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Changing Moralities

*Shifts in American Attitudes and Law in the “Moral Values” Debate*

There is a religious war going on in our country for the soul of America. It is a cultural war, as critical to the kind of nation we will one day be as was the Cold War itself.

—Patrick Buchanan, 1992 Republican National Convention

It’s not blue state versus red state after all, but more like blue urban versus red rural, skyscraper versus church house, Chez Panisse versus Denny’s. That is to say, it’s all about population density, cultural hub, all about the much-touted “redneck revenge” on the “liberal elite” for unleashing, I suppose, small European cars and artisan cheese and “Queer Eye” and “The West Wing” on them without their express written consent. It is, in short, all about Retro vs. Metro.

—Mark Morford, “Down with Fancy Book Learnin’: What’s It Mean That the Big Cities and College Towns of America All Voted Blue?” (2004)

*November 2004: Return to “Values”?*

American liberals could be forgiven for thinking that indeed things had turned screwy—or scary—in 2004. Everywhere one turned after the presidential elections of 2004, the Reverend Jerry Falwell was pronouncing the meaning of the election, and why George W. Bush was returned to office. Falwell, who many may have thought had flamed out with his intense and uncompromising conservative religious positions and ubiquitous media role since the Reagan years, was all over the airwaves. One night, he was explaining to Chris Matthews on MSNBC’s
show *Hardball* the failings of an ad campaign by the United Church of Christ, a liberal Protestant denomination, that depicted a church open to gays and lesbians—insinuating to Falwell that evangelical churches in America were bigoted.¹ Another night he was debating on *Meet the Press* with progressive Christian minister Jim Wallis about the role of religion, politics, law, and society.²

The rush to engage Falwell, Dr. James Dobson, and other leading lights of the Christian Right as interpreters of the American public’s shift in attitudes related to politics in general and the law and personal morality in particular was a result of one frame the media had quickly placed on the 2004 election results.

This strong theme that was being trumpeted in the media was the importance of “values,” the result of exit polls taken on election day: As the *New York Times* reported:

In the survey, a striking portrait of one influential group emerged—that of a traditional, church-going electorate that leans conservative on social issues and strongly backed Mr. Bush. . . . Bush appealed overwhelmingly to voters on terrorism and to many others on his ability to handle the economy. But what gave him the edge in the election, which he won 51 percent to 48 percent, was a perceived sense of morality and traditional values.³

The election results were not necessarily a surprise to those who had worried throughout 2004 whether or not the Democrats had a “church gap.” Still, a progressive could be dismayed that such strutting by the Christian Right came so soon after what some progressives referred to as an unusual trifecta in the “gotcha” category of politics: who could have predicted that 2003 would have seen conservative author and former drug czar and cabinet secretary Bill Bennett exposed as an inveterate gambler who lost hundreds of thousands of dollars in video poker in Nevada and New Jersey? Or that conservative radio host Rush Limbaugh would be admitted to treatment with a drug problem centering on illegally obtained painkillers? Or that segregationist favorite and longtime U.S. senator Strom Thurmond was disclosed to have fathered a child with an African American woman?

What had happened?

Was this a sign of the continued vitality of the “culture wars,” twenty years after that term had first been used? And maybe this was
also a sign of the “stealth” nature of the network of Christian conservatives, a factor especially in previous local elections.

Was this a continuation of the conservative mobilization that had followed the sex scandal of Bill Clinton? Sexual behavior had been a major component of the Clinton era scandals and had contributed in no small part to the right’s coalescence on abstinence, zero tolerance, and the ascendance of other traditional values in the broader political debate.

Was this a very specific backlash to the issue of gay marriage, which had been raised by the decision of the Massachusetts Supreme Court in 2003, the Supreme Court antisodomy decision in 2003, and the extra-legal marriages performed in San Francisco and other cities in 2004? A spokesman for the National Gay and Lesbian Task Force had commented on how the Supreme Court decision in Lawrence offered both promise and peril for those advocating equality for gays and lesbians. Certainly, the image of eleven states easily voting in defense of marriage acts (DOMAs) in November 2004, while not necessarily determinative of the Electoral College outcomes, speaks to this backlash.

Was this a continuing example of false consciousness, as raised so effectively by historian Thomas Frank in What’s the Matter with Kansas?, that led working-class evangelical Protestants to collaborate in their own economic demise by joining forces with a coalition of corporate power and social conservatives in the Republican Party? As Frank wrote: “As a formula for holding together a dominant political coalition, the backlash seems so improbable and so self-contradictory that liberal observers often have trouble believing it is actually happening.” Is there anything that progressives could take heart from in the 2004 results? Something had happened, but what?

This book will argue that there is much more consensus on moderate views among the American public on public policy toward issues of law and personal morality—where the “family values” come into debate. In fact, Americans are more “purple” than “red” or “blue” on many of these values issues. Activists care deeply about such issues—on either side of the debates—and political strategists find ways to use these beliefs to achieve success in political campaigns on the margins. Moreover, over the past thirty years America has incrementally liberalized its laws and attitudes across the range of these issues and has even seen new “combustible” issues emerge (assisted suicide and stem cell research, which are discussed in chapters 5 and 6, respectively). We argue:
1. The importance of the “values voters” was overstated, but they remain a vital force;
2. Americans have a more moderate—and tolerant—approach toward a range of policies in the personal morality area;
3. Not all persons of faith are conservative, but the marriage of secularization and religiosity is a confounding one

In this book, we analyze events and lawmaking across these several arenas of the culture war between 2004 and 2006 and present a counterinterpretation to the “values voters frame” of 2004. We end with an assessment of where America stands in 2007 after a few years of discussion and debate, use and abuse of “wedge issues,” and accusations of misplaced emphasis and false consciousness. We also present our thoughts on the nature of lawmaking in this complicated area and how the American consideration of legal changes in the area of “victimless crime” has changed in various ways since the concept was first introduced forty years ago.

We should explain the title of the book. The use of the word “sin” here is meant to convey the complexity and duality of the subjects of law and morality we address inside. In one use of the term, a Catholic priest encourages a penitent in confession (or the now renamed “sacrament of reconciliation”) to “go and sin no more,” with the understanding that the individual has transgressed and should now try to stay on the straight path. The second sense in which we use the term—and that which cuts against the first use—is in signifying that an activity, like abortion or same-sex relations, is no longer considered a “sin” by many. While ultimately we are not focused on religious changes, we have written a book about the changing of mores and norms, and the changing of laws to follow that societal trend, however contested it has been.

