casuistical Voices*

What about the casuists in the debate over abortion and the presidential election? Let me begin by being clear: the casuists *agreed* with the prophets that abortion is a grave moral wrong. They did not, however, begin their reflections from that stance. They began with the *casus*, the particular case or question to be decided, and worked from there. And that case or question was whom to vote for as the next President of the United States. In approaching this question, they applied a multi-tiered system of action-guides, in the manner that casuists typically do. For example, Cardinal Joseph Ratzinger issued a statement to the American bishops indicating that Catholics were to deliberate about whether or not to vote for a politician who is pro-choice in accordance with the longstanding matrix governing what is labeled by the Catholic moral tradition “cooperation with evil.”⁸⁴ This matrix, given its first definitive formulation by St.

84. See Joseph Cardinal Ratzinger, *Memo on Communion Principles*, July 21, 2004, <http://www.archden.org/dcr/news.php?e=89&s=1&a=2134>. Ratzinger wrote:

A Catholic would be guilty of formal cooperation in evil, and so unworthy to present himself for holy Communion, if he were to deliberately vote for a candidate precisely because of the candidate's permissive stand on abortion and/or euthanasia. When a Catholic does not share a candidate's stand in favor of abortion and/or euthanasia, but votes for that candidate for other reasons, it is considered remote material cooperation, which can be permitted in the presence of proportionate reasons.

Id. The memo, which was leaked to the Italian press and was not officially released by Ratzinger's office, generated a great deal of controversy. See Jerry Filteau, *Cardinal McCarrick Says Leaked Ratzinger Memo Is Not the Whole Story*, July 6, 2004, <http://www.catholicnews.com/data/stories/cns/0403723.htm> (purporting that leaked memo was not complete and not reflective of Ratzinger's official position); John Thavis, *Memo on Politicians Touches Nerve in U.S. Campaign*, Sept. 17, 2004, <http://www.catholicnews.com/data/stories/cns/0405112.htm> (discussing controversy caused by leaked memo). Those who adopted a prophetic view toward abortion and the election attempted to cast doubt on the casuistical way of reading the Pope's analysis that follows from his decision to employ the framework of cooperation with evil. See, e.g., Joe Feurherd, *Critics Charge that Washington Cardinal Mised Bishops' Conference*, NAT'L CATH. REP., Oct. 1, 2004, at 5 (accusing Cardinal McCarrick of inaccurately representing Ratzinger's memo). For a prophetic attempt to contain the casuistical approach, see Frank Pavone, *The Ratzinger Fiasco*, <http://www.catholicnews.com/data/stories/cns/0405112.htm>.

Alphonsus Liguori (1696-1787) in the eighteenth century,⁸⁵ constitutes the high water mark of the tradition in casuistical reasoning developed by the Roman Catholic moral tradition.⁸⁶

How far, if at all, should we design or alter our own plans of action to avoid their conscription into the morally objectionable plans of another? The analytical matrix of cooperation with evil attempts to provide moral guidance to an agent who contemplates performing an action, morally good or neutral in itself, which he or she foresees will contribute to the wrongful action of another agent. The Dominican moralist Anthony Fisher summarizes the fundamental issue at stake in cooperation:

Though co-operating in the [wrongful] project, the agent in question is not the one most directly involved, conceiving, instigating, directing, coordinating, and actually engineering the operation. Rather, she is in a secondary or subordinate role to the principal agent(s) and contributes something which facilitates the wrongdoing of the principal agent(s). What she wants to know is how close she can properly get to taking part, without becoming, as it were, an accessory, a conspirator. How involved can she be without being tainted by it?⁸⁷

After its formulation by St. Alphonsus, the matrix for analyzing cooperation with evil was developed and refined for over two centuries by the *moral manualists*—Catholic scholars who wrote manuals to assist their fellow priests in hearing confessions by categorizing the nature and gravity of

priestsforlife.org/columns/columns2004/04-09-13theratzingerfiasco.htm (last visited Feb. 20, 2006) (addressing controversy surrounding memo).

85. See my summary of the analytical matrix of cooperation with evil in M. Cathleen Kaveny, *Appropriation of Evil: Cooperation's Mirror Image*, 61 THEOLOGICAL STUD. 280, 282-86 (2000).

86. Sed melius cum aliis dicendum illam esse formalem quae concurrat ad malam voluntatem alterius, et nequit esse sine peccato: materialem vero illam quae concurrat tantum ad malum actionem alterius, praeter intentionem cooperantis. Haec autem est licita, quando per se actio est bona vel indifferens; et quando adest iusta causa et proportionata ad gravitatem peccati alterius; et ad proximitatem concursus qui praestatur ad peccati executionem. Ratio, quia cum tu praestas actionem indifferentem sine prava intentione, si aliter illa abuti voluerit ad suum peccatum exequendum, non teneris nisi ex charitate illud impedire; et quia charitas non obligat cum gravi incommodo, ideo ponens tuam cooperationem cum iusta causa, non peccas: tunc enim peccatum illius non provenit ex cooperatione tua, sed ex malitia ipsius qui tua actione abutitur.

ALPHONSUS LIGUORI, THEOLOGIA MORALIS, bk. II, sec. 63 (1879). I do not mean to suggest that St. Alphonsus was the first to consider the problem; in fact, he brought a certain amount of clarity to a debate that was already well underway. See Roger Roy, C.S.S.R., *La Cooperation Selon Saint Alphonse de Liguori*, 6 STUDIA MORALIA 377 (1968).

87. Anthony Fisher, *Co-Operation in Evil*, CATH. MED. Q., Feb., 1994, at 15.

the wide variety of specific sins the Catholic laity were likely to confess.⁸⁸ One would frame the question of abortion and the election in terms of the cooperation matrix as follows: "Can an adult citizen cast a vote for John Kerry in the 2004 presidential election, in view of Kerry's unwavering support of abortion rights?" As the question is framed, then, by voting for Kerry, the voter will be cooperating in the evil consisting of the widespread practice of abortion in the United States.

Not all cooperation with evil, however, is wrongful.⁸⁹ In fact, the matrix developed by the moral manualists for analyzing cases of cooperation with evil is characterized by extremely nuanced distinctions. First, the framework rules out *formal cooperation*, which is defined as contributing to a wrongdoer's act precisely with the intention of helping him or her to accomplish it. In this case, the prohibition of formal cooperation would rule out voting for a pro-choice politician with the precise goal or intention of maintaining a regime of legal abortion. And indeed, Cardinal Ratzinger explicitly said as much.⁹⁰

Material cooperation, however, is another matter. In this case, it would be material cooperation to vote for a pro-choice politician not intending to support abortion rights, but foreseeing that one's vote might contribute to that result. According to the Catholic tradition, material cooperation is sometimes permissible, sometimes not, according to an elaborate matrix that considers the gravity of the evil at stake, the importance of other goods at stake, the contribution that the cooperator's act makes to the occurrence of the evil, and how closely the act of the cooperator is connected with the evil act to which it contributes. There has long been considerable debate and discussion among Catholic moralists about where to draw the lines in cases of material cooperation.⁹¹

88. Examples of cooperation cases discussed by the manualists include the following: Can a taxi driver bring a customer to an address that he knows to be a brothel? Can a worker contribute to United Way when a portion of the funds will support Planned Parenthood? Can a taxpayer pay her taxes when she knows that some of the money will be used to support an unjust war? See generally Kaveny, *supra* note 85, at 283-84.

89. This is an aspect of Catholic moral teaching that both Archbishop Chaput and Archbishop Burke failed to communicate, if not to grasp, in their early communications with the press. For a discussion of the viewpoints of Archbishops Chaput and Burke, see *supra* note 82.

90. For a discussion of the Ratzinger memo, see *supra* note 84 and accompanying text.

91. It was observed in one well-respected pre-Vatican II manual:

In estimating the sufficiency of the excuse for material co-operation, we must consider the spiritual character and needs of another, our relations to him, what and how great is his offence against God, the harm that may accrue to a third person, the public harm likely to ensue, how close the co-operation, how indispensable it may be. So many factors enter into all questions of material co-operation, that only the most general principles can be laid down. Great varieties of opinion, therefore, on any given case except the most obvious, are inevitable, and there is no more difficult question than this in the whole range of Moral Theology.

As the Ratzinger memo suggests, voting for a pro-choice politician without intending to further the practice of abortion qualifies as "remote material cooperation" in evil. Remote material cooperation is the most attenuated type of cooperation categorized by the manualist tradition, and therefore is subject to the most lenient standard of justification.⁹² As Cardinal Ratzinger notes, that standard has frequently been articulated by the manualists as "proportionate reason."⁹³

What is "proportionate reason"? The meaning of the term is notoriously nebulous.⁹⁴ In essence, it requires a balancing test: the graver the wrongful act, and the closer the connection between the act of coopera-

HENRY DAVIS, S.J., 1 MORAL AND PASTORAL THEOLOGY 342 (6th ed. 1958).

92. It is of great importance to distinguish between formal co-operation in another's sin and material co-operation. The former is always sinful, the latter not always so. Again, some material co-operation in the sinful act of another is permissible, but it is important to distinguish between immediate and mediate, proximate and remote co-operation, since a more serious excuse is required for immediate than for mediate co-operation, as also for proximate than for remote.

Id. at 341.

93. *Id.*; see EDWIN F. HEALY, MORAL GUIDANCE 47 (rev. ed. 1960) ("Material cooperation with another's evil act is allowed when one has a proportionate reason for so acting. To have a proportionate reason means that, in this particular case, the good effects balance the evil effects that result from the cooperation.").

94. Germain Grisez writes:

If material cooperation is not excluded as an occasion of sin, the problem is that one's own interests in doing what constitutes material cooperation are more or less in conflict with the interests of others who will suffer bad side effects. In such cases, the Golden Rule ["Do unto others as you would have them do unto you"] provides the test.

GERMAIN GRIEZ, 2 THE WAY OF THE LORD JESUS: LIVING A CHRISTIAN LIFE 442 (1993). Unfortunately, this way of framing the question, very common in the older manuals, suggests that the conflict at issue is only or primarily between one's own legitimate self-interest and the interest of third parties. The doctrine of cooperation has also been applied to cases where one is considering a conflict among the legitimate interests of different groups of third parties. Nonetheless, the list of questions Grisez poses to assist in assessing the moral acceptability of material cooperation is very helpful, and does not suffer from the "framing" issue I just identified:

Is there a morally acceptable option other than doing the act and materially cooperating, on the one hand, and, on the other, simply omitting the act so as to avoid the side effects? Plainly, someone who cannot fulfill some important responsibility except by materially cooperating with another's wrongdoing has more reason to do so than someone with a morally acceptable alternative.

What kind of loss or harm will result from the wrong act in which one would materially cooperate, how extensive will it be, how certain is it to occur, and who will suffer it?

What other bad side effects will follow from doing the action that involves materially cooperation? What kind of loss or harm will result from them, how extensive, how certain, and who will suffer it?

What kind of loss or harm will result from forgoing the otherwise good act, how extensive, how certain, and who will suffer it?

If one does not materially cooperate, will that prevent the wrong? Or will the wrongdoer nevertheless be able and likely to act?

tion and the wrongful act, the stronger the set of reasons needs to be in favor of going forward with the act of cooperation.

What shapes one's assessment of "proportionate reason" regarding a vote for President? What is required here is a full range of deliberation about who would be the best President of the United States, the leader of the only remaining superpower on Earth. First and foremost, a voter needs to remember that he or she is electing a person, not a platform. One needs to consider the character, skills and temperament of the candidates for office; one has also to consider the character, skills and temperament of those they are likely to choose as their closest advisors. What degree of the virtue of prudence do they possess? For many Catholic casuists, Bush's record during his first term disqualified him on these grounds. For example, before the election, it became impossible to deny the fact that Bush's two major reasons for going to war against Iraq (to combat al-Qaeda and to neutralize Saddam Hussein's alleged supply of weapons of mass destruction) were seriously flawed, if not entirely specious. Revelations of the torture and abuse of prisoners in American custody, as well as the memos that justified such torture and abuse, called into question Bush's commitment to the laws of war and the commitment to human dignity they instantiate. On that basis, some Catholic casuists concluded that Bush had conclusively demonstrated that he lacked the practical wisdom and moral judgment to serve as Commander-in-Chief.⁹⁵

Second, one needs to consider the evil that is prompting the invocation of the matrix of cooperation. Catholic casuists recognized that the abortion issue must be given due weight; they do not dispute Cardinal Ratzinger's judgment that the over 1.5 million abortions performed per year under the national regime of legalized abortion inaugurated by *Roe* is

Because mercy is the justice of the kingdom, a Christian reflection before applying the Golden Rule brings fully into play the specific claims of love. Hence, in considering various losses and harms, one always should ask:

Does this loss or harm involve a probable and avoidable risk to anyone's salvation? For instance, if the wrongdoer is not in good faith and material cooperation is avoided, is he or she likely to repent and reform?

Will accepting this loss or harm seriously impede one from finding, accepting, or in some respect fulfilling one's personal vocation?

Will accepting it impair the witness that should be given by oneself or one's community to God's truth and love?

Id. at 442-43. It should be noted that unlike traditional manualists (and unlike Cardinal Ratzinger), Grisez does not put any weight on the distinction between various types of material cooperation. In contrast, I have argued that those distinctions are helpful, and can be intelligibly situated within a virtue theory approach to morality such as that of Aquinas. See Kaveny, *supra* note 85, at 304-07.

95. "I voted for George W. Bush and I'm heartily sorry now. My support was motivated by prolife convictions, but so is my present dismay. . . . [O]ur present policies, now dubbed the Bush Doctrine, are morally suspect and prudentially disastrous." Sidney Callahan, *A Prolife Case Against Bush*, COMMONWEAL, June 4, 2004, at 15.

a pressing moral issue.⁹⁶ Yet they did not believe that this issue, considered by itself, pointed toward a vote for George Bush. They questioned whether Bush actually intended to ensure that *Roe* would be overruled. They pointed out that Republicans had been running on an anti-*Roe* platform for nearly thirty years, and that Republican appointments to the Supreme Court had supported *Roe*, at least in its core.⁹⁷ Furthermore, they noted that in the event that *Roe* was to be overturned, decisions about the legality of abortion would be returned to the states, the majority of which would legalize the procedure.⁹⁸ Catholic casuists judged that in a situation in which abortion was likely to remain legal for the foreseeable future, John Kerry's social policies were likely to make it possible for more women to choose childbirth rather than abortion.⁹⁹

96. "In 2002, 1.29 million abortions took place, down from an estimated 1.36 million in 1996." Alan Guttmacher Institute, *Induced Abortion in the United States* (2005), http://www.guttmacher.org/pubs/fb_induced_abortion.html.

97. The legality of abortion will not change under either a second Bush administration or a Kerry administration. Republicans have paid lip service—and sometimes more—to the idea of overturning *Roe v. Wade* through antiabortion Supreme Court nominees. They were wrong about Sandra Day O'Connor, wrong about Anthony Kennedy, and wrong about David Souter—Republican Supreme Court nominees who have supported *Roe*. This Charlie Brown-and-the-football routine notwithstanding, the notion that an anti-*Roe* nominee would make it through the Senate confirmation process, or that Bush would even nominate such a person, is an extreme long shot.

Editorial, *Politics, Piety, and the Catholic Vote*, NAT'L CATH. REP., Apr. 30, 2004, at 24.

98. The Center for Reproductive Rights estimated that twenty-one states are at "high risk" of banning abortion, nine states at "medium risk," and in twenty states abortion rates are secure. It is in the interest of pro-choice groups, in my view, to overestimate the number of states who will restrict abortion, as well as the severity of the restrictions that will be adopted. See CENTER FOR REPRODUCTIVE RIGHTS, WHAT IF ROE FELL? (Sept. 2004), http://www.crlp.org/pdf/bo_whatifroefell.pdf (outlining state-by-state consequences if Supreme Court overrules *Roe*).

99. According to a recent study, women with incomes below 200% of poverty made up 30% of all women of reproductive age, but accounted for 57% of the abortions in 2000. Abortion rates decreased as women's income increased, from 44 per 1,000 pregnancies among poor women to 10 per 1,000 among the highest-income women. Adjusting for different pregnancy rates, it is still the case that high income women are the least likely to abort their pregnancies (15%), and poor and low-income women were the most likely to do so (33%). Furthermore, only one in six women who had an abortion was married. Nearly one in five women who had an abortion was a teenager; about half of them were younger than twenty-five. See Rachel K. Jones et al., *Patterns in the Socioeconomic Characteristics of Women Obtaining Abortions in 2000-2001*, 34 PERSP. ON SEXUAL AND REPROD. HEALTH 226-35 (2002) (connecting women's socioeconomic characteristics with their likelihood to pursue abortions). The investigators are associated with the Alan Guttmacher Institute, a research center affiliated with Planned Parenthood Federation of America. Nonetheless, a Harvard Law School Professor and prominent Catholic lay woman made essentially the same point fifteen years earlier. MARY A. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 59-60 (1987).

