

# “IN A PLACE PARALLEL TO GOD”: THE DRAFT, THE DEMONIC, AND THE CONSCIENTIOUS CUBIST

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## ABSTRACT

The question “What is religion?” has again been roiling the academy, the courts, and public debate. In 1965, the Supreme Court of the United States opined on this question, deciding the fate of would-be conscientious objectors who would not affirm the existence of God. Relying largely on Paul Tillich, the Court ruled in their favor, expanding the notion of “religious belief” beyond its conventional Western confines. This article reexamines the issues raised in this case by exploring the theology of Paul Tillich, particularly its critique of religion as a separate sphere and its challenge to basic tenets of liberal political theory inherited from John Locke. The article, however, also juxtaposes the religion-expanding aspects of Tillich’s thought with his strictures about “demonic” distortions of religion, requiring an excursus into Tillich’s notions of the divine/demonic relationship. Tillich’s rejection of the compartmentalization of “religion” led him to declare that more religious meaning may be found in putatively “secular” artifacts, such as Cubist art, than in conventionally “religious” symbols and institutions, including the Church. This approach both demands a radically interdisciplinary approach to “religion” and casts a skeptical eye on some putatively “religious” claims. The article concludes by juxtaposing Tillich’s anti-essentialist critique of “religion” with more recent, and dramatically different, critiques, particularly those advanced by Talal Asad and Saba Mahmood.

**KEYWORDS:** conscientious objection, construction of religion, Paul Tillich, demonic, aesthetics

*From the demonic depth arise all the higher ... forms of religion; in the battle with the demonic they gain their peculiar form; in the demonic element ... they exert their compulsory power over consciousness.*

—Paul Tillich, 1926<sup>1</sup>

*[T]he disruptedness of expressionism, surrealism, and all the other recent forms of styles, such as cubism and futurism, is nothing else than an attempt to look into the depths of reality, below any surface and any beautification of the surface and any organic unity. It is the attempt to see the elements of reality as fundamental powers of being out of which reality is constructed. ... From this point of view, such a picture [as Braque’s “Table”] can have a tremendous religious power.*

—Paul Tillich, 1956<sup>2</sup>

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- 1 Tillich, *The Demonic: A Contribution to the Interpretation of History* (1926), in *THE INTERPRETATION OF HISTORY* 77, 99, 107 (Elsa L. Tamley trans., 1936) (1926).
  - 2 Tillich, *Existential Aspects of Art*, in *CHRISTIANITY AND THE EXISTENTIALISTS* 128, 137, 139 (Carl Michalson ed., 1956).

## A FATAL QUESTION

In the mid-1960s, as resistance to the Vietnam War escalated together with the war itself, the U.S. Supreme Court found itself preoccupied with a seemingly arcane question: What is religion? Young men seeking to avoid the draft as conscientious objectors were confronting the statutory requirement that their objections be based on “religious training and belief.” The statute defined the key term, *religious*, as

an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code.<sup>3</sup>

In distinguishing between “religion,” on the one hand, and “politics,” “sociology,” “philosophy,” and “personal morality,” on the other, the statute inscribed itself in post-Enlightenment conceptions of the separation of social spheres, divisions between academic disciplines, and, implicitly, delimitations of the distinctive competence of legal analysis and institutions.

The statute posited two key markers of “religion”: a “belief in relation to a Supreme Being” and “duties superior to those arising from any human relation.” In something of a performative contradiction, the legislation thus accorded federal law and, ultimately, federal courts—quintessential products of “human relations”—the competence to decide matters that, by its own definition, transcend those relations. To be sure, at least upon a first consideration, this legal competence over law-transcending questions concerned not those questions themselves (for example, whether such a “Supreme Being” or “duties” exist), but only whether their objects dwelt within an individual’s “belief.” Nonetheless, the notion that one can separate the question of whether an individual believes in something from that of the believability of that something—and thus the boundary between law and theology—has long been contested.<sup>4</sup> In any case, the potential entanglement with theology was not limited to this question, as we shall see.