The Importance of the “Values Voters”

The night of the November 2, 2004, presidential election, exit polls—which had already caused havoc earlier in the day by contributing to a prediction of a Kerry victory—began shaping a story line from the election that would be startling to many: that “moral values” was the leading reason given by voters for their reelection of George W. Bush. According to the New York Times, “What gave him the edge in the elec-
tion, which he won 51 percent to 48 percent, was a perceived sense of morality and traditional values.” In opening a panel discussion on the topic among reporters, pollsters, and analyst two weeks later, journalist Marvin Kalb framed the discussion by introducing the “now conventional wisdom, raised and debunked at the same time, that moral values, more than terrorism, more than the war in Iraq, more than the economy, was the one issue that mattered most to the people voting for President.”

Within a few days, critiques had arisen from political analysts and pollsters, noting that the choice of closed-ended questions from a list had skewed the results, so that “moral values” headed a list of seven choices. (By comparison, an open-ended list elicited a much weaker finding.) Even Michael Barone, a conservative political analysts, allowed as to how, when aggregated, the combination of the Iraq war and terrorism (37 percent) or four leading domestic issues (37 percent) both dwarfed the values item. The Pew Research Center concluded that while “moral values is a top-tier issue for voters . . . the relative importance of moral values depends greatly on how the question is framed.”

Andrew Kohut further explained, from data from the Pew Research Center:

In our post-election survey we did a little experiment. We repeated the question that the exit pollsters used, asking voters to choose from five or six items, including moral values, and in the other half of our sample we asked people on an open-ended basis to tell us what issues were on their mind, and we got quite different answers. In the fixed list column, which is that first column, we got 27 percent mentioning moral values—the most frequently given response, just like in the exit polls. Iraq came second, then economy, then terrorism. But in the open-ended question we just got 14 percent saying anything remotely close to moral values, either moral values itself, social issues such as— one of the social issues such as abortion or gay marriage.

Others commented on the ambiguous nature of all the polls. Adam Nagourney, a political writer for the *New York Times*, observed: “Presidential elections often produce a clear story line, a lesson for losers and winners alike. Not this one, at least not yet. . . . the very ambiguity of the 2004 election results has pushed the party into new sets of arguments. . . . did Democrats lose because they were seen as lax on ‘values,’
which was the early verdict on the Kerry loss, or because they were seen as weak on terrorism?" Sen. Edward Kennedy later added: “Defeat has a thousand causes, and it is too easy to blame it on particular issues or tactics or on the larger debate about values.”

In a listing that approximates the concerns of many of the Christian Right groups, a Catholic group has identified the “five nonnegotiables”—abortion, gay rights, assisted suicide, stem cells, and cloning—for focus in its political activity. However, by most measures, Americans currently:

1. support the key tenets of *Roe v. Wade*,
2. support civil unions for same-sex couples, and oppose a constitutional amendment against same-sex marriage,
3. support suffering patients enlisting doctors to end their life,
4. support research using stem cells to end serious disease, and
5. support legal gambling in many forms throughout the country.

**Arenas of Contestation**

**Abortion**

Americans have been consistently supportive of the main tenets of *Roe v. Wade* in polls since 1973, even as the Supreme Court has been reshaped and determined to undercut it. At the same time, polls have captured the ambivalence of many toward the implications of that support or, more appropriately, the limits of that support—such as Medicaid funding, teenage access, and late-term abortions. Still, a November 2004 poll taken for the Associated Press found what many precursor polls had—that most Americans (59 percent in the AP poll) thought that President Bush should choose a nominee who would uphold *Roe v. Wade*.14

**Gay Rights**

While 2004 may be remembered for the political fallout from the raising of the gay marriage issues—in legal decisions, extralegal actions, church pronouncements, and philosophical discussions—the common ground that did exist was downplayed in favor of the contestation that
made for better media coverage. According to those measures, a majority of Americans favor at least the establishment of civil unions for same-sex couples.15 Clearly, only a majority of Americans favor allowing same-sex marriages. At the same time, clearly only a majority of Americans support a constitutional amendment opposing gay marriage (such as the 56 percent in the November 2004 New York Times–CBS poll). Taken by itself, the majority support for civil unions is a remarkable figure, especially given that only one state (Vermont) then allowed them, and that they were controversial not so long ago. This trend can be seen as signifying the increasing support among a majority of Americans for a range of legal protections for gays and lesbians, beginning with city and county antidiscrimination ordinances in the 1970s. Only a minority thus embraces a position such as that of U.S. Senator John Cornyn (R-Tex.), who offered this assessment of the classic Millian position on gay marriage, morality, and harm: “It does not affect your daily life very much if your neighbor marries a box turtle. But that does not mean it is right. . . . Now you must raise your children up in a world where that union of man and box turtle is on the same legal footing as man and wife.”16

Death with Dignity

Gradually, since the 1970s, Americans have supported the ability of a patient to be able to end his or her life when terminally ill—first through withdrawal of treatment, living wills, advance directives, and “do not resuscitate” orders. While this has taken full legal form in only one state—Oregon, where the Oregon Death with Dignity Act was passed in 1994—polls have regularly shown that Americans are consistent in their support for patient autonomy at the end of life. A 2004 Gallup poll found that two-thirds of respondents agree that doctors should legally be allowed to intervene in a situation in which a patient has “a disease that cannot be cured and is living in severe pain.”17 A majority (53 percent) felt that doctor-assisted suicide is morally acceptable. While there is some discrepancy between what level of support is expressly for the act of physician-assisted suicide, or physician-aided death (which is how Oregon reformers have started to rename their approach), the events surrounding the Terri Schiavo case in 2005 illustrated how deeply Americans feel about autonomy in deeply personal and family matters like end-of-life decisions.
Stem Cell Research

While the passing of Ronald Reagan may have stirred the memories and allegiances of conservatives who revered him, the scene of his son Ron Reagan standing before the Democratic National Convention in August 2004 to support the case for expanded research on the use of stem cells to provide advances in the treatment of debilitating disease was at odds with that legacy. Young Reagan, who had witnessed the steady deterioration of his father, afflicted with Alzheimer’s disease, spoke strongly about the promise of potential new scientific breakthroughs. His mother, Nancy Reagan, showed her support in a more personal fashion, adding support to Senate efforts to pass a law in 2006.

With the support of newly elected governor, Arnold Schwarzenegger, a pro-choice Republican, California solidly passed a state initiative to invest $3 billion in stem cell research, beyond the parameters of what the federal government would allow. The appeals to the electorate—those in the 1994 and 1997 Oregon assisted-suicide campaigns—found doctors and others asking for the opportunity to cure life-threatening diseases through scientific advances made possible through stem cell research. Polls showed that 60 to 70 percent of Americans favored such research, and fifty-four U.S. senators (including fourteen Republicans) supported softening the federal position. Since California’s vote, several other states have begun to frame stem cell opportunities, lest California get too far ahead in germinating such research, and in 2006 Missouri passed a similar law.