Third, in choosing a candidate, Catholic casuists considered a wide range of issues pertaining to human dignity and the common good.¹⁰⁰ These included not only the war in Iraq, the war on terror (including the Bush administration's attempt at justifying torture in order to prosecute the war on terror) and other issues of war and peace, but questions of social justice and solidarity, such as the fate of social security and other social welfare programs, the impact of the tax structure on the most vulnerable and the fate of illegal immigrants and other vulnerable populations under American law. In addition to abortion, other life issues were relevant, such as euthanasia and stem cell research, capital punishment and the protection and promotion of marriage and family life. On each of these issues, casuists were inclined not merely to focus on the existence of the morally relevant negative prohibition (e.g., a law prohibiting euthanasia), but to consider whether the relevant positive support structures were also in place (e.g., sufficient public funding to care for impoverished elderly). To insure the well-being of vulnerable populations, it is not sufficient to ensure they are not harmed; by definition, a vulnerable person is in need of the aid and comfort of others.¹⁰¹

For many Catholic casuists who voted for Kerry, the judgment came down to this: based on the evidence provided by his first term in office, a second Bush term was seen as highly likely to inflict a new range of injustice and suffering upon the nation and upon the world, while unlikely to reduce the ongoing injustice of legalized abortion-on-demand. In con-

100. For representative examples of the Catholic casuist position supporting a vote for John Kerry, see Callahan, *supra* note 95, at 17 (regretting having voted for George Bush); Margaret O'Brien Steinfels, *Time to Choose: Voting with a Catholic Conscience*, COMMONWEAL, Oct. 22, 2004, at 10 (concluding that John Kerry would be no worse than George Bush from Catholic perspectives). See also John Langan, S.J., *Conscience and Controversy: Twelve Observations About Abortion and Politics*, <http://www.avemarialaw.edu/news/Events/conferences/abortion2.pdf> (presenting observations about relationship between abortion and politics). Langan's paper was delivered at a conference entitled Public Witness/Public Scandal, sponsored by Ave Maria Law School and held in Washington, D.C. on September 16, 2004. Another paper advocating a casuistical approach delivered at the same conference is Monika K. Hellwig, *Cultural, Social and Political Implications of the Controversy*, <http://www.avemarialaw.edu/news/Events/conferences/AveMariaConfMHellwig.pdf> (last visited May 24, 2006). The papers of the other presenters (Gerard Bradley, John Coughlin, O.F.M., and Robert George) are also available online at <http://www.avemarialaw.edu/news/Events/conferences/papers.cfm> (last visited Feb. 20, 2006). For a compelling articulation of a casuistical approach conjoined with a sympathetic description of the prophetic approach, see Mark Sargent, *Election 2004: Respect for Life Issues*, Oct. 26, 2004, <http://www.mirrorofjustice.com/mirrorofjustice/sargent/election2004.pdf> (advocating caution when selecting presidential candidates). I myself also adopted a casuistical approach to the question of voting in the election. See M. Cathleen Kaveny, *Response to Russ Hittinger (and, Inferentially, to Greg Sisk, Gerry Bradley, Robert George, and Others)*, Oct. 29, 2004, http://www.mirrorofjustice.com/mirrorofjustice/2004/10/cathy_kavenys_r.html (discussing considerations in selecting appropriate choice for President).

101. I make this point more extensively in M. Cathleen Kaveny, *How Views of Law Influence the Pro-Life Movement*, 34 ORIGINS 560 (2005).

trast, while Kerry's position on the legal status of abortion was troubling in the extreme, Catholic casuists did not see him as any more likely actually to exacerbate the problem than Bush was actually to ameliorate it. At the same time, Kerry was seen as likely to do less damage to other issues of social justice and solidarity, locally and globally. This negative way of phrasing the decision is deliberate: many Catholic casuists did not consider themselves Democratic activists, but "hold-your-nose-and-vote-for Kerry" citizens.

The difference between the prophetic approach and the casuistical approach to the 2004 election can be seen in two guides that were released in order to influence the votes of serious Catholics. The casuistical approach is represented by the *2004 Catholic Voter Guide*, which is published by the Catholic Voting Project. It takes as its centerpiece seven tenets of Catholic social teaching, falling under the categories of life, family, voting and solidarity.¹⁰² The organizational framework used by the *Catholic Voter Guide* was taken from a document produced by the U.S. Conference of Catholic Bishops to guide Catholic voters during the election, entitled *Faithful Citizenship: A Catholic Call to Political Responsibility*,¹⁰³ more specifically, the *Catholic Voter Guide* attempts to compare and contrast the positions of the presidential candidates on over sixty issues in light of that framework.¹⁰⁴ The *Catholic Voter Guide* does not, however, attempt to order the issues in a lexical ranking that would result in a clear decision for one candidate. Nor, for that matter, does *Faithful Citizenship*. Both documents are guides to discernment, not a program for decision-making.

In contrast, the Catholic Answers group, which presents itself as devoted to Catholic apologetics from a conservative perspective, prepared the *Voter's Guide for Serious Catholics*,¹⁰⁵ ("Guide") which corresponds to the more prophetic approach to the question of abortion and the election. This guide asserts that there are five "non-negotiable" issues in the election: abortion, euthanasia, embryonic stem cell research, human cloning and same-sex marriage.¹⁰⁶ Consistent with a prophetic sensibility, the

102. See generally Catholic Voting Project, *2004 Catholic Voter Guide*, <http://www.votingcatholic.org> (last visited Feb. 20, 2006).

103. U.S. Conference of Catholic Bishops, *Faithful Citizenship: A Catholic Call to Political Responsibility* (2003), <http://www.usccb.org/faithfulcitizenship/faithfulcitizenship03.pdf>.

104. See generally Catholic Voting Project, *supra* note 102.

105. See Catholic Answers, *Voter's Guide for Serious Catholics* (2004), <http://www.priestsforlife.org/elections/voterguide.htm>. Catholic Answers is run by Karl Keating, an attorney who has no formal theological training.

106. *Id.* No authority is cited for the proposition that these are "non-negotiable" issues for voters in the sense used in the guide; in fact, there is no such category in official Church teaching. As I hope to have demonstrated above, Cardinal Ratzinger's memo suggests a far more flexible casuistical approach to the decision. Could the prophets have found some ground for their absolutist arguments in traditional casuistry? Possibly. Some of the moral manuals state that "[m]aterial co-operation with the sin of another that will do great harm to Church or State is never lawful" DAVIS, *supra* note 91, at 342. One manual gives the example

Guide focuses on the absolute nature of the moral wrong at stake. "These five current issues concern actions that are intrinsically evil and must never be promoted by the law. Intrinsically evil actions are those which fundamentally conflict with the moral law and can never be deliberately performed under any circumstances."¹⁰⁷ The *Guide* goes on to instruct Catholics to cast their votes overwhelmingly in accordance with their stands on these five non-negotiable issues. More specifically, the *Guide* directs Catholics not to vote for a candidate who is preferable on a "lesser" issue if his or her stance on a "non-negotiable" issue is unacceptable.¹⁰⁸ The *Guide* does not suggest that the likelihood that a candidate's stance on any issue will make a concrete difference to the status quo should be given any consideration whatsoever. The only time that a voter is allowed to compromise is when all candidates for a particular office hold an unacceptable position on the "non-negotiable" issues. While the *Guide* does not explicitly tell voters to vote for George W. Bush instead of John Kerry, there can be no doubt that its criteria logically compelled just such a result.¹⁰⁹

that it is impermissible to vote for a Communist running for President of the United States, saying that "any cooperative action of voting for him would help on an action that is gravely injurious to the state, and so it would not be allowed." HEALY, *supra* note 93, at 42. One could imagine this argument being extended to a firmly pro-choice candidate such as John Kerry. Yet the basis for the extension would be unsound. A careful reading of the manuals reveals that their focus in these examples is cooperating with evil in a way which prefers one's own private good to the common good. What is at stake, however, in the debate over whether a good Catholic can vote for John Kerry is precisely which candidate furthers the common good.

107. Catholic Answers, *supra* note 105. This analysis does not comport with traditional Catholic moral theology. The term "intrinsic evil," which finds its home within the realm of casuistry, refers to the reason that an act is wrong (they are wrong "*ex objecto*"—by reason of the object or immediate purpose of the acting agent, not because of the broader circumstances under which the agent performs that act), not to the degree that an act is wrong. Some intrinsically evil acts (e.g., telling a jocose lie) are far less serious than acts which are evil by reason of their circumstance (e.g., dropping a bomb on a bunker containing one lone enemy private, foreseeing but not intending the death of 1000 schoolchildren lined up for food). In essence, Catholic Answers is here giving a "prophetic" interpretation of a casuistical term.

108. *See id.* The *Guide* states:

Do not vote for candidates who are right on lesser issues but who will vote wrongly on key moral issues. One candidate may have a record of voting in line with Catholic values except, say, for euthanasia. Such a voting record is a clear signal that the candidate should not be chosen by a Catholic voter, unless the other candidates have voting records even less in accord with these moral norms.

Id.

109. *See id.* The *Guide* makes no mention of *Faithful Citizenship*, the guide to voting produced by the National Conference of Catholic Bishops, which may be found *supra* note 103.

3. *The Tension Between Prophets and Casuists*

How do the practitioners of these two modes of moral discourse view each other? As the rhetoric surrounding abortion in the context of the 2004 presidential election demonstrates, not very well. Let us begin with how the prophets view the casuists. First, the prophets' radicality means that they tend to adopt an "if you are not for us, you are against us" approach. The prophets view anything short of full agreement, both with respect to ultimate values and with respect to strategy, as a betrayal of the duty to offer uncompromising witness to the truth. More specifically, the prophets tend to view casuistical approaches, even with respect to strategy, as demonstrating an inadequate understanding of the enormity of the problem of abortion, both with regard to the number of unborn lives taken, and with regard to the particular horror involved in the taking of completely innocent, vulnerable life.

Second, many prophets seem to have more respect for the radical prophets of the opposition than they do for the casuists on their own side, whom they view at best as morally blind, and at worst as morally disingenuous. Radical pro-choice prophets mirror and reinforce the pro-life prophets' belief in the centrality of the abortion issue to the fundamental moral character of our community.

Third, prophets are impatient with, and often disdainful of, the intricacies of argument in which the casuists engage. Prophets see casuists as "rearranging the deck chairs on the Titanic,"¹¹⁰ when what is required is an immediate and radical turn in course.

How do the casuists view the prophets? Not much more favorably than the prophets view the casuists. First, the casuists find the prophets' radicalism deeply troubling. Their concern with one issue, and the identification of that issue with the moral health of the country, is seen by casuists as a drastic oversimplification of the moral issues at stake in the election. In addition, their commitment to an "all or nothing" attitude toward that issue is seen as foreclosing the possibility of incremental improvement.

Second, on the surface, casuists may seem to have more respect for prophets than vice versa; casuists see prophets as performing an important hortatory function, reminding us all about the transcendent importance of certain values. But scratch the surface, and there is more than a little condescension and wariness: Casuists tend to view the commitment of prophets as the immature passion of youth; it is harmless when tightly cabined on a college campus, but dangerous when allowed to threaten the basic structures of society.

Third, if prophets see casuists as rearranging the deck chairs on the Titanic, casuists see prophets as expecting God Himself to turn the ship to avoid the iceberg. Casuists see prophets as engaging in a form of self-

110. GUSTAFSON, *supra* note 11, at 9.

indulgence: Mesmerized by the power of their own rhetoric of condemnation, they excuse themselves from the hard work of designing and implementing a workable plan for ameliorating the evil which they condemn.

4. *Choosing Between Prophecy and Casuistry*

How, then, do people of good will decide whether to adopt a prophetic or a casuistical approach to a particular issue? The obvious rejoinder to this question is to cast doubt upon its presuppositions. Perhaps the use of prophetic style or casuistical style is not a matter of "decision" at all. Perhaps it is a matter of intellectual personality; some people are more drawn to one style, some to the other, by their intellectual temperament and academic training.

Yet, to gain even a minimal hearing, would-be prophets need to choose an issue that is worthy of their rhetoric. It is, of course, not logically impossible to address every question of the slightest moral significance within a prophetic framework. One could attempt to cast each and every decision, no matter how small, as an essential battle in the war between Good and Evil. At the same time, however, some concentration of effort and attention upon issues of particular importance seems pragmatically wise. How do moralists who are open to engagement in prophetic rhetoric decide which issues upon which to concentrate their fire? Obviously, the issue must be seen as highly significant by the would-be prophet. Yet significance is not enough. No one denies, for example, that the deeds of serial killers such as Ted Bundy are horrendous. Yet they are seen (rightly or wrongly) as social and cultural aberrations, which our society firmly rejects and punishes. In addition to being significant, therefore, an issue deemed worthy of prophetic attention must seem to crystallize a fundamental moral or spiritual flaw in our society. By demanding that the society look upon that issue in all its stark horror, the prophet attempts to force the society to see itself for what it really is, and therefore to move toward repentance and reform of life.

Abortion and torture, of course, are both issues which can easily qualify as worthy of prophetic attention from American Christians and Catholics. Moreover, there are obvious ways of linking them together for purposes of prophetic argument. For example, the requirements of both the "culture of life" approach proposed by Pope John Paul II in *Evangelium Vitae*¹¹¹ and the "consistent ethic of life" approach advocated by Cardinal

111. See POPE JOHN PAUL II, *supra* note 62. *Evangelium Vitae* begins with the passage from the Second Vatican Council: "Whatever is opposed to life itself, such as any type of murder, genocide, abortion, euthanasia, or willfull self-destruction, whatever violates the integrity of the human person, such as mutilation, tortments inflicted on body or mind, attempts to coerce the will itse'f . . . all these things and others like them are infamies indeed." *Id.* ¶ 70 (quoting POPE PAUL VI, VATICAN II, GAUDIUM ET SPES, ¶ 27 (1965)). Furthermore, there is no reason to think that Pope John Paul II's remarks about the responsibilities of a democracy with respect to laws permitting abortion would not also apply to laws permitting torture:

Bernardin¹¹² would support such a linkage. At the same time, both issues are, in principle, susceptible to casuistical reflection. One avenue of such reflection focuses on the acts themselves. What precisely, constitutes the prohibited act of "abortion" or "torture"? Why, precisely, are such acts wrong? Are there legitimate exceptions to the prohibition, given the definition of the relevant act? A second avenue of reflection focuses on the appropriate societal response to these actions. Should they be criminalized? Discouraged in other ways? Why? How should disputes about their definition and legitimacy, especially in so-called "hard cases," affect their legal status?

Reviewing the discussion during the time immediately surrounding the election, it is striking that many American Christians, including many American Catholics, did not apply the same style of discourse with respect to both issues. Many of those who took a prophetic stand with respect to voting and abortion sympathized with a more casuistical approach with respect to President Bush's policies on the applicability of the Geneva Conventions and the definition of torture, or at least remained silent about the atrocities. Conversely, those who were more vocal in advocating a casuistical approach to voting and abortion were more prophetic about the administration's willingness to rethink the definition and the restraints on torture in order to win the War on Terror. Before continuing our

Democracy cannot be idolized to the point of making it a substitute for morality or a panacea for immorality . . . Its "moral" value is not automatic, but depends on conformity to the moral law to which it, like every other form of human behavior, must be subject: in other words, its morality depends on the morality for the ends which it pursues and of the means which it employs . . . Of course, values such as the dignity of every human person, respect for inviolable and inalienable human rights, and the adoption of the "common good" as the end and criterion regulating political life are certainly fundamental and not to be ignored.

Id.

112. See Joseph Cardinal Bernardin, *A Consistent Ethic of Life: Continuing the Dialogue*, in *CONSISTENT ETHIC OF LIFE* 12, 17 (Thomas G. Fuechtmann ed., 1988). Torture was not even on the horizon as a debatable issue at the time Joseph Cardinal Bernardin formulated his "consistent ethic of life"—nuclear deterrence was the primary issue pertaining to military security, while capital punishment was the primary "life issue" involving life that was not obviously "innocent." Nonetheless, torture could easily be incorporated as a concern into the "consistent ethic of life." Bernardin writes:

Abortion is taking life in ever growing numbers in our society. Those concerned about it, I believe, will find their case enhanced by taking note of the rapidly expanding use of public execution. In a similar way, those who are particularly concerned about these executions, even if the accused has taken another life, should recognize the elementary truth that a society which can be indifferent to the innocent life of an unborn child will not be easily stirred to concern for a convicted criminal. There is, I maintain, a political and psychological linkage among the life issues—from war to welfare concerns—which we ignore at our own peril; a systemic vision of life seeks to expand the moral imagination of a society, not partition it into airtight categories.

Id.

more general reflections on the use and limitations of the two types of discourse, it will be helpful to consider the discussion of torture arising out of the Bush administration's prosecution of that war.

B. *Torture, Prophecy and Casuistry*

1. *Introduction*

Needless to say, the debate over the appropriate American stance toward torture has not been developed as extensively or as deeply as the debate over our nation's appropriate stance toward abortion. Although academics have long discussed the definition of torture, the harm it causes and the circumstances (if any) under which it might be justified, torture was not a topic that captured the attention of the American public until the spring of 2004. That time period saw three distinct but not unrelated events: the exposure of atrocities committed by American soldiers at Abu Ghraib Prison, the emerging worries about the treatment of prisoners at the American detention center at Guantanamo Bay, Cuba and the declassification of memos written by high officials in the legal arm of the Bush administration, which argued that prisoners held on terrorism-related charges were entitled to diminished legal protections against torture and other forms of mistreatment.¹¹³ The debate over torture came to a head in December 2004 and January 2005 around the congressional hearings to confirm Alberto Gonzales as Attorney General of the United States.¹¹⁴ As Bush's White House Counsel, Gonzalez had endorsed and defended the administration's justification of torture.

As actually conducted in the fall of 2004, the debate over the role of torture in the War on Terror was not precisely parallel to the debate over abortion and the election that I described above. As I noted above, the two cases raised many of the same moral questions on a theoretical level: 1) What constitutes the proper definition of the prohibited act?; 2) When, if ever, is the prohibited act, properly defined, justified?; 3) What is the appropriate legal stance toward the act?; and 4) When, if ever, should a morally serious person vote for a candidate who adopts a defective moral or jurisprudential stance toward the act in question?