A number of would-be conscientious objectors were denied that status after they refused to proclaim their belief in a “Supreme Being,” let alone “God.” Instead, they offered formulations of their “religion” that seemed at odds with the statute—for example, “the consciousness of some power manifest in nature which helps man in the ordering of his life in harmony with its demands . . . the supreme expression of human nature.”<sup>5</sup> This immanentist vision of a pervasive “power manifest in nature” that “expresses human nature” pushed against the demarcation of spheres implicit in the statute. It also raised the question of whether an “expression of human nature” could justify a legal exemption based on “duties superior to those arising from any human relation.” The claims thus entailed both a radical social expansion of the “religious” sphere and the legitimation of the replacement of God (or the “Supreme Being”) by other beings or powers—two distinct challenges to the conception underlying the statute, yet both seemingly limitless in import.

The theoretical conundra raised by such questions, and their seeming transgression of the line between law and theology, did not diminish the fact that the debate over the definition of “religion” had here become the opposite of a merely academic quarrel. On the contrary: for young men seeking to avail themselves of the exemption, and for the Vietnamese upon whom they were being

<sup>3</sup> United States v. Seeger, 380 U.S. 163, 165 (1965).

<sup>4</sup> See, e.g., United States v. Ballard, 322 U.S. 78, 92–95 (1944) (Jackson, J., dissenting).

<sup>5</sup> See *Seeger*, 380 U.S. at 169.

drafted to direct their weapons, these questions were literally a matter of life and death.<sup>6</sup> That the decision in these cases would affect only a relatively small number of participants in the war did not lessen these lethal stakes, though the exceptionality of the exemption will loom large in the discussion that follows here.

In the half-century since the Court decided these cases in favor of the would-be conscientious objectors, the problematization of “religion” as a distinct domain of analysis and experience has grown into something of an interdisciplinary academic specialty, a fertile field for legislators and litigators, and a site of political and social struggle around the world. This problematization has included challenges related to both kinds of innovations implicitly broached in 1965, the expansion of the social reach of religion and the substitution of unfamiliar for familiar deities or “powers.” The global sense of a growing intertwining of religion and politics, whether a source of panic or celebration, has never been stronger than it is today. In academia, the encounter between “secular critics,” who would defend and sharpen the skeptical rationality of the Enlightenment, and “genealogists of the secular,” who would relativize it, has set in opposition even those whose ethical and theoretical perspectives have deep affinities.<sup>7</sup> Moreover, the interdisciplinary character of scholarly debates on “religion as a category” is a symptom of the crucial role that the secular/religious divide plays in sustaining traditional academic divisions. In an indication of the depth of these debates, even the notion that “autonomy,” that ultimate Enlightenment value, should be the cherished goal of the formation of national and individual subjectivity has been put into question.<sup>8</sup>

Debates over the substitution of unfamiliar for familiar “supreme” beings, values, or practices have played no lesser a role. The past several decades have seen not only an expansion of a broad ecumenism extending the label “religion” to a wide variety of phenomena, but also the very opposite: renewed fierce struggles over the true meaning of “religion,” in relation to so-called cults, as well as, far more importantly, public, often international, debates, about the “true” interpretation of particular religions, debates often provoked by “fundamentalist” claims to represent the authentic version of a particular religion and counterclaims by their opponents that they have “perverted” that religion. In the course of such debates, each side stigmatizes the other in the strongest terms and each accuses the other of “demonizing” it—a word that may appear to some as medieval, but whose prominence in modern debates about the meaning of “religion” has been, and remains, fundamental, as we shall see below. Conflicts between different religions and between religious publicists and secularists are equally marked by charges of truth, perversion, and demonization.

The sense that the real-world stakes in these questions are nothing less than life and death pervades the current Zeitgeist. The current dormancy of the draft in the United States means that the precise legal questions raised in the Vietnam era-cases practically affect only “in-service” conscientious objectors, soldiers who seek discharge from the armed forces on the grounds of beliefs that arose after their enlistment. But the deeper questions and anxieties about the demarcation of “religion” and the competition among rival truths have only proliferated, underlying both some of the highest-profile American legal disputes over the past several years, as well as the often lethal

6 It seems unlikely the specific objectors in the 1965 cases would themselves have gone to Vietnam, since by the time the cases reached the Supreme Court, their original draft notices were more than a decade old. But the cases were closely watched by all those who objected to the draft and the war more generally.