Gambling

It may seem unusual for this section to include gambling as an example of a personal morality issue that Americans are not deeply divided over. After all, it has been many years since a majority of Americans considered gambling a serious moral issue, or since laws criminalizing gambling were much enforced. Still, as Guth and colleagues explain, gambling was a social issue raising concern for Protestant ministers as late as 1988.

However, legal gambling has been spreading in the United States since New Hampshire legalized its lottery in 1964, and legal gambling revenues have risen from $10 billion in 1982 to $83 billion in 2005. Now forty-eight states permit legal gambling of at least one form, with
only Utah and Hawaii as exceptions (one red state and one blue state, as it is). Two in three Americans reported in 2004 having participated in some form of gambling activity in the prior twelve months.\(^2\)

Gambling still appears on the radar of Christian conservative groups, just not as a high priority. Their efforts have been successful in small campaigns, to prevent the expansion of gambling, but as Bill Bennett’s explanations after his vice was revealed indicate, gambling has been fairly well normalized as an unproblematic leisure time activity in America.

Normalization of Victimless Crimes: Movement and Backlash

Many of these events of 2004 had their roots in a shift in social attitudes and legal forms that had been taking place throughout the United States for the prior forty years. Since the early 1960s, when legal scholars and social activists had pressed for reforms in how America treated abortion, gambling, drug laws, and homosexuality, various states had acted to liberalize their laws in the area of personal morality.

It would have been unthinkable (but satisfying) in 1978 for Harvey Milk, the newly elected openly gay supervisor in San Francisco, to think that one of his successors, Mayor Gavin Newsom, would be allowing the city and county of San Francisco to perform same-sex wedding ceremonies in 2004. Milk himself had helped to beat back a state ballot initiative in 1978 that would have prevented gays and lesbians from being employed as K–12 teachers in public schools in California. And Milk might have been heartened to see Brokeback Mountain as a candidate for the Best Picture Academy Award for 2005. This normalization, however problematic, has been taking place over these thirty years in the case of gay rights. Its pace slowed or changed during the early years of the AIDS crisis, but it has since accelerated in what historian John D’Emilio terms the fourth stage of gay rights.\(^2\)

Newsom was praised in many circles for his open approach and bravery, and derided in others for running outside the law, as the California Supreme Court would eventually decide. In the context of this book, the retrospective look at his action and the legalization of same-sex marriage in Massachusetts in 2004 provide a context for appreciating the vituperative response of the social conservative Right, and its delight in claiming that acts of “overreach” such as those committed by...
Newsom fueled the fire of the values voters, on whose votes they claim the 2004 election turned decisively. This also introduces the theme of rapidity, which we think is key to understanding the social religious Right and its call to man the battlefronts of the “morality wars.” To the same extent that Milk would have been surprised to see gay marriage legalized and debated so widely only twenty-six years after his efforts, other groups we focus on in this book are equally dismayed and angered by the changes to culture and morality they see as ascendant in American life.

By 1978, many states and cities were on the cusp of broad changes in how they treated issues of the law’s reach and personal morality. In California, for instance, 1978 was the year in which the legislature, in a bill sponsored by then assemblyman Willie Brown, voted narrowly to decriminalize sodomy. It had been only two years since California had acted legislatively to decriminalize the possession of small amounts of marijuana (the Moscone Act of 1976). In this way, California was in the first group of states to change its law, after an active debate in the 1960s and 1970s, about the overuse of the criminal sanction in the drug area.

California had been one of the early states to decriminalize abortion, through a law enacted by former governor Ronald Reagan. Twenty years later, it would be on the forefront of state initiatives and funding to circumvent federal prohibitions on research on stem cell lines from embryonic tissue.

California had also been one of the first states to enact a natural death act in 1976, which also reflected the changing mores of society about the law’s reach, in this case in matters related to death and dying. California became the first state to pass “living will” legislation; it was followed closely by other states expanding rights in this most personal of areas. The impetus for that change was certainly different than in the other areas discussed in this book: There was no great opportunity for raising state revenues in times of fiscal crisis, as in the case of gambling. There was no redefinition of an activity as recreational, rather than harmful, as in the case of marijuana use. There was no movement by members of a minority to challenge how society saw them and controlled their personal lives, as in the case of gay rights. Instead, the death with dignity movement was propelled by changes in medicine and specifically in life-extending technology, which led to examples of people dying long, drawn-out deaths in hospital intensive care units, when they might have preferred dying privately at home. These changes fu-
eled the death with dignity movement that began to gain steam with passage of laws like California’s Natural Death Act. Even though California would not be the first state to approve assisted suicide (a 1992 measure failed in an initiative attempt), the 1976 law—and the do not resuscitate and withdrawal of treatment options it provided—was part of the general trend in that state toward redesigning criminal law in the areas of personal morality.

These changes were not without their challenges, with the successes generating a backlash that took many forms. Even as gay supervisor Harvey Milk and gay rights were successful in San Francisco, and California was decriminalizing sodomy, the state ballot in 1978 featured an initiative that would have prohibited gays and lesbians from being employed as schoolteachers in the state. Across the country, the Resorts International Hotel opened its doors as America’s first legal casino outside of Nevada on Memorial Day weekend of 1978. State lotteries had been expanding since being introduced in New Hampshire in 1964, and would do so through the 1980s and 1990s.

With the opening of Atlantic City in 1978, America seemed poised to become a nation of casino states. Indeed, casino industry analysts—including the new category of Wall Street gambling stock analysts—predicted just that. Although the failure of Florida to join that movement in 1978 seemed to slow down the effort, many observers of gambling thought that the country was ripe for more casinos and even sports gambling. But as James Frey has noted, the many fears about corruption in sports limited enthusiasm for that. However, one form of gambling did boom during this period: state-run lotteries. At the same time, a number of Indian reservations were experimenting with forms of gambling that would grow over the next two decades. But even in 1978, one could discern the ambivalence that characterized gambling legalization.

With the advent of Las Vegas–style gambling in Atlantic City, more than the local gamblers from Newark and Brooklyn were taking notice of the available casino gambling. After Business Week trumpeted the value of the newly discovered gambling stocks in a 1978 cover story, Wall Street, which had not been a major player in the growth of Las Vegas gambling, given its roots in organized crime and closely held ownership groups, began taking note.24

Indeed, President Jimmy Carter had espoused marijuana decriminalization while campaigning in 1976 and supported it in his first year in office, saying in 1977: “Penalties against drug use should not be more
damaging to an individual than the use of the drug itself. Nowhere is this more clear than in the laws against the possession of marijuana in private for personal use."