The energy in the debate over abortion in fall 2004 centered around the fourth question—whether a vote for John Kerry in the presidential election was morally justifiable, given his stance on abortion. In contrast, the controversy over torture spent at least as much attention on the first three questions. This debate was about what counts as impermissible treatment of enemy prisoners, and more particularly, what constitutes torture.

113. See *supra* note 54.

114. Gonzales was approved by the Senate Judiciary Committee on January 26, 2005. See Eric Lichtblau, *Senate Panel Approves Gonzales on a Party-Line Vote*, N.Y. TIMES, Jan. 27, 2005, at A21. He was confirmed by the Senate on February 3, 2005. See Eric Lichtblau, *Gonzales Is Confirmed in a Closer Vote than Expected*, N.Y. TIMES, Feb. 4, 2005, at A13.

It was about the development and defense of moral categories, particularly “negative moral absolutes”—how to define the set of actions that is never permissible.

2. *The Torture Memos*

In early 2005, Cambridge University Press published a 1249-page volume entitled *The Torture Papers: The Road to Abu Ghraib*.¹¹⁵ The volume contains a wealth of documentation, including the main memos providing a legal justification for Bush administration policy toward the treatment of incarcerated Taliban and al-Qaeda forces. Two memos in particular are worth particular scrutiny, both of which were written by assistant attorney general Jay Bybee to White House Counsel Alberto Gonzales.¹¹⁶ The first of these is dated January 22, 2002 and entitled “Application of Treatise

115. See *THE TORTURE PAPERS*, *supra* note 68. The title asserts a connection between the policy of the Bush administration with respect to torture and suspected terrorists, on the one hand, and the brutal mistreatment of Iraqi prisoners, on the other. That assertion is supported by some of the reports contained therein. For example, the independent panel charged by the Department of Defense to investigate the abuses notes:

Operation Iraqi Freedom is wholly different from Operation Enduring Freedom [i.e., the battle against terrorism]. It is an operation that clearly falls within the boundaries of the Geneva Conventions and the traditional law of war. From the very beginning of the campaign, none of the senior leadership or command considered any possibility other than that the Geneva Conventions applied.

The message in the field, or the assumptions made in the field, at times lost sight of this underpinning. Personnel familiar with the law of war determinations for OEF in Afghanistan tended to factor those determinations in to the decision-making for military operations in Iraq. Law of war policy and decisions germane to OEF migrated, often quite innocently, into decision matrices for OIF. We noted earlier the migration of interrogation techniques from Afghanistan to Iraq. Those interrogation techniques were authorized only for OEF. More important, their authorization in Afghanistan and Guantanamo was possible only because the President had determined that individuals subject to these interrogation techniques fell outside the strict protections of the Geneva Conventions.

The Schlesinger Report (Final Report of the Independent Panel to Review DoD Detention Operations), Aug. 2004, in *THE TORTURE PAPERS*, *supra* note 68, at 948-49.

116. At the time both memos were written, Bybee was head of the Office of Legal Counsel, an office which was traditionally understood as providing disinterested legal advice to the Attorney General and to the President of the United States. On March 13, 2003, his appointment to serve as a judge on the United States Court of Appeals for the Ninth Circuit was confirmed by the United States Senate. The nomination generated controversy over Gonzales's position on torture. See, e.g., *Excerpts from Judiciary Committee Hearing On Attorney General Nominee*, N.Y. TIMES, Jan. 7, 2005, at A18; David Johnston & Neil Lewis, *Bush's Counsel Sought Ruling About Torture*, N.Y. TIMES, Jan. 5, 2005, at A1; Neil A. Lewis, *Ex-Military Lawyers Object to Bush Cabinet Nominee*, N.Y. TIMES, Dec. 16, 2004, at A36; Eric Lichtblau, *Gonzales Speaks Against Torture During Hearing*, N.Y. TIMES, Jan. 7, 2005, at A1.

and Laws to al-Qaeda and Taliban Detainees.”¹¹⁷ The second, dated August 1, 2002, is entitled “Standards of Conduct for Interrogation.”¹¹⁸

Both memos employ casuistical reasoning in order to justify a policy which would drastically reduce the legal strictures protecting captured members of the Taliban and al-Qaeda against harsh treatment by their American captors.¹¹⁹ Their overarching goal is to clear away any legal obstacles under international law or American law that would in any way impede President Bush’s freedom to control the interrogation of prisoners captured in the War on Terror. Consequently, the memos belong to the genre of legal advocacy rather than to that of scholarly investigation.

More specifically, their author, Jay Bybee, deploys casuistry as a tool to further the objectives of the President of the United States, who stands in the role of Bybee’s client. Bybee does not treat the legal sources that he analyzes, including the Geneva Conventions, as a source of moral wisdom with which to illuminate a difficult decision; he does not interpret the letter of the laws governing treatment of enemy prisoners according to its animating moral spirit. Nonetheless, it would be wrong to say that the memos are devoid of moral concern. On the contrary, they treat the obligation of the President to protect the citizens of the United States against terrorism not only as morally imperative, but also as overriding all other moral issues. Bybee’s casuistry, in other words, is not the exercise of moral discernment in the course of practical reasoning, but is rather the deployment of a powerful analytical tool to clear away what he views as a potential impediment to a morally and politically imperative course of action.

By intricately detailed legal analysis, the January 22 Memo argues that the Geneva Convention protections governing treatment of prisoners of war apply neither to the conflict with al-Qaeda¹²⁰ nor to the conflict with the Taliban.¹²¹ In brief, the January 22 Memo maintains that Geneva Convention III, which governs the treatments of POWs, does not apply to al-Qaeda because it is a terrorist organization and not a state actor.¹²²

117. See Jay Bybee, *Memo 6: January 22, 2002 (Application of Treatises and Laws to al Qaeda and Taliban Detainees)*, in THE TORTURE PAPERS, *supra* note 68, at 81-117 [hereinafter Bybee, *January 22 Memo*]. This memo was based almost entirely on a memo prepared by John Yoo, a Deputy Assistant Attorney General. See John You, *Memo 4: January 9, 2002 (Application of Treatises and Laws to al Qaeda and Taliban Detainees)*, in THE TORTURE PAPERS, *supra* note 68, at 38-79.

118. See Jay Bybee, *Memo 14: August 1, 2002 (Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A)*, in THE TORTURE PAPERS, *supra* note 68, at 172-217 [hereinafter Bybee, *August 1 Memo*].

119. According to one article in the *New York Times*, the August 1, 2002 memo was prepared in order to provide *post hoc* justification for harsh interrogation procedures used by the CIA on high-level al-Qaeda operatives, in particular Abu ZuBaydah, a top aide to Osama bin Laden after his capture in April 2002. See David Johnston & James Risen, *Aides Say Memo Backed Coercion Already in Use*, N.Y. TIMES, June 27, 2004, at A11.

120. See Bybee, *January 22 Memo*, *supra* note 117, at 89-90.

121. See *id.* at 90-105.

122. See *id.* at 89.

Moreover, the members of al-Qaeda do not meet the qualifications for POWs set forth in that Convention.¹²³ What about the Taliban? The January 22 Memo argues that Article III of the U.S. Constitution gives the President the power unilaterally to suspend the Geneva Conventions with respect to Afghanistan¹²⁴ or to interpret Geneva Convention III categorically to say no member of the Taliban should qualify as POWs under its provisions.¹²⁵

Furthermore, the January 22 Memo maintains that neither al-Qaeda nor the Taliban merit the protections of "common Article 3," which is a provision common to all four Geneva Conventions and requires "humane treatment" for those placed outside of combat by "sickness, wounds, detention, or any other cause."¹²⁶ The memo asserted that "common Article 3's text provides substantial reason to think that it refers specifically to a condition of civil war; or a large-scale armed conflict between a State and an armed movement within its own territory."¹²⁷ The American conflict with neither al-Qaeda nor the Taliban fits that description. "Giving due weight to the state practice and doctrinal understanding of the time, the idea of an armed conflict between a nation-State and a transnational terrorist organization (or between a nation-State and a failed State harboring and supporting a transnational terrorist organization) could not have been within the contemplation of the drafters of common Article 3."¹²⁸

The January 22 Memo recognizes that the President's decision to suspend the Geneva Conventions may not be recognized as valid under international law.¹²⁹ One would think that such recognition would prompt the author to reconsider his analysis. Instead, it triggered an expression of defiance: "Customary international law cannot bind the President or the

123. *See id.* at 89-90.

124. *See id.* at 90-102. The memo suggested that appropriate grounds for suspension might include the claim that Afghanistan under the Taliban was a "failed state" unable to fulfill its treaty obligations.

125. *See id.* at 110-11. The memo also contends that if the members of the Taliban were not protected under Article 4 of Geneva Convention III, "they would not be entitled to the standards of treatment in common Article 3 Common Article 3 . . . does not serve as a catch-all provision that applies to all armed conflicts, but rather as a specific complement to common Article 2." *Id.* at 111. Article 2 of Geneva Convention III applies to armed conflicts or declared wars between two or more High Contracting Parties. *See id.* at 86. The memo argues that the applicability of Article 2 triggers the POW provisions of Article 4 of the third Geneva Convention. *See id.* at 90. The net effect of these contentions is that the members of the Taliban, like the members of al-Qaeda, are entirely without protection under the Geneva Conventions.

126. *See id.* at 85 n.12. Before arguing that Common Article 3 does not apply, the memo takes pains to minimize requirements; it "requires State parties to follow only certain minimum standards of treatment toward prisoners, civilians, or the sick and wounded—standards that are much less onerous and less detailed than those spelled out in the Conventions as a whole." *Id.* at 85.

127. *Id.* at 86.

128. *Id.* at 88.

129. *See id.* at 102-07.

executive branch, in any legally meaningful way, in its conduct of the war in Afghanistan.”¹³⁰ Why such a reaction? Clearly, because the intricate arguments of the January 22, 2002 Memo were not meant to provide disinterested legal analysis; they were formulated as an effective means to achieve a desired legal and political end, which became starkly apparent in White House Counsel Alberto Gonzales’s January 25, 2002 Memo to President George W. Bush.¹³¹ Defending Jay Bybee’s January 22, 2002 Memo against the criticisms of Secretary of State Colin Powell, Mr. Gonzales bluntly highlights two advantages of determining that the Geneva Conventions do not apply to the conflict. First, such a determination preserves flexibility in fighting this “new kind of war,” which places a premium on “the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American civilians.”¹³² Second, it “substantially reduces the threat of domestic criminal prosecution under the War Crimes Act.”¹³³

President Bush acceded to this advice. On February 7, 2002, he issued a memorandum stating that: 1) the Geneva Conventions do not apply to al-Qaeda; 2) he, as President of the United States, has the authority to suspend the Geneva Conventions as between the United States and Afghanistan, but declines to exercise that authority at this time; 3) Common Article 3 of the Geneva Convention does not apply to either al-Qaeda or to the Taliban; and 4) Taliban detainees are “unlawful combatants” and do not qualify as prisoners of war under the Geneva Conventions; al-Qaeda detainees also fail to qualify for that status.¹³⁴

130. *Id.* at 115.

131. See Alberto Gonzales, *Memo 7: January 25, 2002 (Decisions Re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban)*, in *THE TORTURE PAPERS*, *supra* note 68, at 118-21.

132. See *id.* at 119. Gonzales remarks: “In my judgment, this new paradigm [of the war against terrorism] renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions requiring that captured enemy be afforded such things as commissary privileges, scrip (i.e., advances of monthly pay), athletic uniforms, and scientific instruments.” Clearly, the United States was not worried about being able to provide athletic uniforms to the prisoners at Guantánamo Bay. *Id.*

133. *Id.* Bybee’s January 22 Memo, framed the question of the applicability of the Geneva Conventions in terms of the strictures of the War Crimes Act (18 U.S.C. § 24441 (Supp. III 1997)), which prohibits as war crimes acts falling into four categories, including “grave breaches” of the Geneva Conventions, and violations of “common Article 3.” See Bybee, *January 22 Memo*, *supra* note 117, at 81, 83-84. In so doing, in my view, it implicitly reinforces its underlying assumption that international law is binding only to the extent it is incorporated explicitly into American positive law. Furthermore, by focusing the analysis in terms of what acts are criminally prohibited, rather than in terms of what acts are morally and legally justifiable, Bybee is implicitly adopting Oliver Wendell Holmes’s “bad man” theory of the law—a theory which asks what one can get away with doing, rather than what one ought to do.

134. See George W. Bush, *Memo 11: February 7, 2002 (Humane Treatment of al Qaeda and Taliban Detainees)*, in *THE TORTURE PAPERS*, *supra* note 68, at 134-35 [hereinafter Bush, *February 7 Memo*]. Bush goes on to state, “As a matter of policy,

The second memo from Mr. Bybee to Mr. Gonzales, dated August 1, 2002,¹³⁵ is dedicated to enhancing the administration's ability to obtain information pertaining to future acts of terrorism without incurring a significant threat of domestic criminal prosecution under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, as that Convention is implemented in federal law.¹³⁶ The cumulative effect of the memo is to encourage the President to authorize obtaining such information by any means necessary, because a number of factors render it highly unlikely that the interrogators will be punished for their acts.

The memo begins by analyzing the applicable provision in the United States Code, which makes it a crime for any person "outside the United States to commit or attempt to commit torture."¹³⁷ It elaborates on the elements of the crime, noting in particular that to convict a defendant, the prosecution must prove that the defendant acted with the specific intent to cause severe physical or mental pain or suffering.¹³⁸ At the same time, the memo points out that "a showing that an individual acted with a good faith belief that his conduct would not produce the result that the law prohibits negates specific intent."¹³⁹

Next, the memo attempts to define the prohibited acts of torture as narrowly as possible. It contends that:

[P]hysical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function or even death. For purely mental pain or suffering to amount to torture . . . it must result in significant psychological harm of significant duration, e.g., lasting for months or years.¹⁴⁰

the United States Armed Forces shall continue to treat detainees humanely, *and to the extent appropriate and consistent with military necessity*, in a manner consistent with the principles of Geneva." *Id.* at 135 (emphasis added).

135. See Bybee, *August 1 Memo*, *supra* note 118. In December 2004, immediately before the Senate Judiciary Committee hearings on the nomination of Alberto Gonzales to serve as Attorney General of the United States, the Justice Department significantly retreated from the analysis outlined in this memo. See Neil A. Lewis, *U.S. Spells Out New Definition Curbing Torture*, N.Y. TIMES, Jan. 1, 2005, at A1. The revised policy is available at Department of Justice, Memorandum, *Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A*, Dec. 30, 2004, <http://www.usdoj.gov/olc/18usc23402340a2.htm>.

136. See 18 U.S.C. §§ 2340-2340A (2006).

137. See Bybee, *August 1 Memo*, *supra* note 118, at 173.

138. See *id.* at 174-75.

139. *Id.* (clarifying specific intent).

140. *Id.* at 172 (examining injury constituting torture). The memo goes on to further limit the type of mental suffering that qualifies as torture:

We conclude that the mental harm also must result from one of the predicate acts listed in the statute, namely: threats of imminent infliction of such physical pain as a means of psychological torture; use of drugs or other procedures designed to deeply disrupt the sense, or fundamentally

Finally, after significantly limiting what would count as "torture" for purposes of federal criminal law, the memo erects two further barriers to its enforcement. First, the memo contends that "in the circumstances of the current war against al Qaeda and its allies, prosecution . . . may be barred because enforcement of the statute would represent an unconstitutional infringement of the President's authority to conduct war."¹⁴¹ Less dramatically, but no less definitely, the memo maintains that the legal defenses of self-defense and/or necessity might justify interrogators in engaging in techniques that were indisputably barred as torture by the law, given the magnitude of the threat posed to the United States after the attacks on September 11, 2001.¹⁴²

Taken together, the import of Bybee's memos is that there are few, if any, limits to what American interrogators can do in order to extract information from al-Qaeda and Taliban prisoners. In tone, argument and structure, the memos suggest that Bybee views his analysis as a broom with which to sweep away the web of international and national law protecting prisoners detained by the United States in the War on Terror, in order to facilitate American victory. Two features of his use of casuistry are worthy of comment. First, Bybee's choice of casuistical techniques is governed, in large part, by the end he seeks. His driving question is, "How can the impact of applicable laws against torture on my client's course of action be minimized?" not "How should my client shape his course of action in view of applicable laws against torture, and the moral values they instantiate?" Second, and relatedly, it is designed to create a sphere of action that is comparatively unencumbered by the relevant legal norms, and the moral norms they embody. It is not designed to extend the legal and moral norms embodied in statutory and case law, moving by analogy from a familiar situation to an unfamiliar situation. Bybee's use of casuistry, in other words, is not the exercise of practical reason in an effort to deliberate in the first instance about what ought to be American policy toward prisoners detained as part of the War on Terror. It is, rather, an effort to eliminate the external barriers the law imposes upon his client's exercise of practical reasoning in order to win the War on Terror.

3. *Prophetic Voices*

So how do the prophetic voices respond to revelations of the Torture Memos? By and large they do not engage the intricate legal arguments

altar an individual's personality; or threatening to do any of these things to a third party.

Id.; see also *id.* at 176-83 (interpreting American statutory law); *id.* at 184-91 (interpreting Convention Against Torture); *id.* at 191-200 (analyzing relevant American and international judicial opinions).

141. *Id.* at 173 (recognizing barrier to enforcement).

142. *Id.* (recognizing self defense may justify torture in light of magnitude of threat).

mounted by Jay Bybee, Alberto Gonzales and their associates.¹⁴³ More specifically, they do not respond by calling into question the validity of the analysis itself; that is, they do not point to particular flawed arguments or highlight particular flawed assumptions. With some modifications, their response can be understood in terms of the two main features James Gustafson associated with prophetic discourse, moral indictment and utopianism.