When one looked across the broad sweep of victimless crimes in 1978, it was not difficult to think that, within a few years, legal treatment of these formerly prohibited victimless crimes would be dramatically changed. We would be buying marijuana at the local drug store, perhaps packaged by tobacco companies under catchy names, as rumors of the time suggested.

One author of this book coauthored an article predicting the widespread decriminalization of drugs and other forms of deviance, a prediction that would be found lacking fifteen years later. Ten years after that critique, progressive changes such as gay marriage were emerging, but not without heated contestation.

What was happening in 2004? Was it the ascendance of “value voters” and a backlash to the liberal and tolerant policies of the recent past? What happened between 1978 and 2004 in terms of the legal treatment of abortion, gambling, gay rights, assisted suicide, and now stem cell research?

Soon after the events of 1978, the election of Ronald Reagan as president signaled the ascendancy of a group of conservatives, many of them greatly concerned with changes in areas of American law and morality. From Reagan’s election onward, the battle was joined over the status of abortion, and legislative, judicial, and political debates and contests between pro-life and pro-choice activists would come in many ways to define the American social landscape of the 1980s.

Still, looking at the events of 2004 against the background of the preceding forty years of contestation, it would be hard not to agree with Thomas Frank’s assertion that, despite the setbacks such as those in 2004, the Right in America has not been able to stop the progress of cultural history. This operates, despite what Kevin Phillips calls the “national Disenlightenment” and “cultural antimodernism” of the social conservative agenda.

The story of this book is therefore not one of evolutionary change throughout those decades. In fact, it is one of extremely contested change, events that earned the term “culture war,” which has been widely used from the 1990s forward. This book presents important developments in current American law and policy toward each of the topics covered, both those that are a central feature of the culture wars—
abortion, gay rights, assisted suicide, and stem cell research—and gambling, which is now a normalized and common feature of American life, an accepted form of entertainment. It does so in a comprehensive manner, with each activity analyzed within the context of prior efforts toward normalization and liberalization of criminal laws. Each of the topics is at a different point in terms of such normalization, and each has traveled a unique road to achieve that situation. Some have generated more direct and grassroots response and support, whereas others have followed more corporate, or bureaucratic, or state-sponsored models. Each topic will be examined in depth in a separate chapter: chapter 2, “Painless Prosperity: The Spread of Legal Gambling”; chapter 3, “Abortion: Contestation and Ambivalence in the Long Era of Roe v. Wade”; chapter 4, “Gay Rights: Beyond Tolerance and Privacy to Equality”; chapter 5, “Assisted Suicide: The Road to New Rules of Dying”; and chapter 6, “Stem Cells: Framing Battles and the Race for a Cure.” Finally, chapter 7, “To Form a More Purple Union?,” addresses the questions of political polarization in America, assessing whether we are as “red” or “blue” as suggested by some analysts, and whether it is possible that we are more tolerant, more in agreement, and more “purple” than generally portrayed. Running through each chapter will be a central tension: that American attitudes and laws regarding these victimless crimes are best understood as a process of “problematic normalization.”

This book takes a unique perspective based upon extended empirical research in each of the four issues. It does this through examining the framing of issues, creation of social movements, and deploying of strategy in what Edwin Schur has termed “stigma contests.”

A major theme of the book is that of the rising level of tolerance or liberalization in each of these four areas, especially when tracked over the past forty years. There has been a “rising floor” of liberalization, despite the images of polarization and red-versus-blue separation and conflict.

Who wins such contests, and what tactics do they employ? The next sections of this chapter will examine successful and unsuccessful efforts to remove the criminal sanction from specific activities in the United States since the 1960s. We will consider the nature of efforts to initiate reforms, to define constituencies, to mobilize resources, to frame debates, and to connect with public opinion and parallel social movements to achieve cultural change.
The Concept of Victimless Crimes

In his 1859 essay *On Liberty*, John Stuart Mill wrote that all persons should be free to “go to Hell in their own way” and that it is not the business of government to prevent people from doing harm to themselves. Mill’s dictum is a classic statement of the principle that the individual citizen is to be protected against unwarranted state control, in a zone of freedom guaranteed by legal rights, a principle that distinguishes the tradition of Anglo-American liberal democracy from all other forms of government.

Over the past several generations, all Western industrial democracies have witnessed remarkable social foment surrounding the question of the boundaries of the private domain of individual autonomy (“liberty interests,” in the language of American constitutional law) and the state’s right to dictate terms of personal behavior for the common good. The Wolfenden Committee in England can be taken as the most important 1950s critique of the use of the criminal law in this area. On the American scholarly front, Sanford Kadish has written of a “crisis of over-criminalization,” Edwin Schur has elaborated on the problem of “crimes without victims,” Jerome Skolnick has worried about society’s capacity to “coerce virtue,” Gilbert Geis has surveyed the range of activities considered “not the law’s business,” and Herbert Packer has sought to delineate the “limits of the criminal sanction.” Others have mulled over the bases for legitimate penal intervention in zones of individual privacy. Sir Patrick Devlin, a former British high court judge, for instance, has advocated state intervention in private morality because “society cannot ignore the morality of the individual any more than it can his loyalty; it flourishes on both and without either it dies.” Importantly, discussion about vices has revolved not only around issues of right and wrong but also around the issue of the practicality and usefulness of applying criminal law to the private behavior.

In the everyday public arena, these same issues have been framed relatively constantly through debates about the private, versus public, nature of forms of conduct as diverse as euthanasia, abortion, use of substances, sexual orientation, commercial sexual activity, the production and commercial exchange of pornographic materials and drugs, and myriad forms of gambling. All of these, at one time or another, have been characterized as “victimless crimes.”
The term “victimless crimes” first gained widespread attention among social scientists when Edwin Schur wrote his now classic book *Crimes without Victims*, a study of the reciprocal relationship between deviance and public policy. Following from previous scholarship by Howard Becker, Erving Goffman, Edwin Lemert, and Frank Tannenbaum, Schur demonstrated how borderline crimes have less to do with the characteristics of behavior than with the social processes by which certain behaviors and people who engage in them are successfully labeled as deviant. Unlike violent crimes against persons and serious crimes against property, borderline crimes involve “the willing exchange of socially disapproved but widely demanded goods or services.” This element of consent, Schur averred, “precludes the existence of a victim—in the usual sense of the word,” hence the coinage “victimless crimes.”

Victimless crimes are said to lie at the borderline of the criminal sanction for several key reasons. First, there are two types of problems inherent in enforcing such laws. One is that providers and consumers of illicit commodities and services do not perceive themselves as victims; hence they do not call upon law enforcement. This means that police themselves must initiate enforcement, and because of the consensual nature of victimless crimes, the tactics required to catch, prosecute, and convict perpetrators are time-consuming and costly, and they divert police resources from preventing and solving more serious crimes. The second problem with enforcement is its creation of “secondary crime.” Illicit markets for drugs, prostitution, gambling, and abortion, when it was illegal, are created and thrive due to the very criminalization and enforcement of these activities. Often these activities are accompanied by more serious crimes, such as assault, battery, theft, burglary, robbery, and even homicide. Moreover, secondary crimes are not limited to civilians: for where there’s vice, there’s often police corruption.

A second key reason victimless crimes exist at the borderline of the criminal sanction is that they are viewed ambivalently. Cook observes that public attitudes toward victimless crimes are subject to significant changes over time. For example, American views on abortion changed dramatically in the 1850s as the birthrate declined and waves of Catholic immigrants arrived with large families. As Conrad and Schneider explain, up to that time, physicians and midwives commonly practiced abortion before quickening, and the procedure was not associated with any moral, legal, or medical problems. But as the demography of abortion shifted, and middle- and upper-class men grew “anxious about the
decline in production of . . . strong, native-born, Protestant stock,” the American Medical Association responded with passage of a resolution condemning abortion. Yet physicians themselves began to challenge abortion laws in reaction to the harsh treatment of women who obtained abortions in the 1940s and 1950s, and by 1973 the movement to decriminalize abortion culminated in Roe v. Wade.

In addition to this propensity for temporal ambivalence, Cook explains that public attitudes toward victimless crimes are characterized by lack of consensus at any point in time. McConahay’s review of public opinion polls regarding pornography provides a good example: “Pornography is a contemporary problem for a small, but intense, minority of Americans, somewhat of a problem for a larger minority, something to be enjoyed by a larger, less intense minority, and a matter of ambivalence for most Americans.” Finally, ambivalence characterizes many individual attitudes, as well. Thus, contemporary attitudes toward homosexuals generally combine tolerance for same-sex relations in private with state-sponsored public disapproval through social shame. Such instances of public and individual ambivalence render borderline crimes unenforceable, said Schur. Quoting Edwin Sutherland he observed:

Laws have accumulated because the mores have been weak and inconsistent; and because the laws have not had the support of the mores they have been relatively ineffective as a means of social control. When the mores are adequate laws are unnecessary; when the mores are inadequate, the laws are ineffective.

**Competition over Relative Moral Standing**

In *The Politics of Deviance*, a later book by Schur, he states: “Deviance struggles involve competition over relative moral standing.” Competition over relative moral standing involves struggles for power, specifically “the power or resource of moral standing or acceptability.” These struggles, or “morality contests” as Schur calls them, are grounded in the sociological perspective that power “is more like a process than an object.” This perspective resonates with “one of the dominant socio-
logical frameworks of the last few decades," namely, the constructionist approach to understanding how social problems, and the deviance associated with them, are collectively defined. Anchored in the constructionist approach, in this book we turn away from the perspective that deviant categories are objective conditions whose magnitude, causes, consequences, and resolutions should be examined. Rather, we examine deviance as subjective definitions—or the activities by which human actors ascribe meaning to social conditions; interpret some conditions as problematic or deviant, and others not; and thereby negotiate the moral order.60

As a mode of social subordination, deviance struggles create devalued categories. Devaluation of certain individuals and groups necessarily implies valued status for others. To Schur, “Deviance defining contributes to social cohesion and reinforces the dominant standards in a society by establishing social and moral limits.”61 Thus competitions over relative moral standing, or “stigma contests,” as Schur calls them, determine whose rules and standards are legitimated and applied. As a common process at the individual and collective levels, stigmatization—that is, stereotyping, depersonalizing, and devaluing others—works to sustain and reinforce the power of “conformists.” In Schur’s words:

In these continuing struggles over competing social definitions, it is relative rather than absolute power that counts most. The power of either side may be subject to change, not only through external causes but to an extent by conscious effort. When people engage in organized political activity on deviance issues they are, in fact, intentionally ... trying to ensure that a particular balance of power will tip in their favor. . . . Thus, the key to understanding deviance lies not in specific kinds of acts and individuals but rather in this deviantizing process.62

Insofar as “victimless crimes” is a polemical concept, the extent to which the criminal law ought to be used as a form of “boundary maintenance” has produced a long course of scholarship and debate. On one side are those who argue that criminalizing immoral behaviors is necessary for maintaining cohesion in civilized societies. The argument on the other side is that issues of morality, while they may be a proper subject for social institutions such as the family, the educational system, and religious tradition, ought to be out of law’s reach. The classic statements
on each of these positions include this one by John Stuart Mill: “The only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a warrant.”

By contrast, Patrick Devlin argued forcefully that as history shows, unless a society enforces a common morality, it is doomed to break down:

Societies disintegrate from within more frequently than they are broken up by external pressure. There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve a moral code as it does to preserve its governmental and other institutions.

In its most comprehensive sense, this book presents the “natural history” of attempts to define deviance, specifically the processes through which, and conditions under which, particular deviance categories have developed and changed.

The Paradox: Normalization but Ambivalence

This book presents important developments in current American law and policy toward each of the topics covered, both those that are a central feature of the resurgent “culture wars” or “morality wars”—abortion, gay rights, assisted suicide, and stem cell research—and gambling, which is now a normalized and common feature of American life, an accepted form of entertainment. It does so in a comprehensive manner, with each activity analyzed within the context of prior efforts toward normalization and liberalization of criminal laws. Each of the topics is at a different point in terms of such normalization, and each has traveled its own road to achieve that status. Some have generated more direct and grassroots response and support, while others have followed more corporate, bureaucratic, or state-sponsored models. Each topic will be examined in depth in a separate chapter.

Running through each chapter is a central tension: that American attitudes and law toward these victimless crimes are best understood as a
process of “problematic normalization.” It is clear that today American society does not enforce policies that mirror the times of Edwin Schur, Herbert Packer, Gilbert Geis, Sanford Kadish, and Jerome Skolnick and their call for liberalization of laws in such areas in the 1960s. Surprisingly, some issues—like drug laws and prostitution—have remained in large part much closer to their 1960 status. Others, like abortion and gay rights, have changed dramatically. Even those persons who were optimistic about liberalization of laws and policies related to gays and lesbians in the 1970s did not predict gay marriages in such a short time. Nonetheless, the issue of sexual orientation, law, and society in the United States is in flux and reflects the ambivalence that Skolnick describes as a key theme in American legal treatment of personal morality issues. Assisted suicide was not even on the radar of the 1960s reformers, and stem cells are a contested issue only because of the scientific breakthroughs of recent years. The full effects of the changes in medicine, dying, and the centrality of privacy and autonomy did not accelerate until after Roe v. Wade had taken hold and reproductive rights had been revolutionized.