The primary form of the indictment was not verbal; it was visual: the horrifying spectacle of the abuses of prisoners that took place at Abu Ghraib Prison. We all saw the photographs of a smiling American soldier pulling a desperate, naked prisoner by a leash and of the bloodied and bruised corpse being carried out of the prison on a stretcher.¹⁴⁴ What about the fact that the Torture Memos were never intended to apply to prisoners at Abu Ghraib? Prophetic voices did not make a detailed argument regarding the relevance of the Torture Memos to the abusive conditions in Iraq. Instead, they relied upon the fact that the photographs raised a host of questions in the minds of those who saw them. If this is the sort of treatment that merits a visual record, what is happening in situations where there is no photographer present? What sort of ethos pervades a military operation which can engender this sort of behavior upon the part of American soldiers charged with guarding prisoners of war? If the ultimate justification of torture is that it is necessary to win the War on Terror, is the mere fact that the Bush administration recognizes that Iraqi prisoners, unlike members of the Taliban or al-Qaeda, are

143. I do not mean to imply here that there were no casuistical responses to the Torture Memos, which systematically attempted to critique their understanding of the law. In my judgment, however, they were less prominent during the initial phase of the scandal, for two reasons. First, engaging in fine casuistical analysis was seen by many, including many lawyers, as an inappropriate initial response to the abuse. Second, formulating a detailed and comprehensive response to the memos, as well as the incidents of abuse, takes time and study. For an eighty-two page analysis and critique of the jurisprudence of the Torture Memos, see Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005).

144. David Griffith makes the insightful point that the cropping of the photographs affects whether one views the problem as one of a few bad apples in the military or a systemic problem of abuse. He notes that "cropped, the pictures suggest the work of only a handful of reservists. Uncropped, they show more soldiers, some identified as military intelligence officers, a few watching, others preoccupied with the most mundane activities. One picture reveals a man cleaning his fingernails." David Griffith, *A Good War Is Hard to Find: Abu Ghraib, Flannery O'Connor, and the Problem of American Innocence*, GODSPY, Sept. 24, 2005, available at <http://www.godspy.com/issues/Abu-Ghraib-Flannery-OConnor-and-the-Problem-of-American-Innocence.cfm>. He goes perceptively to observe that the photos are "icons, Rorschachs used by commentators to justify, criticize, or deconstruct the war, and the United States." *Id.* Very tellingly in my view, Griffith invokes a prophetic perspective at the beginning of the article by beginning with a verse from the prophet Hosea: "'Sow for yourselves righteousness, reap the fruit of unfailing love and break up your unplowed ground; for it is time to see the Lord, until he comes and showers righteousness upon you.'" *Id.* (quoting *Hosea* 10:12).

clearly protected by the Geneva Conventions likely to make any real difference? President Bush, after all, had initially justified the war against Iraq at least in part on the grounds that Saddam Hussein's administration was giving aide and comfort to terrorists.¹⁴⁵

From the perspective of the prophets, what was the basis of the indictment against the casuists in the Bush administration? What was the root cause of their disastrous policy? Fundamentally, the root cause was their failure to obey divine law. In an open letter to Alberto Gonzales (who is an evangelical Christian) dated January 4, 2005 and signed by more than 200 religious leaders,¹⁴⁶ we can see the development of a prophetic indictment along these lines.

First, the open letter articulates the requirements of God's law; it constitutes the basis against which all human conduct is to be judged:

We invite with you to affirm with us that we are all made in the image of God—every human being. We invite you to acknowledge that no legal category created by mere mortals can revoke that status. You understand that torture—the deliberate effort to undermine human dignity—is a grave sin and affront to God.¹⁴⁷

Second, the open letter issues its moral indictment, detailing the manner in which Gonzales's actions failed to conform to the requirements of the divine law:

How could you have written a series of legal memos that disrespected international law and invited these abuses? How could you have justified the use of torture and disavowed protections for prisoners of war? How could you have referred to the Geneva conventions as "quaint" and "obsolete." We fear that your legal judgments have paved the way for torture and abuse.¹⁴⁸

Can we also find utopianism in prophetic responses to the Bush administration's policy on torture, as Gustafson would predict? My sense is that we come upon a type of reversal here; the utopia in question is a negative utopia. More specifically, the prophetic voices do not gesture toward a blissful world that will come into being if their prescription against torture is accepted by the American government (after all, according to

145. See Address Before a Joint Session of Congress on the State of the Union, 37 WEEKLY COMP. PRES. DOC. 109, 115 (Jan. 28, 2003) (rationalizing war against Saddam Hussein). "Evidence from intelligence sources, secret communications and statements by people now in custody reveal that Saddam Hussein aids and protects terrorists, including members of Al Quida." *Id.*

146. Church Folks for a Better America, *Open Letter to Alberto Gonzales*, Jan. 4, 2005, http://www.cfba.info/analyst/Gonzales_letter.html (recognizing grave concerns over Gonzales's nomination). *Commonweal* also published an editorial on the Gonzales nomination. See Editorial, *The President's Lawyer*, COMMONWEAL, Dec. 3, 2004, at 5.

147. *Open Letter to Alberto Gonzales*, *supra* note 146.

148. *Id.*

common accounts, that has been our world to date), but rather toward the hellish existence that we will all endure if we no longer comply with the relevant divinely given mandates.¹⁴⁹ Most importantly, the prophetic voices on torture repeatedly suggested that we will lose our national identity if we proceed along this path. An editorial in *National Catholic Reporter* begins by asking: "Who are we in America? What is being done in our name?"¹⁵⁰ Bishop John Ricard, Chair of the International Policy Committee of the National Conference of Catholic Bishops, writes "[t]he abuse and torture of Iraqi prisoners have brought shame upon our nation, is an affront to our most basic ideals, and will undermine legitimate efforts to confront the very real threats faced by our nation and the world."¹⁵¹

This threatened loss of identity, through loss of one's fundamental commitments, is a recurrent theme in the Old Testament prophets. Consider this passage from the book of Isaiah:

Jerusalem is crumbling, Judah is falling;
For their speech and their deeds are before the LORD,
A provocation in the sight of his majesty.
Their very look bears witness against them;
Their Sin like Sodom they vaunt,
They hide it not. Woe to them!
They deal out evil to themselves.¹⁵²

The prophetic response to the Torture Memos and the abuses revealed at Abu Ghraib assumed they revealed something deeply troubling about the American character.¹⁵³ The fact that we have stooped to both justifying torture and engaging in the practice is a sign of our radical de-

149. One of the most powerful responses to the revelations at Abu Ghraib was written by Dianna Ortiz, O.S.U., a religious sister who was a victim of torture while teaching Mayan children in Guatemala. See Sister Diana Ortiz, O.S.U., *Mr. President, Stop the Torture!*, U.S. CATH., July 2004, at 50, 50 (denouncing torture wherever and whenever it occurs).

150. Editorial, *Difficult Questions Won't Go Away*, NAT'L CATH. REP., Nov. 5, 2004, at 24, 24, available at http://natcath.org/NCR_Online/archives2/2004d/110504/110504t.php. For another argument about American identity, see James Ross, *Bush, Torture, and Lincoln's Legacy*, AMERICA, Aug. 15-22, 2005, at 10, 10-13. For other writings raising themes of the inconsistency of torture with American values, see Editorial, *Torture's Apologists*, COMMONWEAL, Feb. 11, 2005, at 5.

151. U.S. CONFERENCE OF CATHOLIC BISHOPS, HORRENDOUS TORTURE OF IRAQI PRISONERS IS CHALLENGE TO REFLECT ON LARGER MORAL ISSUES, <http://www.usccb.org/comm/archives/2004/04-091.htm> (last visited Feb. 20, 2006); see also Letter from Bishop John H. Ricard to House and Senate Conferees on Human Rights and Torture (July 12, 2004), <http://www.usccb.org/sdwp/torture.htm> (supporting codifying our nation's obligations by prohibiting torture or degrading treatment of persons in custody).

152. *Isaiah* 3:8-9.

153. The Vatican newspaper responded in prophetic terms by focusing upon the symbolic function of the photos at Abu Ghraib:

In its May 10 edition, *L'Osservatore Romano* commented on the widely published photo showing a U.S. Soldier holding a naked Iraqi detainee on a leash. Of all the images that have been released, this one is the most

parture from the bedrock values upon which our nation was founded. To the prophetic critics of torture, the idea that the United States can effectively defend itself by engaging in acts so thoroughly inconsistent with our fundamental moral commitments is both foolhardy and dangerous.¹⁵⁴

4. *Casuistical Responses*

Needless to say, it is impossible for Christians of any stripe to defend what happened at Abu Ghraib. What, then, has been the response of the conservative Christian defenders of the Bush administration with respect to the question of American policy on torture? Unfortunately, as several commentators have pointed out, the predominant response has been silence. For example, as of November 2005, not one full-length article has been devoted to the question of torture in *First Things*, arguably a publication of record for Christian (especially Catholic) Republicans.¹⁵⁵ Notwithstanding the silence, it is possible to reflect more generally upon the shape of a casuistical response to torture and the abuse of prisoners exemplified by Abu Ghraib, as well as to find key elements of this response in some conservative Christian commentary.

'tragically symbolic' because it shows a desire to treat the enemy almost as an animal, it said.

John Thavis, *Vatican Newspaper Condemns 'Inhuman Acts of Torture' by U.S. Soldiers*, CATH. NEWS SERVICE, May 10, 2004, available at <http://www.catholicnews.com/data/stories/cns/20040510a.htm>.

154. According to a survey conducted by the Pew Research Center and released November 17, 2005, "[T]he American public is far more open than opinion leaders to the use of torture against suspected terrorists in order to gain important information. Nearly half of the public (46%) say this can either often (15%) or sometimes (31%) be justified." PEW RESEARCH CTR. FOR THE PEOPLE AND THE PRESS IN ASS'N WITH THE COUNCIL ON FOREIGN RELATIONS, *AMERICA'S PLACE IN THE WORLD 2005*, at 24 (2005), <http://people-press.org/reports/pdf/263.pdf>. For an illuminating examination of the conflicted American stance on torture, see Joseph Lelyveld, *Interrogating Ourselves*, N.Y. TIMES, June 12, 2005, § 6, at 36.

155. A search of the *First Things* web site on November 28, 2005 for the phrase "Abu Ghraib" revealed only three hits, one of which mentioned Abu Ghraib only in an aside. The two other, more substantive discussions were in issues of the magazine where the editor, Rev. Richard John Neuhaus, offered his opinion on the events of the day. He unequivocally condemned torture, and flatly rejected the theory that Abu Ghraib is attributable to "a few bad apples." See Richard John Neuhaus, *Bishops at a Turning Point*, FIRST THINGS, Oct. 2004, at 76 (noting outrages committed by Americans at Abu Ghraib). He writes, "[t]here is a temptation to place terrorists beyond the pale of humanity. But every human being, no matter how radically he has debased himself, is a child of God, created in His image and likeness." *Id.* In a subsequent issue, Neuhaus admits the reluctance of the magazine to cover this issue in any kind of depth:

[A]s some readers have pointed out, either in praise or complaint, the war on terror has not been center stage in these pages. . . . In considering articles and reviews, we tend to shy away from subjects that are amply, and more or less adequately, addressed in other publications. Editing is an exercise in the art of discretion, and such judgment calls are eminently debatable; as, indeed, they are debated among the editors.

Richard John Neuhaus, *Internationalisms*, FIRST THINGS, Dec. 2004, at 64.

As we have seen, many religious thinkers who adopt a prophetic stance on torture see the abuses at Abu Ghraib as revealing something both important and disturbing about the American character. In contrast, for those who adopt a casuistical stance, the abuses at Abu Ghraib were essentially unfortunate anomalies. While deeply wrong and repulsive, they do not reveal anything of significance about the American moral character. An early example of this approach can be found in a column by George Weigel, titled *Abu Ghraib and Just War in Iraq*.¹⁵⁶ For Weigel, what is important is the *revulsion* that most Americans expressed at the revelations of the abuses of Iraqi prisoners, he writes: "If anything proves that America is not a Realpolitik country in which it's simply assumed that might makes right, it's the reaction to Abu Ghraib."¹⁵⁷ Weigel maintains that "no one knows the stain on military honor that Abu Ghraib represents better than the officers and enlisted personnel who believe they came to Iraq to liberate its people from a vicious dictatorship in which murder, rape, and torture were normal instruments of state policy, not aberrations."¹⁵⁸

Moreover, the casuists will not be as quick as the prophets to connect the Torture Memos, which were designed to justify a range of coercive interrogation techniques with respect to members of al-Qaeda and the Taliban, with the abuses that occurred at Abu Ghraib. A good example of this approach can be found in conservative journalist Heather Mac Donald's essays in *The City Journal*. In essence, Mac Donald maintains that Jay Bybee's August memo on the topic was at least two steps removed from the atrocities at Abu Ghraib. First, she argues that the memo was directed toward interrogations conducted by the *Central Intelligence Agency*; they "had nothing to do with the interrogation debates and experiments unfolding among *Pentagon* interrogators in Afghanistan and Cuba."¹⁵⁹ Second, she contends that the Pentagon's interrogation practices in Afghanistan and Cuba were also irrelevant to Abu Ghraib. She states:

The abuse at Abu Ghraib resulted from the Pentagon's failure to plan for any outcome of the Iraq invasion except the most rosy scenario, its failure to respond to the insurgency once it broke out, and its failure to keep military discipline from collapsing in the understaffed Abu Ghraib facility. Interrogation rules were beside the point.¹⁶⁰

156. See George Weigel, Op-Ed, *Abu Ghraib and Just War in Iraq*, DENVER CATH. REG., June 23, 2004, available at <http://www.archden.org/dcr/news.php?e=85&s=3&a=2065> (discussing purpose of any just war).

157. *Id.*

158. *Id.*

159. Heather Mac Donald, *How to Interrogate Terrorists*, CITY J., Winter 2005, at 24, 32.

160. *Id.*

In a second article, written in response to Marty Lederman's vigorous critique of her first article,¹⁶¹ Mac Donald expands her argument by citing the "Interrogation Rules of Engagement," which she maintains were "provided to all military interrogators and soldiers in Iraq."¹⁶² She argues that "[t]he abuse in Iraq resulted from a violation of the rules, not from compliance with them. Had interrogators and military guards followed the guidelines governing their behavior, none of the sadistic treatment of detainees would have occurred."¹⁶³

Whereas the prophets interpreted Abu Ghraib as revealing a fundamental flaw in the national character of the United States, the casuists attribute it to the grubby failures of uncontrolled and undisciplined individuals, whom Mac Donald refers to as the "grunts on the ground."¹⁶⁴ She writes:

Soldiers talked back to their superiors, refused to wear uniforms, operated prostitution and bootlegging rings, engaged in rampant and public sexual misbehavior, covered the facilities with graffiti, and indulged in drinking binges while on duty. The guards' brutal treatment of the prisoners was an extension of the chaos that already engulfed the prison.¹⁶⁵

From her casuistical perspective, the problem was not with American law or mores—the military interrogation manuals clearly prohibited the morally atrocious behavior engaged in by American soldiers at Abu Ghraib. The problem was with a small number of individuals whose characteristically human failings were undisciplined and uncontrolled in a way that facilitated those atrocities. Mac Donald's essays suggest that Abu Ghraib does not require Americans to examine their own moral values and commitments; it simply requires us to see that they are enforced with sufficient discipline among the young soldiers acting in our name.

What can the casuists make of the Torture Memos? It is important to emphasize that a casuist need not defend them *in toto*; indeed, it would be impossible for a casuist working within the resources of the Catholic Christian tradition to do so. While she does not draw explicitly upon religious sources in making her arguments, Heather Mac Donald's essays are instructive regarding how a casuistical argument might proceed. She explicitly distances herself from Jay Bybee's August 1, 2002 Memo, which focuses

161. See Posting of Marty Lederman to Balkinization Blog, <http://balkin.blogspot.com/2005/01/heather-macdonalds-dubious-counter.html> (Jan. 11, 2005, 13:47 EST) (critiquing Mac Donald's article *How to Interrogate Terrorists*).

162. Heather Mac Donald, *Heather Mac Donald Responds to Marty Lederman on Abu Ghraib and U.S. Interrogation Policies*, CITY J., Winter 2006, available at http://www.city-journal.org/html/eon_01_13_.html.

163. *Id.*

164. *Id.*

165. *Id.* For Marty Lederman's reply to Mac Donald's second essay, see Posting of Marty Lederman to Balkinization Blog, http://www.city-journal.org/html/eon_01_13_05hm2.html (Jan. 23, 2005, 23:31 EST).

on the nature and scope of international and national laws against torture.¹⁶⁶ At the same time, her analysis implicitly legitimates the two fundamental questions Bybee grappled with in that memo, together with his memo dated January 22, 2002.¹⁶⁷ First, what are the positive moral and legal obligations owed to members of groups such as al-Qaeda and the Taliban, which do not comply with the laws of war? With respect to this question, Mac Donald's argument concords with the argument of the January 22 memo, which maintained that the Geneva Conventions do not apply to al-Qaeda and Taliban detainees. She writes, "Were the United States to announce that terrorists would be protected under the Geneva Conventions, it would destroy any incentive our ruthless enemies have to comply with the laws of war."¹⁶⁸

Second, what are the moral limits of what we can do to such detainees in the course of interrogations designed to obtain potentially life-saving information from them? Subsidiary questions include what constitutes "torture" that is prohibited always and everywhere; what constitutes "inhumane treatment" that is generally prohibited, and what counts as a sufficiently pressing reason or set of reasons to engage in progressively more aggressive forms of interrogation. Mac Donald does not raise these questions in any systematic manner, let alone address them with any kind of precision. Yet her essays are clearly designed to precipitate their discussion. She argues:

[T]here is a huge gray area between the gold standard of POW treatment reserved for honorable opponents and torture, which consists of the intentional infliction of severe physical and mental pain. . . . To declare non-torturous stress off-limits for an enemy who plays by no rules and accords no respect to Western prisoners is folly.¹⁶⁹

166. See generally Bybee, *August 1 Memo*, *supra* note 118, (presenting views of U.S. Department of Justice regarding standards of conduct under Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment). She writes, for example, "In response to the CIA's request, Assistant Attorney General Jay S. Bybee produced a hair-raising memo that understandably caused widespread alarm." Mac Donald, *supra* note 159, at 32. While Mac Donald does not clearly articulate her objections to the memo, they appear to be, first, that Bybee's definition of torture is too stringent; and second, that Bybee argues that the president is not bound by either international treaties or American law in wartime. See *id.* (suggesting Bybee memo was irrelevant to what happened in Abu Ghraib).