One paradox is that, despite the growing tolerance and liberalization by Americans across these four issues of personal morality over the past thirty years, there remains a lively and very engaged “morality war” between progressives and religious conservatives, and the “red” versus the “blue.” Another paradox is concerned with the related issues of secularization and religiosity. The American paradox is that the United States has clearly secularized over the past forty years, and Americans have changed attitudes regarding personal morality in ways that are at odds with the teaching of major churches. At the same time, America is a decidedly observant nation in religious terms. This is both a societal paradox and a source of tension within the contestation of specific laws and policies. Another paradox is that America has unmistakably limited the law’s reach in the area of victimless crime but has stopped short of embracing full legal change in the areas described. We have moved toward new legal forms, but not fully embracing them. We have a checkerboard pattern of laws. A final paradox is that the conservative backlash of the 1980s and the Reagan years slowed, but did not stop, the momentum for these changes in victimless crime laws. Each of these themes contributed to the overall concept of problematic normalization.
The Ongoing “Morality Wars”

Thomas Frank made quite a splash in 2004 with his book *What's the Matter with Kansas?* There he painstakingly and passionately argued for the concept of false consciousness in an attempt to understand the willingness of lower-middle-class voters in Kansas (and elsewhere in America) to forsake their economic interests and embrace the Republican agenda, which promised a return to traditional values at the same time as it supported a corporate business elite restructuring that undercut the ability for many of these same Kansans to make a life for themselves and their families. In Frank’s critique, the morality war is represented by a backlash, which is a central feature of the generating power of the conservative movement around such culture war issues such as abortion and gay rights.

Frank describes many features of the morality war. Some groups, like Christian Exodus, point to the level of normalization of formerly sinful or illegal activities that government has increasingly embraced in recent decades: “If you are tired of government-endorsed sin, then stand up and be counted!”

Others, like former House minority leader Tom DeLay, see at the heart of the morality battles the inroads of secular forces—and their supporters in the courts—against those whose morality has religious bases: “‘Our faith has always been in direct conflict with the values of the world,’ DeLay said. ‘We are, after all, a society that provides abortion on demand, has killed millions of innocent children, degrades the institution of marriage, and all but treats Christianity like some second-rate superstition.’” To others, like Focus on the Family head Dr. James Dobson, judicial power is central to their unease:

You’ve heard me talk a great deal, especially in the past year, about “judicial tyranny”—the threat that unelected, unaccountable judges pose to our religious liberties, traditional marriage and each human being’s God-given right to life. If you’ve ever struggled to understand why I think this issue is so important, two decisions issued yesterday by the U.S. Supreme Court make painfully clear what’s at stake not only for us, but for future generations.

To another social conservative engaged in the morality wars, Gary Bauer (and his organization American Values), secular and liberal forces have advanced in a similar manner:
In a story headlined, “Same-Sex Marriage Battles Escalate,” USA Today picked up on a point I have been stressing for years—that the militant homosexual movement, in an effort to force its “morality” on the American people, has adopted the most undemocratic method of changing public policy by waging a massive campaign with well-placed, well-timed and well-financed lawsuits in the courts. That is the way liberalism has advanced most of its agenda for decades.\(^7^3\)

The concern about the reduction of religion in the public square, combined with public ambivalence and feelings about a strict separation of church and state, gives rise to certain efforts to mobilize believers against the de-religionizing of American society. In addition to the courts, of which critique and contestation are intense, few institutions generate as much attention as the public school system.

Increasingly, in the fall of each year, Americans are treated to a debate over the proper limits to celebrating what was traditionally known as the Christmas season. In recent years, with appropriate sensitivity toward American diversity of religion, schools and workplaces have veered toward celebration of non-Christian holidays, to be as inclusive as possible. Religious conservatives become upset when the legal reading of the separation of church and state limits the celebration of Christmas, in lieu of a more generic winter holiday. The 2005 campaign by Rev. Jerry Falwell and Liberty Counsel, with the slogan, “Merry Christmas. It’s OK to say it,” reflects their legal efforts to fight limitations on references to and the celebration of Christmas. Their targets are especially stores, which may be responsive to boycotts in their busy selling season. On Fox News, Bill O’Reilly’s version is “Christmas Under Siege.”\(^7^4\)

**Secularization and Religiosity: The Persistent and Variable Role of Religion in America**

Our first paradox regards the changing role of religion in American society. The contests over abortion and gay rights in particular have showcased the deep feelings with which many Americans approach the topics included in the victimless crimes category. Denominational groups themselves have been fractured by the issue of ordination of gay clergy and gay officials as mainstream Protestant churches have followed secu-
lar society in embracing acceptance of gays and lesbians. The culture war has been a deeply divisive conflict, with fundamental disagreements over issues of morality and religion at its base. One might think that this signifies that America has changed, to the point where those who are churchgoers feel their influence waning. The culture wars then would signify their attempt to keep traditional values in place in American society, against the onslaught of secular and humanist trends.

Political theorist Michael Kazin noted in an article after the 2004 elections, “The United States remains a nation with an evangelical soul, a fact that liberals ignore at their peril.” Recent analyses of the 2004 votes emphasize Kazin’s point. The Pew Research Center concluded that 36 percent of Bush voters in 2004 were white evangelical Protestants, a significant portion of the base of the Republican Party (a group originally talked about as Reagan Democrats and the focus of Frank’s book). At this level, evangelical churches take on the centrality of labor unions or African Americans in the Democratic Party. Part of the backlash against progressive reforms in these four areas is fueled by a concern that such advances—coming from at best a secular approach and at worst an antireligious viewpoint—are undermining the vitality of religion in American society.

The Christian Right became a force of significant impact and attention in the 1990s, as the culture war exploded to include contests over abortion, gay rights, pornography, and changing sexual and cultural mores in general. The Christian Right became a much-used reference in the 1990s to describe groups like the Christian Coalition and an aligned group, the Traditional Values Coalition, and allies like the Moral Majority, Family Research Council, and Focus on the Family.

Ralph Reed, the first executive director of the Christian Coalition, organized it into a potent political force in the 1990s. The Christian Coalition capitalized on the growth in evangelical Protestantism and mobilized the dislike evangelicals had for the shifts in American values and laws, especially regarding victimless crimes and issues of personal morality. During his stewardship—and the growth in the Christian Coalition’s power and political influence—the group turned away from what sociologist Jose Casanova describes as the traditional American evangelical apolitical approach, with an emphasis on not being engaged with the material world.

That said, overstating the power of Christian conservatives in the
body politic cedes ground that need not be ceded. As UCC minister Madison Shockley commented in the *Los Angeles Times*: “Right-wing fundamentalist Christianity has so dominated the media that many Americans don’t believe liberal/progressive Christianity even exists.”