167. See generally Bybee, *January 22 Memo*, *supra* note 117 (discussing application of treaties and laws to al Qaeda and Taliban Detainees).

168. Mac Donald, *supra* note 159, at 36.

169. *Id.* at 28.

5. *Torture, Prophets and Casuists*

What does the controversy over torture reveal about the relationship between prophecy and casuistry that was not revealed in the controversy over abortion? As I argue in more detail below, it reveals two fundamental aspects of that relationship. First, the Torture Memos exemplify how casuistry as a fundamental form of practical reasoning can be thoroughly distorted, so that it becomes nothing more than an attempt to rationalize a course of action already chosen for other reasons. Second, it reveals that prophetic voices do not always critique such distorted forms of casuistry; on occasion, they sometimes employ those distorted forms in order to clear away impediments to their own ends. It reveals, in other words, that the relationship between prophecy and casuistry is not only one of ineluctable opposition; there can also be a kind of guilty conscription.

The general refusal of the prophets to engage any of the administration's arguments about the applicability of the Geneva Conventions, or other facially relevant international or American law prohibiting torture is significant.¹⁷⁰ In time, once scholars have absorbed all the relevant legal memos, I believe, it will be transmuted into accusations that the highest members of the Bush legal team engaged in the sort of argumentative practices that give casuistry a bad name.¹⁷¹ Unfortunately for those of us who find much of value in the practice, there is no denying that the term "casuistry" has a pejorative connotation in common usage. A prominent internet dictionary defines "casuistry" as "[s]pecious or excessively subtle reasoning intended to rationalize or mislead."¹⁷² As Albert Jonsen and Stephen Toulmin observe in their history of casuistry, one citation for the word in the *Oxford English Dictionary* proclaims that "[c]asuistry destroys by

170. Some refused as well to be mollified by the Justice Department Memorandum reaffirming the responsibilities of the United States under the Geneva Conventions and the Conventions against Torture: "This memo should not be allowed to paper over an unprecedented national disgrace. From holding detainees incommunicado to torturing them for the purpose of gaining intelligence, the administration has taken a series of initiatives that violate fundamental freedoms, basic rights and essential human decencies." Editorial, *From Terror to Torture*, AMERICA, Jan. 31, 2005, at 3.

171. See Mark Shea, *Toying with Evil: May a Catholic Advocate Torture*, CRISIS, Mar. 2005, available at <http://www.crisismagazine.com/march2005/feature2.htm> (making similar point without using "casuistry" in article). "Different political ideologies tend to have different ways of finessing and nuancing what, in Catholic thinking, is more bluntly called 'mortal sin.'" *Id.* Criticizing the conservative writer Linda Chavez, Shea writes:

Chavez's stated purpose is to open "rational debate" about what does and does not constitute torture. . . . Is missing a meal torture? . . . That's a perfectly reasonable question and would certainly be beneficial—if that's where Chavez went with her article. . . . Instead she asks, "[I]f such methods are 'torture', is the United States justified in using them anyway?" Mark that: Even if it is torture, can we do it anyway?

Id.

172. Dictionary.com, Casuistry, <http://dictionary.reference.com/search?q=casuistry> (last visited May 23, 2006).

distinctions and exceptions all morality, and effaces the essential difference between right and wrong."¹⁷³

For those inclined to argue that the Torture Memos exemplify the pejorative meaning of casuistry, one particularly apt piece of evidence will be the manner in which Bybee developed his narrow definition of torture in the August 1, 2002 Memo.¹⁷⁴ The focus of this memo is the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, codified in American law by Sections 2340-2340A of Title 18 of the United States Code. As Bybee notes, "Section 2340A makes it a criminal offense for any person 'outside the United States [to] commit or attempt to commit torture.'"¹⁷⁵ He goes on to observe that Section 2340 defines an act of torture as an:

[A]ct committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.¹⁷⁶

But what counts as "severe physical or mental pain or suffering"? In order to answer this question, Bybee does not turn to other discussions of torture in international law or in the scholarly literature. Instead, he searches the *United States Code* for other instances of the isolated term "severe pain," finally finding what he is looking for in "statutes defining an emergency medical condition for the purpose of providing health benefits." Without a hint of irony, Bybee contends that "although these statutes address a substantially different subject from Section 2340, they are nonetheless helpful for understanding what constitutes severe physical pain." He argues that "[t]hese statutes suggest that 'severe pain,' as used in Section 2340, must rise to . . . the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions—in order to constitute torture."¹⁷⁷

But there is irony aplenty to be found in Bybee's analysis. The specific statutory provisions pertaining to an "emergency medical condition" cited by Bybee all pertain to the requirements that health care providers must meet in order to receive federal funding through the Medicare and Medicaid programs.¹⁷⁸ Taken together, these statutory provisions express

173. ALBERT R. JONSEN & STEPHEN TOULMIN, *THE ABUSE OF CASUISTRY* 12 (1988).

174. See Bybee, *August 1 Memo*, *supra* note 118, at 173 (noting mental pain or suffering must result in significant psychological harm or significant duration to amount to torture).

175. *Id.*

176. *Id.*

177. *Id.* at 176.

178. See *id.* (referring to statutory provisions which pertain to "emergency medical condition").

Congress's overarching concern to insure that no one in need of emergency medical treatment will be denied such treatment. This concern not only extends to enrollees in Medicare and Medicaid programs, but also to those who are unable to pay for such treatment, and even to illegal aliens.¹⁷⁹ Taken together, they express the conviction that the moral imperative to *alleviate* the severe physical suffering of another human being overrides other important national goals and policies. For Bybee to invoke these statutory provisions—without paying attention to their broader statutory context—in order to justify *the infliction* of severe physical suffering is deeply troubling, both morally and intellectually.

Consider what is perhaps the most well-known of the statutory provisions that he draws upon in developing his definition of “severe pain,” the Emergency Medical Treatment and Active Labor Act (EMTALA), codified at 42 U.S.C. § 1395dd. Colloquially known as the Anti-Dumping Law, EMTALA prohibits hospitals that have executed Medicare provider agreements from refusing to serve any patient who presents an “emergency medical condition” on the grounds that he or she does not have the financial means to pay for the emergency services provided.

In his exposition of the “Anti-Torture Law,” Bybee quotes a definition of “emergency medical condition” which reflects the statutes he cites, including the EMTALA. An “emergency medical condition” is a condition:

[M]anifesting itself by acute symptoms of sufficient severity (including *severe pain*) such that a prudent lay person, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate medical attention to result in—placing the health of the individual . . . (i) in serious jeopardy, (ii) serious impairment to bodily functions, or (iii) serious dysfunction to any bodily organ or part.¹⁸⁰

Based on the foregoing definition of “emergency medical condition” Bybee goes on to define “severe pain” for purpose of the anti-torture law as pain requiring that “[t]he victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or perma-

179. See *id.* (citing 8 U.S.C. § 1369(d) (2000)) (noting emergency medical condition includes condition manifesting symptoms of severe pain); see also 42 U.S.C. § 1395w-22(d)(3)(b) (2000) (same); 42 U.S.C. § 1395x(v)(1)(K)(ii) (2000) (same); 42 U.S.C. § 1395dd(e)(1)(A) (2000) (same); 42 U.S.C. § 1396b (v)(3) (2000) (same); 42 U.S.C. § 1396u-2(b)(2)(C) (2000) (same).

180. See Bybee, *August 1 Memo*, *supra* note 118, at 173 (quoting 42 U.S.C. § 1395w-22(d)(3)(b)). The definition in EMTALA at 42 U.S.C. § 1395dd(e)(1) is identical, save for the fact that it eliminates the phrase “such that a prudent lay person . . . could reasonably expect.” This omission is obviously necessary, since EMTALA places the burden on emergency room physicians, not on patients, to make the determination of whether an “emergency medical condition” exists.

nent damage resulting in a loss of significant bodily function will likely result.”¹⁸¹

So what are the problems with his casuistical analysis? First, it is logically flawed. “Severe pain” is not defined in EMTALA or in any of the other statutes he cites. It is one of the *defining criteria* of an “emergency medical condition.” From a logical perspective, the EMTALA provision followed in the structure of “If A (severe pain), then B (the elements of an emergency medical condition).” Bybee’s casuistry attempts to extend this analysis by reversal, by making a statement of the form: “If (and only if) B, then A.” As any graduate student in a first-year logic class would tell us, that extension-by-reversal is not warranted.

Second, even if we set its logical flaws aside, Bybee’s casuistical analysis is strikingly selective. In the relevant EMTALA provision, “severe pain” (A) triggered an “emergency medical condition” (B), which was defined to include not merely death, organ failure or serious impairment of bodily function, but also a condition placing the “health” of the person in serious jeopardy without immediate medical treatment. Not only did Bybee make the mistake of exhaustively defining a symptom (severe pain) in terms of a set of underlying medical problems that such pain might signal, he also conveniently omitted the mildest problem in the set—severe pain as an indication that one’s *health* was in serious jeopardy.

Third, and more broadly, Bybee seems immured to the particular ironies involved in evoking the terms of the Anti-Dumping Act in order to justify a narrower reading of the Anti-Torture Act. EMTALA explicitly included “severe pain” in the list of triggering conditions for an emergency medical condition in order to insure that no one in severe pain would be denied emergency medical treatment based upon inability to pay—even if the pain was unaccompanied by any other symptoms. The “severe pain” must be treated and controlled before a hospital can transfer the patient. It is ironic—indeed perversely so—to invoke federal legislation imposing an obligation to alleviate physical suffering in order to justify the infliction of physical suffering.

Some of the argumentation in the Torture Memos, therefore, exemplify the sort of distorted moral reasoning that tends to give casuistry a bad name. How do the authors defend their approach to moral and legal argumentation? A careful reading of the memos reveals that their ultimate form of self-justification is actually prophetic, not casuistical, in nature. Prophecy, in other words, distorts casuistry in order to make use of it for its own ends. More specifically, reading through the Torture Memos, it is clear that the authors understand the conflict between al-Qaeda and the United States in almost absolute terms. The legal analysis is undergirded by a portrayal of a conflict of fundamental moral values, highly characteristic of prophetic discourse, that propels their use of a distorted casuistry to

181. *Id.* at 183.

clear the way to employ any means necessary in fighting this enemy.¹⁸² Accordingly, the persuasive power in the Torture Memos does not come from the tortured legal analysis itself. Instead, it comes from the imperative for national survival against the threat of a ruthless and corrupt enemy, which the memos portray as inextricably linked to success in the War on Terror.¹⁸³

For example, consider the structure of Part V of the August 1, 2002 memo, in which Bybee posits a virtually limitless presidential power in prosecuting the War on Terror.¹⁸⁴ Part V, Section B and Part V, Section C defend this position with a number of arguments based on the structure of the relevant Supreme Court opinions and the text, as well as the structure, of the Constitution itself. Yet the burden of persuasion is actually carried by Part V, Section A, entitled "The War With al Qaeda."¹⁸⁵ Here, Bybee characterizes what is at stake. He does not tell his readers what would be gained by a decision to authorize a broader range of interrogation techniques; indeed, it is questionable whether techniques verging on torture are even effective means of obtaining information. Instead, he presents his readers with the specter of what might be lost if interrogators do not have all necessary means at their disposal—a devastating loss at the hands of an implacable enemy.

More specifically, Bybee begins by recounting the acts and objectives of al-Qaeda, most prominently including the attacks on September 11, 2001: "The United States and its overseas personnel and installations have been attacked as a result of [O]sama Bin Laden's call for a 'jihad against the U.S. government, because the U.S. government is unjust, criminal and

182. See Andrew Sullivan, *Atrocities in Plain Sight*, N.Y. TIMES, Jan. 13, 2005, § 7, at 1 (explaining that Abu Ghraib tortures were scandals done in "plain sight"). Andrew Sullivan attributes this sensibility to the nation as a whole, not merely to our leadership:

But in a democracy, the responsibility is also wider. Did those of us who fought so passionately for a ruthless war against terrorists give an unwitting green light to these abuses? Were we naive in believing that characterizing complex conflicts from Afghanistan to Iraq as a single simple war against "evil" might not filter down and lead to decisions that could dehumanize the enemy and lead to abuse? Did our conviction of our own rightness in this struggle make it hard for us to acknowledge when that good cause had become endangered? I fear that the answer to each of these questions is yes.

Id. at 6-7.

183. See Bush, *February 7 Memo*, *supra* note 134, at 134-35 (explaining imperative for national survival in face of enemy). In his memorandum declaring the inapplicability of the Geneva Conventions to al Qaeda and the Taliban, President Bush writes: "As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva." *Id.* (emphasis added).

184. See Bybee, *August 1 Memo*, *supra* note 118, at 200-07 (noting constitutional authority as Commander-in-Chief).

185. See *id.* at 200-02 (discussing what may be at stake if interrogators do not have all possible methods of interrogation at their disposal).

tyrannical.”¹⁸⁶ After detailing the American response to this threat, he notes that “[d]espite these efforts, numerous upper echelon leaders of al Qaeda and the Taliban, with access to active terrorist cells and other resources, remain at large. It has been reported that the al-Qaeda fighters are already drawing on a fresh flow of cash to rebuild their forces.”¹⁸⁷ Bybee then proceeds to suggest that engaging in aggressive, and possibly torturous, interrogation techniques may be necessary to preserve the nation itself:

Al Qaeda continues to plan further attacks, such as destroying American civilian airliners and killing American troops, which have fortunately been prevented. It is clear that bin Laden and his organization have conducted several violent attacks on the United States and its nationals, and that they seek to continue to do so. Thus, the capture and interrogation of such individuals is clearly imperative to our national security and defense. Interrogation of captured al Qaeda operatives may provide information concerning the nature of al Qaeda plans and the identities of its personnel, which may prove invaluable in preventing further direct attacks on the United States and its citizens. Given the massive destruction and loss of life caused by the September 11 attacks, it is reasonable to believe that information gained from al Qaeda personnel could prevent attacks of a similar (if not greater) magnitude from occurring in the United States.¹⁸⁸

Upon this basis, Bybee goes on to argue that the “President enjoys complete discretion in the exercise of his Commander-in-Chief authority and in conducting operations against hostile forces.”¹⁸⁹ Section 2340A’s anti-torture strictures ought to be construed in a way that does not impinge upon this discretion. Furthermore, any attempt on the part of Congress to limit the President’s power to control interrogation of enemy prisoners is constitutionally impermissible.¹⁹⁰ If interrogators acting pursuant to a presidential directive were to be charged with a violation of Section 2340A’s strictures, they might appropriately invoke the defenses of necessity or self-defense. “[T]he fact that previous al Qaeda attacks have had as their aim the deaths of American citizens, and that evidence of other plots have had a similar goal in mind, would justify proportionality

186. *Id.* at 200; *see also* Frontline, *Osama Bin Laden v. The U.S.: Edicts and Statements*, <http://www.pbs.org/wgbh/pages/frontline/shows/binladen/who/edicts.html> (last visited May 23, 2006) (compiling various statements of Osama bin Laden).

187. Bybee, *August 1, Memo*, at 201.

188. *Id.* at 201-02.

189. *Id.* at 202.

190. *See id.* at 203 (“Congress may no more regulate the President’s ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield.”).

of interrogation methods designed to elicit information to prevent such deaths."¹⁹¹

The normative substratum of Bybee's legal analysis presents al-Qaeda as a ruthless enemy of the United States that must be defeated at all costs. It is a prophetic substratum, resonating with those sections of the prophetic books commonly referred to as the "oracles against the nations."¹⁹² The prophets of Israel and Judah not only condemned their own people for faithlessness and moral ruin, they also chastised the pagan nations who were the enemies of the Jewish people. It is instructive, for example, to consider the oracles against Babylon in *Isaiah* and *Jeremiah*.¹⁹³ Consider the following passage from *Isaiah*, which is directed against the king of Babylon:

All the kings of the nation lie in glory, each in his own tomb;
But you are cast forth without burial, loathsome and corrupt,
Clothed as those slain at sword-point, a trampled corpse.
Going down to the pavement of the pit, you will never be one
with them in the grave.
For you have ruined your land, you have slain your people!

Let him not be named forever, that scion of an evil race!
Make ready to slaughter his sons for the guilt of their fathers;
Lest they rise and possess the earth, and fill the breadth of the
world with tyrants.¹⁹⁴

On the basis of the "severity of the critique," biblical scholar David L. Petersen argues that these verses against the king of Babylon were likely inspired by Babylon's total destruction of Judah (under King Nebuchad-

191. *Id.* at 211.

192. See, e.g., *Isaiah* 13-23 (revealing Isaiah's awareness of God's sovereignty of the nations); *Jeremiah* 46-51 (presenting prophecies against other nations); *Ezekiel* 25-32 (explaining divine judgment against the nations), *Amos* 1-2 (discussing judgment of Israel's neighbors for their sins). Contemporary biblical scholars take pains to point out how the oracles against the nations were shaped by those editing the canonical texts "to modify the negative attitude of these oracles and to open them up more favorable toward the nations." Carroll Stuhlmueller, *The Major Prophets, Baruch, and Lamentations*, in *THE CATHOLIC STUDY BIBLE*, RG 287, RG 329 (Donald Senior ed., 1990).

193. Jerusalem, the capital of Judah, fell to Nebuchadnezzar II, king of Babylon, in 586 B.C.E. The Temple and the city were destroyed, and many Jews were exiled to Babylon. Judah lost its status as a sovereign state and became a Babylonian province. The Babylonian exile was short-lived; in 539 B.C.E., Cyrus, king of Persia, conquered Babylon, allowed the Jews to return to Jerusalem, and facilitated the rebuilding of the Temple, which was completed in 515 B.C.E. See Philip J. King, *An Outline of Biblical History*, in *THE CATHOLIC STUDY BIBLE*, *supra* note 192, at RG 31, RG 31-34 (giving history of historical events in biblical times). But the intervention of the Persians did not bring political independence for the Jews, who did not reestablish political sovereignty over their biblical homeland until the birth of the state of Israel in 1948. See *id.* (outlining history of Jews' political sovereignty).

194. *Isaiah* 14:18-21.

nezzar) in the sixth century B.C.E.¹⁹⁵ Fifteen centuries later, the words aptly capture the underlying attitude of the Torture Memos toward Osama bin Laden and al-Qaeda. Bin Laden is a leader of a tightly knit organization bent on destruction of the United States; he is a "loathsome and corrupt" leader. We must be willing to deal harshly with his ideological "sons," "lest they rise and possess the earth, and fill the breadth of the world with tyrants."

In light of the prophetic "oracle against the nations" in section V-A, the strained legal and constitutional analysis in sections V-B and V-C become not only intelligible, but defensible. The President of the United States, must have unfettered discretion in making use of any means necessary to defeat this new "king of Babylon," Osama bin Laden. Sections V-B and V-C simply clear away the legal brambles that may hamper his "constitutional power to protect the security of the United States and the lives and safety of its people."¹⁹⁶

The fact that the distorted form of casuistry practiced by the Torture Memos is actually motivated by a prophetic world view gives us, I think, some insight into one of the reasons that some of torture's prophetic opponents choose not to parse the arguments and expose the false assumptions in the Torture Memos. If one's interlocutor is not actually engaged in casuistry, that is, in the honest exercise of practical reason in order to determine what is to be done in a particular case, then it makes no sense to offer a casuistical response to them. Effectively countering their arguments requires unmasking and critiquing the prophetic stance that motivates them.

The fact that the Torture Memos are helpfully understood as a case of prophets making (distorted) use of casuistical discourse for their own prophetic purposes leads us to ask whether the reverse can be the case: Do casuists make use of prophetic discourse for casuistical purpose? It appears that the answer to this question must be "yes." Some, if not all, of the prophets against torture are moved to adopt their position by a casuistical insight: This type of action, or class of actions, not entirely well defined, is completely inconsistent with human dignity, which must be given uncompromising protection.

As I noted above,¹⁹⁷ Roman Catholic casuistry recognizes a category of actions that one must never perform under any circumstance, the so-called "negative moral absolutes." An "intrinsically evil act" is wrong by reason of the agent's object in acting—the immediate purpose of his or her action. It is always wrong, for example, to act with the object of intentionally killing an innocent person, no matter what good may be obtained

195. DAVID PETERSON, *THE PROPHECIC LITERATURE* 57 (2002) (arguing that verses likely inspired by total destruction of Judah).

196. See Bybee, *August 1 Memo*, *supra* note 118, at 204.

197. For further discussion on negative moral absolutes as attributed to Roman Catholic teachings, see *supra* notes 114-15 and the accompanying text.

by doing so.¹⁹⁸ Casuists can and do dispute the specific characteristics an action must exhibit in order to fall into this category; their disputes revolve around how properly to describe the immediate object of a particular agent's action.¹⁹⁹ At the same time, an agent's recognition of the existence and force of these "negative moral absolutes" is understood as the precondition for the functioning of casuistry in a reliable and uncorrupted way. As Pope John Paul II writes in the encyclical *Veritatis Splendor*, "the human act depends upon its object, whether that object is *capable or not of being ordered* to God, to the One who "alone is good," and thus brings about the perfection of the person." Consequently, it is possible to see the prophets against torture as animated by the desire to protect a fundamental moral insight that serves as the basis for practical reasoning. This is by no means the abuse of prophecy by casuistry; in fact, I believe the purpose of prophetic discourse is precisely to protect the conditions for undistorted practical reasons. Nonetheless, anything that can be used can be abused.

The investigation of the use of prophetic discourse and the use of casuistical discourse in the context of the recent controversy over torture in the context of American interrogation of suspected terrorists reveals that both these forms of discourse can be distorted and misused. We saw, for example, that the Torture Memos exhibit the distorted form of moral reasoning that has historically given casuistry a bad name. There is no reason to think that prophecy cannot be misused in similar ways; the term "false prophet" suggests as much. It also reveals that the two forms of discourse are not hermetically sealed from one another. We saw, more specifically, that the use (or misuse) of casuistical discourse can be motivated by prophetic purposes, and casuists can respond with prophetic indignation when bedrock commitments of their system of practical reasoning are ignored or undermined. In the next section of this Essay, I will attempt to reflect more systematically and generally on the relationship between prophecy and casuistry.

198. It is important to remember by "innocent" the Catholic tradition does not mean "morally innocent," but rather a person who is not currently engaging in an act of aggression.

199. The "doctrine of double effect" recognizes that one can engage in an action that has two simultaneous effects, one good, and one bad. An act performed with the object of securing the bad effect would be intrinsically evil. Under some circumstances, however, it is licit to perform the action with two simultaneous effects, provided that one's aim or object in acting is to secure the good effect, and that one accepts the bad effect as foreseen but unintended side effect of the action. For example, one can licitly administer powerful pain medication to a cancer patient, acting with the object of alleviating great physical suffering, foreseeing but not intending that the medication will shorten the patient's life. Casuists do not always agree how to distinguish the "object" of the action—the agent's immediate purpose in acting—from a foreseen but unintended side effect.

IV. RELATING PROPHECY AND CASUISTRY

How, if at all, are prophetic discourse and casuistical discourse related? When is it appropriate to use one, rather than the other? In addressing these questions, I can only be programmatic. I will approach my topic obliquely, first by outlining four ways of relating prophetic discourse and casuistical discourse that I believe to be problematic, and secondly, by attempting to describe how prophecy and casuistry might relate to one another more fruitfully.

A. *Problematic Ways of Relating Prophetic Discourse and Casuistical Discourse*

There are in, my view, a number of unhelpful ways of relating casuistry and prophecy. Despite their differences, they share one general characteristic: they involve the attempt of one mode of moral discourse to conscript the other mode for its own purposes. Unhelpful ways of relating prophecy and casuistry, in other words, involve a wrongful subordination of one mode of discourse by the other mode of discourse, in a way that inevitably results in distortion. As we saw above, the Torture Memos are best understood as prophecy making use of a distorted form of casuistry for its own purposes. It is not only prophecy, however, that can misuse casuistry. As I briefly describe below, the reverse is also possible.

1. *Ways in Which Casuistry Misuses Prophetic Discourse*

Casuistry can misuse prophetic discourse by putting it on a pedestal. By relegating prophecy entirely to the realm of an ideal world, casuistry can dismiss its normative claims upon the world we live in here and now. The prophetic calls to do justice to the widow, the orphan and the stranger can be honored by the casuist as the pure norms that govern the kingdom of God, even as they are set to one side as too pure and too demanding for life in the kingdoms of this earth.

In a closely related move, casuistry can reduce prophecy to a moral admonition. The urgent demand of prophecy is politely paraphrased, its power reduced; it is turned into a true moral proposition and it is defanged. An example of this approach can be found in *Economic Justice for All*, the U.S. Catholic Bishops' Pastoral Letter on the Economy. It observes that:

[T]he substance of prophetic faith is proclaimed by Micah: "to do justice and to love kindness, and to walk humbly with your God" (Mic. 6:8). Biblical faith in general, and prophetic faith especially, insist that fidelity to the covenant joins obedience to God with reverence and concern for the neighbor.²⁰⁰

200. NAT'L CONFERENCE OF CATHOLIC BISHOPS, *ECONOMIC JUSTICE FOR ALL: PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY* ¶ 37 (1986).

All true, yet something important is lost in the translation. Consider this passage from the book of Isaiah:

The Lord rises to accuse,
standing to try his people.
The Lord enters into judgment
with his people's elders and princes:
It is you who have devoured the vineyard;
the loot wrested from the poor is in your houses.
What do you mean by crushing my people,
and grinding down the poor when they look to you?
Says the Lord, the God of hosts.
The Lord said:
Because the daughters of Zion are haughty,
and walk with necks outstretched,
ogling and mincing as they go,
their anklets tinkling with every step,
The Lord shall cover the scalps of Zion's
daughters with scabs,
and the Lord shall bare their heads.²⁰¹

The moral indictment of prophetic discourse cannot be separated from its rhetoric of indictment.

Third, practitioners of casuistry sometimes use prophecy as a step stool to bolster ideals that are not as unqualified or as impressive as they might wish. More specifically, casuistry is a type of practical reason; it considers what ought to be done in a particular case, given all the circumstances. Sometimes the decision reached by practical reason is less firmly grounded in the relevant principles, facts and circumstances, than the reasoner would like it to be. If one is tentative about one's assessment of key facts or circumstances, one ought to be correspondingly tentative about a course of action chosen on the basis of that assessment. Yet casuists can fear, sometimes reasonably, that any tentativeness in judgment on controversial political or moral issues will be exploited by the other side. Consequently, a strategically minded casuist might decide to play down the inescapably tentative character of their conclusions by drawing upon a prophetic interpretation of the situation.

In my judgment, some pro-life opponents to human embryonic stem cell research avail themselves of prophetic discourse to buttress the inherently debatable conclusions of a casuistical argument. More specifically, they invoke prophetic language to buttress their claim that such research is morally unacceptable because it involves the intentional destruction of human embryos, which is tantamount to the intentional killing of human persons, albeit very young ones. Archbishop Raymond Burke, for example, has recently denounced human embryonic stem cell research, argu-

201. *Isaiah* 3:13-17.

ing that to sign a petition in support of an initiative favoring such research "is to promote the culture of death which tragically besets our nation."²⁰² Outlined in syllogistic form, the basic pro-life argument runs as follows:

Major premise: Each and every living, individual, human being merits equal respect as a human person made in the image and likeness of God.

Minor premise: This entity is a living, individual human being.

Conclusion: This entity merits equal respect as a human person made in the image and likeness of God.

The moral insight of the pro-life argument is carried by its major premise. Pro-life Catholics believe it is morally unacceptable, for example, to say that a fetus or a newborn does not count as a human person because it is not yet capable of thought.²⁰³ It is equally morally unacceptable to say that persons in a persistent vegetative state no longer count as human beings, because they have irretrievably lost that capacity.²⁰⁴

The minor premise, however, entails a factual judgment. In most circumstances, common sense suffices to identify individual, living members of the species *homo sapiens*. But in order to determine the very beginning and the very end of an individuated human life, we need to draw heavily upon the best insights of biology and medicine. The decision when the biological life of individual human being comes to an end is in large part a scientific one, not a moral one.²⁰⁵ So too is the decision when an individuated human being comes into existence.

202. See Raymond L. Burke, *Safeguarding Human Life: The Very Beginning*, ST. LOUIS REVIEW ONLINE, Nov. 11, 2005, at Archbishop's Column, available at <http://www.stlouisreview.com/abpcolumn.php?abpid=9557> (last visited May 22, 2006) (arguing that human embryos are human beings); see also Tim Townsend, *Catholic Clergy Will Oppose Embryonic Stem Cell Research from the Pulpit*, ST. LOUIS POST-DISPATCH, Nov. 24, 2005 (explaining that Catholic priests will discourage parishioners from signing embryonic stem cell research petitions in their homilies).

203. See PETER SINGER, PRACTICAL ETHICS 138 (2d ed. 1993) (adopting this position and laying out moral arguments against abortion).

204. See, e.g., John Harris, *Euthanasia and the Value of Life*, and John Finnis, *A Philosophical Case Against Euthanasia*, in EUTHANASIA EXAMINED 6-35 (John Keown ed., 1995) (debating criteria for human personhood).

205. See PAUL RAMSEY, PATIENT AS PERSON 63-64 (2d ed. 2002)

No doubt there are various levels of death (clinical death, physiological death, organ death, cellular death). No doubt also life and death fall within the continuum of all life's processes. . . . These facts are not crucial when, in a medical ethical context we ask the meaning of life and death. This is, to ask when in the continuum of the beginning of life there is a human life among us, and when in the continuum of the dying process there is a life still among us who lays claim to the immunities, respect and protection which in ethics and/or by law are accorded by a man to a fellow man. Even if the "moment" of death is actually a span of time, pronouncement of death still has this significance: that we need some procedure for determining when a life is still with us, making its moral

As Archbishop Burke himself recognizes, the pro-life argument against embryonic stem cell research depends upon the scientific judgment that an individuated human being comes into existence at fertilization.²⁰⁶ Unfortunately, however, the available scientific evidence does not unequivocally support that judgment. Until it reaches the age of approximately fourteen days, the embryo can divide, creating two embryos through a process of asexual reproduction ("twinning"). It is also possible, but rarer, for two embryos to join together to constitute one embryo, through a process of "combination."²⁰⁷

These biological facts weaken the basis for saying that an individuated human being comes into being at the time of fertilization, because individuated human beings, who are mammals, do not reproduce asexually days after coming into existence, and because individuated human beings do not combine to form one human being. There is no question, of course, that the embryo is biologically human, in the sense that its component cells are not those of a plant or another animal. Yet more is required to constitute an entire individuated human being than the possession of living cells bearing a human genotype. Also required is a holistic, integrating organization with the prospect of maintaining a stable, individual identity through time. The possibilities of twinning and recombination raise doubts about whether the very early embryo has developed the stability and coherence of biological identity that justify calling it an individual human being.²⁰⁸

Those opposed to embryonic stem cell research are often reluctant to admit that the case for the status of the early embryo as an individuated human being is susceptible to questions that gave pause to giants in the

claims upon us, and when we stand instead in the presence of an unburied corpse.

Id. Ramsey goes on to state that: "No more should the definition of what death is be confused with the methods by which it shall be determined that death has occurred. One of these may undergo change without changing the other; or both may be revised in the light of contemporary knowledge." *Id.*

206. See Burke, *supra* note 202 ("The truth that the human embryo is a human being is not a matter of religious faith. It is a matter of biological science. Biology, and . . . embryology, teaches . . . that once fertilization (or a procedure which replaces fertilization like human cloning) takes place, a new human being comes into existence.").

207. See The President's Council on Bioethics, *Monitoring Stem Cell Research*, at 157-80 (2004), available at http://www.bioethics.gov/reports/stemcell/pcbe_final_version_monitoring_stem_cell_research.pdf (providing brief, helpful description of embryonic development).

208. Those who hold that the life of an individuated human being begins at fertilization have articulated responses to these objections. For a concise presentation of the arguments on both sides, see *id.* at 74-78. See also The President's Council on Bioethics, *Human Cloning and Human Dignity: An Ethical Inquiry*, at 133-38, 152-59 (2002), available at http://www.bioethics.gov/reports/cloningreport/pdbe_cloning_report.pdf (exploring possible moral dilemmas of cloning).

pro-life movement such as Paul Ramsey.²⁰⁹ At times, in fact, the rhetoric condemning embryonic stem cell research as the slaughter of innocent human beings is heightened, rather than qualified, despite the factual uncertainties.²¹⁰ Why? In my judgment, this is partly because of political wariness. Once opposition to human embryonic stem cell research becomes less about the concrete violation of the rights of particular human beings (i.e., the embryos), and more about the relatively abstract harms associated with exploiting the seeds of the next generation in a futile quest to escape death, the casuistical argument becomes harder to make in the public square. To counter the concrete appeal of the late Christopher Reeve, or Michael J. Fox to the benefits of stem cell research, some pro-life advocates believe they need the concrete appeal of other helpless, vulnerable human beings—which is no doubt why President Bush staged a photo opportunity with children born from frozen embryos.²¹¹

Nonetheless, I believe it is a mistake for those who read the biological data as supporting the position that an individuated human life begins at fertilization to resort to prophetic rhetoric in their response to those who read that data in a different way. It is one thing to put forward factual, casuistical arguments in favor of life beginning at fertilization; it is another thing entirely to say that anyone who is not persuaded by those factual, casuistical arguments is an advocate of the “culture of death.” This rhetoric of prophetic condemnation wrongfully obscures the fact that the dispute between the parties does not lie at the level of fundamental moral

209. See Paul Ramsey, *Abortion: A Review Article*, in *THREE ON ABORTION* 13 (1978) (discussing various arguments in contemporary abortion debate). Ramsey notes:

So in order to retain the belief that life begins at conception, [Germain] Grisez (*contra* Hellegers) adopts the view that “a certain number of human individuals . . . cease to be shortly after conception,” and at that point two others begin by asexual reproduction (p. 26). In the case of mosaics, Grisez relies on the fact that implantation cannot occur without definition of function, so long as the two morulae are distinct from each other they are distinct individuals, and “once combined the two cease to be as such and form one new individual”—like a “grafted plant.” With considerable astonishment we may ask whether any such “individuality” is the life we should respect and protect from conception. In trying to prove too much, Grisez has proved too little of ethical import.