Shockley’s comments resonate with the findings of noted sociologist of religion Robert Wuthnow, who found in a 2000 study: “The perception that religious groups are really only interested in conservative issues is not true. They are not only focused on issues such as abortion or prayer in the schools. Progressive issues do seem to be of enormous importance to people.”

Not all Christians are like Rev. Fred Phelps and his “God Hates Fags” campaign. (Phelps is now protesting at the funerals of soldiers from the Iraq War, on the theory that such deaths are attributable to our nation’s embracing of homosexuality.) At the same time, we have to recognize that some Christians are like that: Rev. Bob Jones III, for example, wrote the president after the 2004 election: “Don’t equivocate. Put your agenda on the front burner and let it boil. You owe the liberals nothing. They despise you because they despise your Christ.” The Reverend Donald Wildmon of the Traditional Values Coalition warned California governor Arnold Schwarzenegger that moderate Republicans who are pro-choice, −gay marriage, and −stem cell research should not stand in the way of the Christian Right.

The American paradox is that the United States has clearly grown more secular over the past forty years, and Americans have changed attitudes regarding personal morality in ways that are odds with the teaching of major churches. And yet America is a decidedly observant nation in religious terms, far more so than our European counterparts, even if there is some dispute about exactly how observant. We stand out in our embrace of religion. In a 2003 survey by the Pew Forum on Religion and Public Life, 85 percent of American respondents stated that religion was either “very” or “fairly” important in their lives. Another 60 percent reported attending religious services at least once a month. This level of interest and support extended even to the young, with three of five teenagers reporting that religion was “very important” or “pretty important” to them in a national poll. The poll also found Americans wanting more religion in public life. As Luis Lugo noted in the *Atlanta Journal-Constitution*, “Nearly twice as many respondents say there has been too little reference to religion by politicians (41 percent) as say
there has been too much (21 percent). And it’s equally clear that those surveyed also want to see religion play a more prominent role in policymaking.”

Christian Smith argues that the secularization process—however strong—is characterized more by contest and struggle than by easy evolution. Fundamentalist activism had increased at the same time, and indeed as a reaction to, this same secularism: “American evangelicalism is thriving as a religious movement not despite the forces of secular modernity but in part precisely because of them.”

In November 2005, the Anti-Defamation League (ADL) added to this conversation when it released a poll showing that 63 percent of American respondents feel that “religion is under attack,” and 53 percent believe that religion is “losing its influence in American life.” This same poll found majority support for teaching creationism, alongside evolution, and displaying religious symbols in public buildings, and a near majority supportive of organized prayer in public schools. The numbers for teaching “the biblical story of creation” alongside evolution are enlightening. Fully 56 percent of respondents agreed with that approach, and the number climbs only to 70 percent with evangelical respondents. Nonetheless, nearly half of the respondents (45 percent) agree that “right wing religious leaders are seeking to impose their religious beliefs on everyone else.”

ADL director Abraham Foxman, while not denying the complicating nature of these results, offered that it was unfortunate that “those who would like to Christianize America seek to use the concerns reflected in this survey toward goals which would turn America into a very different place than the one that has been so open to all religious perspectives.” Foxman lamented, “Too many people . . . [believe] that there should be a fundamental collapse of our traditional church-state barrier.”

This book is deeply interested in the effect of the emergence of the New Christian Right, and how that changed the public discussion of legal reform and options specifically for the most contested of the victimless crimes analyzed here: abortion, gay rights, assisted suicide, and stem cell research. We take as our template the enormous investment by the Christian Right in the abortion rights struggle. Meanwhile, the similar but not identical views of American Catholicism, and the positions and effects of mainline Protestant denominations, suggest a struggle
that is still taking shape, that has as much to do with the definition of religiosity in the United States as with the state of our laws, and which will continue alongside whatever trends toward what could be called the unique American brand of secularization.

The public discussion of the role of religion in American society since the 2004 election campaign has taken several twists and turns, as we capture in the following chapters. The question of whether America, despite the exceptional religious observance of Americans compared with our Western industrial counterparts, was separating into a political system with one largely religious party and one large secular political party remained open and debated between 2004 and 2007. The implications of this religious identification have great meaning for the societal discussion and lawmaking efforts surrounding the law and morality topics with which this book is concerned.

**Partial Normalization**

Our second paradox is that America has unmistakably limited the law’s reach in the area of victimless crime but has stopped short of embracing full legal change in the areas detailed in this book. Drug laws changed in the marijuana decriminalization efforts of the 1970s, then shifted as America’s prison population and the number of drug offenders in prison rose dramatically in the 1980s and 1990s. The decriminalization of sodomy was followed by the widespread passage of antidiscrimination laws affecting gays and lesbians, but the battles over AIDS and the fevered pitch of culture war discussions, from the Christian Coalition, ACT UP, the Moral Majority, the National Gay and Lesbian Task Force, and others kept the contestation alive.

This is the result of complex and countervailing movements, interests, framing, and discussions. The changes over four decades in societal treatment of victimless crime are reflected in the shifting policy responses detailed in this book. The zone of privacy that Mill wrote about has solidified, if not expanded to the limits that have been hoped for by some legal scholars and movement activists.

One of the signs that America has shifted in its moralistic view of personal choices is in the investment sector. Dan Ahrens and others have argued that “booze, bets, bombs and butts” are recession-proof,
and wise investments. “Among the areas that appeared to be recession proof were those industries that have been screened out by many investors and especially many of the so-called socially responsible investors as being ‘evil’: alcohol, tobacco, gaming and defense.” Ahrens discusses how gaming stocks as a group had dramatically outperformed the Standard and Poor Index stocks in the late 1990s and early twenty-first century. He offers specific advice on favorite stocks, which by 2004 had grown beyond the original companies with casinos, to a variety of technology-driven stocks that supplied various aspects of the gaming environment. In a sizable bibliography, Ahrens shows that his advice is far from peripheral, citing a variety of stock analysts and business experts who have made similar observations in a range of venues, from ABC, CNN, and CBS, to Barron’s, the American Banker, the Wall Street Journal, and Financial Times. Others, like New York Times columnist William Safire, do not agree, arguing that “sin taxes” are an unwise, perhaps unholy, way for society to attract tax revenues.

In some of the issues—like gambling—legalization has been widespread, and yet without significant grassroots social support. The type of organization and strategy that has typified the abortion rights area is not reproduced in the gambling issue. We did not see gambling advocates marching in the streets, holding placards that read “Slots Now,” or conducting nonviolent sit-ins in front of state legislatures. We did not see impassioned pleas for protecting the autonomy of gamblers, nor did we see arguments that the criminalized gambler was unfairly stigmatized.