Id. at 29-30 (quoting GERMAIN GRISEZ, *ABORTION: THE MYTHS, THE REALITIES, AND THE ARGUMENTS* 26 (1970)).

210. See, e.g., Matt Sande, *Embryo Destruction Bill Advances the Culture of Death*, MILWAUKEE J. SENTINEL, May 28, 2005, available at <http://www.jsonline.com/news/editorials/may05/329342.asp> (reporting on House of Representatives’ passage of Stem Cell Research Enhancement Act of 2005). “Last week, the U.S. House of Representatives shamefully disregarded the right to life of innocent human beings by passing a deadly measure that would fully rescind President Bush’s federal funding restrictions on human embryonic stem cell research.” *Id.*

211. See *President Bush Meets with Families of Adopted Frozen Embryo-Children*, LIFE SITE NEWS, May 25, 2005, <http://www.lifesite.net/ldn/2005/may/05052505.html> (reporting that Bush’s visits with parents who had adopted children at embryonic stage was part of his campaign against embryonic stem cell research).

commitments, but at the level of factual judgment on an obscure and difficult issue of human biology.

2. *Ways in Which Prophets Misuse Casuistical Discourse*

It is not only casuistry that misuses prophetic discourse; we can also find mirror-image situations in which prophets misuse casuistical discourse. First, prophets can deny that casuistry has any legitimate contribution to make to moral reflection at all. They can portray casuistry as a type of malignant rationalization, as a thin excuse for *realpolitik* in the domestic, national and international spheres of human existence. Very crude, divine, command theories of morality, which do not see themselves as relying in any way upon the frailties of human reason, can sometimes take this line in any explicit way. Obedience to God's command is set over and against attempting to find moral wisdom in the processes of discursive reason.

Second, and sometimes related, prophecy can at times attempt to subvert casuistry, taking its categories, grids, analogies and decision-making procedures, and employing them in a way which leads to the practical uselessness of the categories themselves—and which points toward a prophetic vista as the only possible alternative. For example, consider the debate between pacifists and just warriors. Although early Christians were pacifists, since the time of Constantine and the adoption of Christianity by the Roman Empire, a number of Christian thinkers have advocated the position that it may sometimes be just to wage war. Over the centuries, Christian political theorists developed the just war theory, which in its present form identifies seven criteria which should govern a just decision to go to war (*ius ad bellum*)²¹² and two criteria that should govern just conduct in the waging of war (*ius in bello*).²¹³

Some pacifists, however, have taken the just war criteria and turned them against themselves, interpreting the evidence in a way that would justify virtually no war that has been waged in the course of human history. An example of this approach can be found in the late Mennonite theologian John Howard Yoder's book, *When War Is Unjust: Being Honest in Just-War Thinking*.²¹⁴ A pacifist himself, Yoder sees this book as calling just war theorists to be true to the requirements of their own theory, as insisting that they resist the temptation to concoct rationalizations for decisions made by nation-states and governments to augment their own power and

212. The seven criteria are: 1) just cause, 2) competent authority, 3) comparative justice, 4) right intention, 5) last resort, 6) probability of success and 7) proportionality. NAT'L CONFERENCE OF CATHOLIC BISHOPS, *THE CHALLENGE OF PEACE: GOD'S PROMISE AND OUR RESPONSE* ¶ 85-100 (1983), available at <http://www.osjspm.org/cst/cp.htm>.

213. The two criteria are: 1) discrimination and 2) proportionality. *Id.* ¶ 101-10.

214. See JOHN HOWARD YODER, *WHEN WAR IS UNJUST: BEING HONEST IN JUST WAR THINKING* (2d ed. 1996).

influence.²¹⁵ And surely, just war theorists might profitably read his work for such purposes.

At the same time, however, it is clear that Yoder does not consistently treat just war theory as the channel for practical reason that he explicitly recognizes it to be.²¹⁶ Theoretically, he recognizes that it offers a structure in which Christians might legitimately grapple with the question of whether and in what respect a particular war is being waged justly. Practically, however, he treats it as if it were either (at best) a toothless construct of Christian moralists relegated to the ivory tower of academia,²¹⁷ or (at worst) a propaganda tool of politicians who proclaim their Christian commitments while actually practicing *realpolitik* in statecraft.²¹⁸ He concludes chapter 3, which discusses the evolution of the conduct of war from the Middle Ages to the present, with the following indictment:

Every one of the above changes [in war] is sufficient to make the application of the just-war tradition questionable. When taken cumulatively, they have hollowed out the tradition to little more than a shell. The words are still there, but the realities to which they apply escape almost entirely the discipline that used to be, if not effective, at least reasonably thinkable.²¹⁹

The bulk of *When War Is Unjust* is devoted to describing the uselessness of the just war theory in restraining the conduct of wars in the real world. Yoder expends very little effort outlining, and still less, trying to think with contemporary just war theorists as they ponder the changing circumstances of war in the real world. He does not, for example, grapple with the copious and detailed analysis expended by Paul Ramsey on pondering the application of the just war theory to conditions of the twentieth century warfare, including the challenges posed by the Viet Cong in

215. See *id.* at 3 (discussing position behind just-war theory).

The just war position is . . . the one most Christians say they take. But is that claim accurate? We shall observe that there is reason to doubt that it is. My task is to ask what it would really mean to take a just-war position. As an ecumenical contribution to the integrity and the self-esteem of my just-war interlocutors, I shall proceed to examine the credibility of the dominant tradition.

Id.

216. See *id.* at 7 (analyzing just-war tradition).

But before leaping to the basic question of credibility, we need a broader acquaintance with what the just-war tradition is about. The tradition is not merely a set of criteria to apply to a political situation. It is as well a culture, shaped by a long history of thought and application, which evolved along the way with more twists and turns than the popularizers or even the theologians tend to acknowledge.

Id.

217. See *id.* at 19-31 (asserting hollowness of just-war tradition).

218. See *id.* at 32-49 (describing historical use of just-war tradition by political leaders).

219. *Id.* at 30.

the Vietnam War.²²⁰ Precisely because he does not engage the actual engagement of just war criteria, his chapter entitled "Making the Tradition Credible" conveys the overwhelming impression, first, that little effort has been made to date by just war theorists and practitioners to apply the just war tradition honestly and fairly; and second, that a fair application of the just war tradition would rule out most if not all wars that have been waged throughout history.²²¹

In short, in this book, Yoder is turning casuistry to prophetic ends. In my judgment, his overall perception of the situation of just war theory is articulated in the preface:

Most people who hold to that view have not been pressed to think about it very critically, and many of those in fact believe (wrongly) that there is no other view. Some, as we shall see later, were in fact honoring its logic when in recent time they came to say that they reject it. Others who say they hold to it and use its vocabulary, do not in fact reason and act accordingly.²²²

He attempts to use just war theory against itself, functionally leaving a form of pacifism as the only available option, at least for self-professed Christians.²²³ Ultimately, however, Yoder's critique in *When War Is Unjust* is deceptive. His own case for pacifism is rooted not in the failure of just war theory but in his own commitment to the "war of the lamb," i.e., to the path of self-sacrifice and suffering freely accepted by Jesus Christ.²²⁴ His problem with the just war theory is ultimately its bedrock conviction that it can be right to engage in non-spiritual warfare in order to ameliorate an unjust situation. The basis of his critique, in other words, is ultimately both radical and prophetic.

Third, and finally, prophecy sometimes uses casuistry as a mere instrument to achieve its ends, just as casuistry sometimes uses prophecy in the

220. See PAUL RAMSEY, *THE JUST WAR: FORCE AND POLITICAL RESPONSIBILITY* 427-536 (Univ. Press of Am. 1983) (1968) (analyzing insurgency warfare in Vietnam). Yoder does, however, mention this work and other important works in his bibliography.

221. See YODER, *supra* note 214, at 71-80 (noting importance of spelling out implications of just-war tradition in order for theory to be respected).

222. *Id.*

223. See JOHN HOWARD YODER, *THE POLITICS OF JESUS: VICIT AGNUS NOSTER* (1972) (developing his own theologically grounded pacifism).

224. See *id.* at 240 (analogizing lambs being slain to execution of Jesus). The choice that [Jesus] made in rejecting the crown and accepting the cross was the commitment to such a degree of faithfulness to the character of divine love that he was willing for its sake to sacrifice "effectiveness." Usually it can be argued that from some other perspective or in some long view this renunciation of effectiveness was in fact a very effective thing to do. "If a man will lose his . . . life he shall find it." But this paradoxical possibility does not change the initially solid fact that Jesus thereby excluded any normative concern for any capacity to make sure that things would turn out right.

Id.

same manner. In some contexts, an explicitly prophetic voice is not likely to be either welcome or effective. For example, one such context is the legal realm, which is dominated by a casuistical approach, at least in the Anglo-American tradition. In the United States, the legal realm constructs an elaborate series of checks and balances upon political power, and places significant constraints upon the choice of means that any agent (e.g., an individual, a corporation or a governmental body or functionary) may select in order to achieve chosen ends. In such contexts, prophetic voices must apply casuistical tools instrumentally, in order to clear the way for them to give full allegiance to the prophetic vision. Assuming that George W. Bush and his advisors are indeed operating from the conviction that the West is engaged in a "clash of civilizations" with Islamic militancy, it becomes very plausible to view the Torture Memos as essentially a case of prophecy using casuistry—and in fact, as I argued above, as misusing casuistry—to remove the legal and moral barriers that impeded full compliance with their prophetic vision.

a. Toward a More Fruitful Relation Between Casuistry and Prophecy

Is there a way to move beyond the apparent impasse between casuistry and prophecy? What would moving around this impasse require? Can we articulate the conditions under which each mode of discourse is appropriate? It seems to me that in order to answer these questions, we need to take a step back, in an attempt to articulate the fundamental purposes of each mode of discourse.

What is the purpose of casuistry? Fundamentally, it is a form of practical reasoning. It is an effort to discern the appropriate course of action in the case at hand, in part by taking account of what has been judged the appropriate course of action in similar cases. Practical reasoning is our ordinary way of proceeding in the face of the countless decisions we must make every day—each of which, as Aquinas tells us, has moral implications. We deliberate about the decision facing us by describing the relevant particular facts and general situation, by framing the relevant moral principles and action guides and by comparing the case at hand to comparable cases faced by others or ourselves on previous occasions.

Because casuistry is a form of practical reasoning, those who hope to practice it well must possess the virtues characteristically associated with good practical reasoning. Chief among these, according to Aquinas (and Aristotle), is the virtue of prudence—right reason with respect to things to be done. In addition, Aquinas identifies three virtues closely associated with prudence as responsible for guiding these particular elements of the process of practical deliberation. *Euboulia* is the disposition to take good counsel, which includes not simply seeking advice from the right people, but providing oneself more generally with reliable information about all

relevant aspects of the decision which must be made.²²⁵ *Synesis* is the disposition of good judgment about particular practical matters; for Aquinas it consists in the cognitive power apprehending a thing just as it is in reality.²²⁶ Finally, *gnome* is the virtue of being able to recognize when one has a truly exceptional situation on one's hands.²²⁷

It is the practice of casuistry by one who is bereft of the necessary virtues that gives it a bad name. More specifically, in my judgment, there are two situations in which casuistry tends to go wrong. First, casuistry can be employed disingenuously, by which I mean that the one employing casuistical tools only appears to be engaged in a form of practical reasoning. In reality, such a person is not in fact committed to moral discernment and deliberation in this particular case, but is using their trappings to justify a decision that was reached on other grounds. I have argued above that prophets can misuse casuistical reasoning for such a purpose. They are not, however, the only culprits. Any of us can misuse casuistical reasoning when we attempt to rationalize *post hoc* a decision we have actually reached previously and purely on other grounds (e.g., fear, desire).

A second situation in which casuistry can go terribly wrong is when it is practiced by someone whose process of practical reasoning is distorted in a morally significant way. In such cases, unlike in the former class of cases, the practitioner of casuistry is genuinely attempting to employ practical reason in order to deliberate about a particular course of action. The attempt, however, is doomed from the start, because some aspect of the broad set of assumptions and perceptions which shape and guide the process of practical reasoning is skewed. Unfortunately, skewed assumptions and perceptions frequently do not remain localized in their effect; they have a way of infecting the whole of one's moral analysis. How, specifically, can the process of practical reasoning be morally distorted? In my view, answering this question requires particular attention to the virtues associated with prudence: *synesis*, *eboulia* and *gnome*.²²⁸ Agents who do not possess the virtue of *synesis* are not disposed to take good counsel, or more particularly to inform themselves about the relevant facts affecting the decision at hand. It is tempting to rely upon a familiar, comfortable version of "the way things are," rather than to incorporate the best available information into one's decision-making process. Agents who do not possess the virtue of *eboulia* are not disposed to perceive a situation just as it is in reality. In some cases, that can mean completely missing a fundamental

225. See SUMMA THEOLOGICA, *supra* note 40, pt. II-II, q. 51, art. 1. (defining *eboulia* as one virtue of prudence).

226. See *id.* pt. II-II, q. 51, art. 3 (defining *synesis* as one virtue of prudence).

227. See *id.* pt. II-II, q. 51, art. 4 (defining *gnome* as final virtue of prudence).

228. See *id.* arts. 1,3-4 (discussing three virtues connected with prudence). As Aquinas recognized, prudence and its associated virtues can be significantly eroded by sin. See *id.* pt. II-II, q. 53 (analyzing vices opposed to prudence). A full examination of how sin (both personal and social) corrodes moral perception is beyond the scope of this Essay.

component of the moral terrain—for example, failing to see that African-Americans are equal members of the human community.²²⁹ In other cases, it can mean appreciating the full ramifications of such a component. For example, for approximately a century, Virginia officially acknowledged the full humanity of African-Americans while failing to appreciate that their laws against miscegenation were inconsistent with that acknowledgment.²³⁰ Finally, agents who do not possess the virtue of *gnome* are not able accurately to identify a truly exceptional situation or to judge correctly what the exceptional nature of the situation does and does not justify them in doing. For example, it is important to recognize that being at war with another country creates an exceptional situation. While that exceptional situation may justify a decision not to return property or other resources that will be used in the enemy war effort,²³¹ it does not justify suspending the moral rule against intentional killing of the innocent.²³²

229. For a powerful account of a situation in which a morally flawed assumption pervasively infected casuistical reasoning, see JOHN T. NOONAN, JR., *THE ANTELOPE: THE ORDEAL OF THE RECAPTURED AFRICANS IN THE ADMINISTRATIONS OF JAMES MONROE AND JOHN QUINCY ADAMS* (1977) (chronicling fate of group of stolen slaves held captive on ship named *The Antelope*). After the ship was captured off the coast of Florida, an international dispute arose over the fate of the slaves, eventually ending up in the Supreme Court of the United States. See *id.* at 1. In his opinion for the Court, although Chief Justice Marshall admitted that slavery and the slave trade were contrary to the law of nature, he also found that they were prohibited by no positive national or international law—a decision which permitted the slaves to be classified as “property.” See *id.* at 111-12. The only question for the courts to determine was the monetary compensation deserved by the various claimants for the loss of such “property.” See *id.* at 113. It would be wrong to say that Marshall did not recognize the humanity of the slaves—in one sense, he clearly did. Yet he failed to allow that recognition to exert its proper influence in his reasoning process; he failed, in other words, to recognize what it would mean to honor that humanity in deciding the concrete legal dispute before him. In Noonan’s terms, one could say that the legal framework created masks (*personae*) that obscured the faces of the persons (*personae*) whose lives Marshall disposed of as chattel property. See JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW* (2d ed. 2002).

230. See *Loving v. Virginia*, 388 U.S. 1 (1967) (holding Virginia’s law barring interracial marriage unconstitutional).

231. See *SUMMA THEOLOGICA*, *supra* note 40, pt. II-II, q. 51, art. 4. (distinguishing between virtues of *synesis* and *gnome*).

Now it happens sometimes that something has to be done which is not covered by the common rules of actions, for instance in the case of the enemy of one’s country, when it would be wrong to give him back his deposit, or in other similar cases. Hence it is necessary to judge of such matters according to higher principle than the common laws, according to which *synesis* judges: and corresponding to such higher principles it is necessary to have a higher virtue of judgment, which is called *gnome*, and which denotes a certain discrimination in judgment.

Id.

232. See *id.* pt. II-II, q. 64, art. 6. (stating that “it is in no way lawful to slay the innocent”). But note that Aquinas admits that under certain circumstances, a judge must pronounce sentence and an executioner must carry out the sentence against an innocent man. See *id.* The judge “does not sin if he pronounce sen-

We cannot do without casuistry or practical reasoning about what to do in concrete cases. Moreover, we cannot deny the significant potential for casuistry to go deeply awry, in the ways that I described above, as well as in other ways. What is the remedy? In my view, the remedy is prophecy. In order to explain how this can be the case, we need to consider the function of prophecy, especially with respect to practical reason.

One thing we may say for certain. Whatever else prophecy may be, it is essentially *not* practical reasoning. Turning first to the biblical prophets as a touchstone, it is clear that the *sole* qualification for being a prophet is being called by God to prophecy. Philosophical acumen and practical wisdom are not job requirements for prophets.²³³ Prophets do not in the first instance use practical reason to deliberate about the content of their prophetic utterances; they respond to God's command regarding that content.

What about the audience? The fundamental response which the prophet seeks to evoke in his audience is obedience—he urges them to comply with God's demand. A prophet does not encourage his audience to pay attention to the dictates of their own practical reason; it is by following those (mistaken) dictates that they have strayed so far from compliance with divine will. The audience's sole task is to decide whether the person claiming the mantle of a prophet is in fact who he claims to be. Once that decision is made affirmatively, the need for practical reasoning is diminished, if not entirely eliminated, with respect to the subject matter of the prophecy. One does not quibble with the word of God—one obeys it.

More specifically, the characteristic responses to a prophet involve *either* obedience (if he is accepted as a true prophet) *or* what amounts to an *ad hominem* attack (if he is rejected as a false prophet). In either case, a deliberative conversation oriented toward action—reasoning together about what is to be done—is not possible. More specifically, accepting a person as a true prophet entails admitting that he is reliably transmitting a message from God; there is consequently no room to negotiate, and no reason to introduce additional considerations, which could only dilute one's commitment to following the divinely mandated course of action. Compliance, not deliberation and discussion, is the order of the day. In contrast, rejecting a prophet's message inevitably entails rejecting him—or at least a crucial part of his avowed identity. Repudiating the self-pro-

tence in accordance with the evidence, for it is not he that puts the innocent man to death, but they who stated him to be guilty." *Id.* Reply Obj. 3. This is an attempt at a deeper understanding of what it means—and what it does not mean—to "slay the innocent."

233. For example, the prophet Amos was a breeder of livestock and a tender of mulberry figs. See Michael L. Barré, *Amos*, in *THE NEW JEROME BIBLICAL COMMENTARY* 209, 209 (1990). Jeremiah was a native of a small village and "heir of a declassified priesthood"—he was likely viewed as a marginal figure by those in Jerusalem. See DAVID L. PETERSEN, *THE PROPHETIC LITERATURE: AN INTRODUCTION* 98 (2002).

claimed message entails denying his claim to be a faithful and accurate messenger of God. In so doing, one implicitly suggests that he is either a liar or deeply self-deceived. The purported prophet will be reluctant to pursue a discussion with interlocutors whom he believes to be attacking his character and/or mental stability, while the interlocutors will not likely believe it worthwhile to engage in prolonged discussion with someone they believe to be duplicitous or unbalanced.

Of course, not everyone who employs prophetic discourse claims to be a true prophet, in the sense of claiming literally to be delivering a message from God. Nonetheless, it strikes me that those who invoke prophetic rhetoric to address a particular issue create the very same limitations on discourse that are created by the biblical prophets. This fact should not be surprising; while those availing themselves of prophetic rhetoric may not claim to be delivering a message from God word-for-word, they frequently do claim to be proclaiming God's unequivocal will about a particular matter facing their society. The line between being a messenger of God, on the one hand, and standing in the tradition of the messengers of God, on the other, is not as sharp as one might think.²³⁴

As I emphasized earlier in this Essay, few of those who employ prophetic discourse in our own time claim literally to be prophets. In fact, such a claim would be looked upon with great suspicion by most Christian communities.²³⁵ Yet the nature and function of prophetic discourse is much the same, whether it is employed by true prophets or by those who aspire to stand in their footsteps. This is the case because the fundamental point of the message preserved in the prophetic books of Scripture is not innovative; it is essentially conservative. Generally and characteristically, the Hebrew prophets called upon members of their community to reaffirm their fundamental commitments and their fundamental values, even as they confronted the challenges of new situations. Because God's consistency renders those commitments and values unchangeable, one does not need to be the recipient of a direct message from God in order to avail oneself of prophetic themes and tropes in order to confront the moral cancer afflicting one's community.

234. See ABRAHAM J. HESCHEL, *THE PROPHETS* xxii (2001) (introducing his discussion of prophets). Abraham Joshua Heschel reminds us that even the biblical prophets did not mechanically transmit God's word in a manner that eliminated their own personal agency:

The prophet is a person, not a microphone. He is endowed with a mission, with the power of a word not his own that accounts for his greatness—but also with temperament, concern, character, and individuality. As there was no resisting the impact of divine inspiration, so at times there was no resisting the vortex of his own temperament. The word of God reverberated in the voice of man.

Id.

235. KARL RAHNER, *FOUNDATIONS OF CHRISTIAN FAITH* Ch. VI (1982) (noting that Jesus understood himself as "final prophet"). Thus, any modern prophet likely would be received with great skepticism.

If prophecy is decidedly not practical reason, how should we describe its relationship with practical reason? In my view, it should be viewed as a kind of moral chemotherapy. It is a brutal but necessary response to aggressive forms of moral cancer, whose uncontrolled growth threatens to corrupt practical reasoning, and ultimately to destroy the very possibility of it. More specifically, as I argued above, practical reasoning in general and casuistry in particular can go wrong in a number of ways. It can be practiced in a disingenuous manner; it can be practiced with distorted assumptions about the nature of reality, or with skewed perception of the importance of the moral values at stake.

If severe enough, these distorted assumptions and skewed perceptions plague moral reasoning like a cancer, causing it to develop and unfold in deeply distorted ways. Prophetic rhetoric aims its destructive force at the moral cancer, with the ultimate goal of restoring the possibility of the healthy exercise of practical reasoning. How does it function? By destroying the diseased moral reasoning and promoting healthy re-growth, based upon a secure connection with fundamental religious and moral truths, which alone can serve as the basis for sound practical reasoning.

Again, it is instructive to turn to the biblical prophets for concrete examples. When they chastise the Jewish people, they do so primarily because of Israel's faithlessness, calling upon their fellows to recover the constitutive elements of their identity, particularly the primacy and exclusiveness of the relationship between Yahweh and Israel. The terms of that relationship are articulated most fully in the covenant given to Moses on Mount Sinai. Although the Hebrew prophets focus a significant amount of attention on individual actions or classes of action that exemplify the faithlessness of the Jews to Yahweh, they characteristically do not view them as the locus of the exercise of practical reason. Instead, they see them as the symptoms of a moral and spiritual disease which must be eliminated at the root.

For example, the biblical prophets regularly preached against idolatry as the root of all evils suffered and committed by the Israelites. By committing idolatry, the Israelites did not merely raise the suspicion that their practical reasoning was flawed in a localized or occasional manner. Instead, they conclusively demonstrated that they did not even possess the necessary preconditions for the reliable exercise of practical reason. By committing idolatry, the Israelites manifested the fact that they had obliterated their consciousness of Yahweh's very identity as the one true God, and of their own identity as Yahweh's Chosen People.

The Book of Hosea furnishes a good case study. As Abraham Joshua Heschel notes, during the time of that prophet (the mid-eighth century B.C.E.), the people of the Northern Kingdom of Israel worshiped in the Canaanite cult of Baal, without entirely abandoning the worship of

Yahweh.²³⁶ Hosea depicted Israel's lack of faithfulness to the one true God as a type of adultery. He vividly evokes Yahweh's hurt and anger at this betrayal, as well as Yahweh's enduring desire for reconciliation with His people. The vividness of Hosea's language is attributable in part to the prophet's own agonized experience of marriage to his beloved but serially unfaithful wife Gomer, whom God commanded him to marry.²³⁷

Consider, for instance, this passage, in which Yahweh expresses his rage at his people for their betrayal:

I am the Lord your God
 From the land of Egypt;
 You know no God but Me,
 And besides Me there is no savior.
 It as I who knew you in the wilderness,
 In the land of drought;
 But when they had fed to the full,
 They were filled, and their heart was lifted up;
 Therefore they forgot Me.
 So I will be to them like a lion,
 Like a leopard I will lurk beside the way.
 I will fall upon them like a bear robbed of her cubs,
 I will tear open their breast,
 And there I will devour them like a lion,
 as a wild beast would rend them.²³⁸

Understandably, in this context, Hosea evinces no interest in discerning the finer points of what precisely constitutes "idolatry." Such a discussion would presume the ability of the participants to engage in an undistorted form of practical reasoning, the very ability which had been destroyed by the Israelites' indifference to the exclusiveness of the claims of the one true God. In another time and place, however, such a casuistical discussion would not be out of order, as St. Paul's nuanced discussion of eating meat sacrificed to idols indicates.²³⁹

236. See HESCHEL, *supra* note 234, at 55-58 (describing religious affiliation of Israelites when Hosea was prophet).

237. See *Hosea* 1:2-3 (describing Hosea's wife and children).

238. *Hosea* 13:4-8 (describing God's judgment on Israel).

239. See *1 Corinthians* 8:4-9 (describing treatment of idols).

So about the eating of meat sacrificed to idols: we know that "there is no idol in the world," and that "there is no God but one." Indeed, even though there are so-called gods in heaven and on earth (there are, to be sure, many "gods" and many "lords") yet for us there is one God, the father, from whom all things are and for whom we exist, and one Lord, Jesus Christ, through whom all things are and through whom we exist. But not all have this knowledge. There are some who have been so used to idolatry up until now that, when they eat meat sacrificed to idols, their conscience, which is weak, is defiled. Now food will not bring us closer to God. We are now worse if we do not eat, nor are we better off if we do.

Chemotherapy can be dangerous. It kills healthy cells as well as diseased ones. In order to improve the overall health of the patient, therefore, it must be used both accurately and sparingly. So, too, must the moral chemotherapy of prophetic discourse. More specifically, as I argued above, the use of prophetic language in a particular context disrupts the normal functioning of a deliberative community. It renders the normal interactions of mutual reason-giving impossible because the audience's only avenues of response to a prophetic statement are either to acquiesce in the prophet's demands or to engage in what amounts to an *ad hominem* attack. Those considering whether to use such language, therefore, have to decide whether the prospect of disrupting normal communal deliberations in order to reconstitute them on a sounder basis is worth the price of the concomitant destruction to the social fabric.

In particular, prospective prophets need to remember that not every moral-practical disagreement signals the breakdown of the conditions for the possibility of practical reasoning. Furthermore, they also need to pay attention to the root sources of important and neuralgic moral-practical disagreements. For example, it is one thing to be opposed to welfare programs because the poor are not worthy of our assistance; it is quite another to be opposed to them because one does not believe they actually assist the poor. The former position is inconsistent with a basic Christian world view, the latter position is not, whether or not it is ultimately correct. Those involved in ordinary disputes of practical reason need to resist the temptation to achieve premature closure by invoking prophetic discourse.

Finally, in my judgment, those who would avail themselves of prophetic rhetoric would do well to consider how they themselves will preserve a sense of solidarity with those against whom they direct their criticism. The biblical prophets did not chastise the people of Israel or Judah from an isolated position of moral supremacy; ultimately, they saw themselves as belonging to the group of people whom they called to account. Not infrequently, the prophets begged God to turn aside His anger and to have mercy upon the people.²⁴⁰ The motivation of the prophets is ultimately constructive, not destructive: by calling their society back to its fundamental principles, they aim to create a situation of justice, peace and social harmony.²⁴¹ Even the harshness of the oracles against the nations,

But make sure that this liberty of your in no way becomes a stumbling block to the weak.

Id.

240. See *Amos* 7:1-3 (describing Amos begging God to have mercy on Jacob). This is what the Lord God showed me: He was forming a locust swarm when the late growth began to come up (the late growth after the king's mowing). When they were eating all the grass in the land, I said: Forgive, O Lord God! How can Jacob stand? He is so small! And the Lord repented of this: "It shall not be," said the Lord God.

Id.

241. See *Isaiah* 49:14-18 (recounting God's refusal to forget children of Israel)

which are directed against Israel's enemies, is tempered by a vision of the whole world united in peaceful worship of the one true God.²⁴²

V. CONCLUSION

In this Essay, I have explored the intersection between moral stance and moral rhetoric. More specifically, taking as my case studies the long-controversial issue of abortion as well as the emerging controversy of torture, I have argued that moral questions can be addressed in at least two ways: by deploying the sometimes intricate form of practical reasoning known as casuistry, and by invoking the clear and absolute call to rectitude of the prophets. In my view, contemporary social fissures on issues such as abortion and torture are as much attributable to conflicts in rhetorical style as they are to substantive moral disagreement.

After introducing my topic in Section I, I attempted to define prophecy and casuistry in Section II, as well as to articulate in preliminary form some of the potential tensions between the two forms of discourse. In Section III, the heart of the Essay, I first explained why both abortion and torture are issues ripe for the development of controversy between prophets and casuists who share the same underlying moral and religious world view. I then proceeded to identify and examine the clash between prophets and casuists over abortion and torture, as those issues presented themselves in the context of the 2004 presidential election. This examination not only revealed how each form of discourse operates by itself in the context of a concrete controversy, it also revealed something of how the two forms interrelate. In particular, examination of the abortion controversy suggests that prophets on one side of a social issue may experience more respect for prophets on the other side of that issue than with casuists on their own side. Conversely, the respect that casuists frequently express for the moral purity of prophets quickly turns to impatience when the casuists are confronted with what they believe to be un-nuanced and impractical prophetic demands. Examination of recent discussions of tor-

But Zion said, "The Lord has forsaken me; My lord has forgotten me." Can a mother forget her infant, be without tenderness for the child of her womb? Even should she forget, I will never forget you. See, upon the palms of my hands I have written your name; your walls are ever before me. Your builders make haste, as those who tore you down, and lade you waste go forth from you; Look about and see, they are all gathering and coming to you. As I live, says the Lord, you shall be arrayed with them all as with adornments, like a bride you shall fasten them on you.

Id.

242. See *Isaiah* 66:18, 20 (containing Isaiah's prophecy that people of Israel would endure).

I come to gather nations of every language; they shall come and see my glory They shall bring all your brethren from all the nations as an offering to the Lord, on horses and in chariots, in carts, upon mules and dromedaries, to Jerusalem, my holy mountain, says the Lord, just as the Israelites bring their offerings to the house of the Lord in clean vessels.

Id.

ture reveals another crucial point—it is a mistake to present prophecy and casuistry as forms of discourse that are hermetically sealed from one another. More specifically, close analysis of one of the Torture Memos showed the use of a debased form of casuistry in order to further ends that are best understood in prophetic terms.

Section IV reflected more generally on the relationship between prophecy and casuistry. Building upon Section III's recognition that prophecy can misuse casuistry, I attempted to identify a number of ways in which each form of discourse can fail to respect the other, in essence by treating it as a means to its own ends. I then began to articulate a more positive vision of the dynamics of moral discourse which would incorporate both prophecy and casuistry, each in its rightful place. More specifically, I suggested that casuistry—as practical reasoning—is our basic moral language. It provides the framework for the countless decisions we make every day, which can have a range of implications on our moral life. Prophecy is by its very nature an extraordinary form of moral discourse; its purpose is not to replace casuistry, but to correct its course. Prophecy, I maintained, functions like a type of "moral chemotherapy"; it takes aim at morally cancerous assumptions or perspectives on reality that threaten to destroy the possibility of reliable practical reasoning within a particular community at a particular time. Like chemotherapy, prophecy is inherently destructive, but in service of an ultimately constructive purpose: prophecy's goal is the reestablishment of the possibility of a healthy, functioning context for moral deliberation and decision. Furthermore, the destructive aspects of prophetic discourse are not negligible, any more than are the deleterious effects of an intensive course of chemotherapy. Those considering whether or not to invoke prophetic discourse to make their point in a particular instance would do well to consider whether the cure will cause more harm than the disease.

In short, the thesis of this Essay has been that moral discourse in our society is nearly as much about style as about substance. To put it another way, I have argued that the choice of style of moral discourse is actually a substantive moral question. Moreover, it is a moral question that cuts across religious and political ideology. As I hope to have demonstrated, those who are religiously and politically conservative are more inclined to invoke prophetic language in their approach to voting for pro-choice politicians, while those of a more religiously and politically liberal bent are more likely to be prophetic about the question of torture in order to obtain information regarding suspected terrorists. The very idea of conservatives being prophetic may seem unnerving to those whose framework for moral debate was framed in the crucible of the 1960s, where religious and social progressives dominated in the use of prophetic rhetoric. Yet as James Darsey has demonstrated, the social and political history of the United States demonstrates that conservatives are no less likely than liberals to invoke the fiery rhetorical style of the biblical prophets to make their

point.²⁴³ In my judgment, they are also no less likely than liberals to deploy prophetic rhetoric without thinking through the ramifications of so doing.

We cannot do without practical reasoning or casuistry; it is the day-to-day substance of our moral lives. We also cannot do without prophecy, which calls practical reasoning into account when it has gone terribly wrong. But what calls prophecy into account? There are, after all, false prophets, and by extension, deliberately or innocently misguided invocations of prophetic rhetoric. One cannot reason with a false prophet any more than with a true prophet. Except under special circumstances, one cannot launch a counter-prophecy without thoroughly overheating the context for moral discussion. One can, however, create distance for oneself—and for one's audience—from a prophet by invoking the rhetoric of irony. In *A Dictionary of Modern English Usage*, H.W. Fowler claims that “[i]rony is a form of utterance that postulates a double audience, consisting of one party that hearing shall hear & shall not understand, & another party that, when more is meant than meets the ear, is aware, both of that more & of the outsiders' incomprehension.”²⁴⁴ In other words, through the use of irony, one can create a context in which the false prophet's message is prevented from having a broad effect. The false prophet, who presents himself or herself as someone with unusually deep understanding of a moral issue, is treated by the practitioner of irony—and by the community—as someone who “shall hear and not understand.” By so doing, the community reestablishes the basis for its moral deliberation, i.e., its casuistry, without the interference of the false prophet. But the use of irony to control prophecy is a topic for another day.

243. See generally JAMES DARSEY, *THE PROPHETIC TRADITION AND RADICAL RHETORIC IN AMERICA* (1997).

244. H.W. FOWLER, *A DICTIONARY OF MODERN ENGLISH USAGE* 295 (1926) (defining irony).