Instead, gambling legalization has proceeded in a more top-down manner, with states and gambling corporations playing major roles. The reason for legalization has been relatively straightforward—tax revenue and economic development. Although these claims have been contested—indeed, defeated in some jurisdictions—they have propelled lotteries across the nation since the 1960s and riverboat gambling since the 1990s. (Indian casinos have developed from a unique legal framework.)

In the case of gay rights, several social movement groups from the time of the initial gay rights groups of the 1950s, Mattachine Society and the Daughters of Bilitis, bravely and strategically challenged dominant societal conceptions and laws. Today’s key groups, like the Human Rights Campaign and the National Gay and Lesbian Task Force, are among many that negotiate the laws and attitudes of a contested yet normalizing American population.
Rising Tolerance, Stalled and Challenged Movements

Our third paradox is that the conservative backlash of the 1980s and the Reagan years slowed, but did not stop, the momentum for these changes in victimless crime laws. This “Reagan interruptus” theme suggests that the events of 2004 should be looked at as a point in the evolution of American law and policy in the social and legal treatment of victimless crimes, from the time of the early articulation of the proper reach of the criminal law by Schur and others. This paradox asserts that the stalling of movements for liberalization in the 1980s was a momentary setback rather than a redirecting of the general trend toward liberalization of laws and policies in American law and society.

The culture wars of the 1980s and 1990s were a result of the advances made in reproductive rights, anti–gay discrimination measures, drug decriminalization, and general changes in gender relations in American society. The urgent call to protect “traditional values” created countermovements specifically designed to thwart the movement toward tolerance and creation of new rights in the personal sphere.

These movements certainly had the effect of curtailing the effectiveness of some forms of liberalization efforts. While the Christian Coalition did not focus on drug laws, it was part of the constellation of issues that formed the “moral decay” its leader preached against. Other portions of what we might call the “rollback coalition,” such as those working with First Lady Nancy Reagan, did spend their energy on this. The drug punitiveness of the crack era of the 1980s was facilitated by these groups, to the extent that they slowed the momentum of drug reformers, including even recriminalization of marijuana in some cases.

Some analysts have drawn upon the idea that the Christian Right movement of the 1990s was a cynical play upon certain segments of the American population, those in the lower middle class who placed their social conservatism ahead of their economic needs. There is a strong element in American sociolegal studies that emphasizes the primacy of “symbolic politics.” Nonetheless, some of the accomplishments of the countermovement in the culture wars has been the slowing of liberalized laws, the dismantling of reform efforts, and the adoption of oppositional policies. With this in mind, chapters 2 through 5 will take as one line of inquiry the question of how the conservative ascendancy of the 1990s derailed, redefined, or simply masked the liberalization impulses and successes that have been present from the 1960s.
Conclusion: Ambivalence and the Problematic Normalization of Victimless Crime in America

Our fourth and final paradox combines elements of the prior three items, in what might be called the summary paradox. The current state of victimless crimes in America is one of “problematic normalization.” We have moved toward new legal forms, but not fully embracing them. We have a checkerboard pattern of laws, in some ways reflecting our federalism and emphasis on states’ rights, or on the diversity of our large population and the strength of views of the “blue” America and the “red” America, representing the Democratic and Republican leaning of various states in presidential elections. But is can also be described as a stubborn ambivalence, a stalled movement toward the 1960s clarion call for liberalization, and the enactment of decriminalization laws in the 1970s.

A few years back, toward the end of a year of American national debate over the scope of privacy and the relative seriousness of adultery in the impeachment of President Clinton, Jacob Weisberg wrote in a New York Times Magazine cover story:

You can . . . say that the Lewinsky scandal says something not just about the development of American political morality, but also about American morality in general. A quick survey might leave one with the impression that the 1990’s were the decade that Puritanism died. Since Clinton has been President, homosexuality has gained public acceptance; legal gambling has swept the country; pornography has become ubiquitous; and vice has been redefined as disease. Meanwhile, the public has become unshockable about sex and unconcerned about Presidential adultery. These changes imply that traditional morality has receded.99

Weisberg goes on to argue that such an implication would be misguided, that what characterizes the American public at the beginning of a new century is instead adherence to strict personal morality but a reluctance to judge the morality of others. By 2005, even this 1999 interpretation may seem overly optimistic. There is no easy “receding” of traditional morality. Perhaps Weisberg captured a moment when the shift in values was generating a backlash that would crest in 2004?
In place of the “five nonnegotiables,” it might be better to focus on the three “A’s”: anxiety, ambiguity, and ambivalence.

While Frank has clearly captured something important in his false-consciousness arguments about Kansas and elsewhere, acknowledging economic anxiety and frustration while critiquing the forms it often takes is a delicate dance. As Arlene Skolnick notes: “But conservatives, following [late Republican strategist Lee] Atwater’s advice, also speak to the ambivalence and anxiety most people feel about the bewildering cascade of changes in family life in recent years and its effects on children.”

The concept of ambiguity could move one to agree with U.S. senator Barack Obama (D-Ill.), who spoke in his riveting speech at the 2004 Democratic convention of a “purple” America, in which elements of red states and blue states would merge (and later gave speeches that described his own religion and the interplay of religion and society). The Reverend Jim Wallis argues for finding common ground. The “values debate should be the future of American politics [but] which values and whose values?”

By January 2005, the Pew Research Center reported that the concerns of most Americans—Republicans, Democrats, and Independents—did not include a concern with “values” such as that which the exit polls indicated. The top domestic priorities chosen were terror defense, the economy, Social Security, Medicare, education, and the military. While 54 percent of the respondents felt that conservative Christians would gain influence in the next four years (as almost an identical number had responded in 2001), only “education” elicited a response in which “traditional values”—as agreed upon by the liberals, conservatives, and the media—played a significant part. Compounding this, a January 2005 poll by the Los Angeles Times found Americans “deeply divided over President Bush’s performance and priorities.” The 2006 elections closed the chapter on this situation, as the Democrats marshaled this discontent, propelling them to control of the House of Representatives and the Senate for the first time since 1994.

As we observe the two hundredth anniversary of the birth of John Stuart Mill, it could be argued that the changes over four decades in law and personal morality suggest that the zone of privacy that Mill wrote about in the nineteenth century has solidified, even if it has not expanded to the limits that have been hoped for by some legal scholars and movement activists. Ambivalence best characterizes the American
approach to legislating personal morality. As Jerome Skolnick argues, this concept of ambivalence best characterizes the American approach to legislating personal morality.\textsuperscript{105} An optimistic reading of recent events is that changes in laws regulating personal morality have not been rolled back—despite the postelection punditry—but their vitality remains fragile and contested. It is a condition that is neither purely red nor purely blue. The following chapters will demonstrate that.