7 See, e.g., Bruce Robbins, *Secularism, Elitism, and other Transgressions*, 40 *SOCIAL TEXT* 25–37 (1994); TALAL ASAD, WENDY BROWN, JUDITH BUTLER & SABA MAHMOOD, *IS CRITIQUE SECULAR? BLASPHEMY, INJURY, AND FREE SPEECH* (2009).

8 See, e.g., TALAL ASAD, *FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY 197–98* (2003); Dipesh Chakrabarty, *Minority Histories, Subaltern Pasts*, 33 *ECONOMIC AND POLITICAL WEEKLY* 473 (1998).

struggles over the construction of political, legal, and even military order at all levels around the world. In this context, a reflection on the 1965 draft cases is urgent, both for their legal analysis and for the innovative theological thinking upon which they drew, in order to reopen the question of the scope of “religion,” as well as to understand the competition among rival truths that so often result in mutual charges of “perversion” and “demonization.”

THE RHETORIC OF “GOD”: FROM LAW TO THEOLOGY . . . TO QUINTILIAN

In deciding the draft cases in 1965, the Supreme Court turned to a number of its theological contemporaries who seemed to reconceive “religion” by attenuating its conventional Western association with a personal deity. The most eminent of these was Paul Tillich, perhaps the most influential Protestant thinker of the twentieth century, who had emigrated to the United States from Nazi Germany in 1933. The Court quoted him as follows:

And if that word [“God”] has not much meaning for you, *translate it*, and speak of the depths of your life, of the source of your being, of your *ultimate concern*, of what you take seriously without any reservation.<sup>9</sup>

The Court ordered that draft exemptions be granted in the cases before it, ruling that the test of “religious belief” was not faith in “God,” but whether

a given belief that is sincere and meaningful occupies a *place* in the life of its possessor *parallel* to that filled by the orthodox belief in God of one who clearly qualifies for the exemption.<sup>10</sup>

Elsewhere in the opinion, the Court offered a slightly different version, replacing the requirement of “parallelism” with “sameness,” albeit a sameness within difference:

the claimed belief [must] occupy the *same place* in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption[.]<sup>11</sup>

William O. Douglas, in his concurring opinion, offered the examples of Hinduism and Buddhism, neither of which, he claimed, embraced conventional understandings of the Jewish or Christian notions of God—and yet both of which, Douglas affirmed, should satisfy the test for “religious belief” under the Selective Service Act. Douglas argued that, despite what he called the “superficially polytheistic” nature of Hinduism and Buddhism’s lack of “interest” in a notion of God as a “personal Creator of the universe,” they could both be interpreted as maintaining a belief in a “Supreme Being”<sup>12</sup>—a phrase, he noted, that has no “narrow technical meaning in the field of religion.”<sup>13</sup>

Even these short quotes evoke the image of justices perched on the precarious border between theology and putatively secular areas of thought and practice, a border whose demarcation law,

9 *Seeger*, 380 U.S. at 187 (quoting PAUL TILICH, *THE SHAKING OF THE FOUNDATIONS* 57 (1948) (emphasis added)).

10 *Id.* at 166 (emphasis added).

11 *Id.* at 184 (emphasis added).

12 *Id.* at 191.

13 *Id.* at 189. Douglas’s views on Buddhism and Hinduism should not, of course, be taken as anything other than his idiosyncratic interpretations.

though sitting on one side, was also charged with determining.<sup>14</sup> In doctrinal terms, this could be construed as a clash between the values underlying the free exercise of religion, here embodied in a statutory exemption for conscientious objection, and the values underlying the prohibition on the establishment of religion, here embodied in the oft-proclaimed refusal of courts to involve themselves with ecclesiastical matters. As in so many First Amendment or statutory religious freedom cases, the Court here faced the task of deciding what is “religious” without acting as a theological arbiter, a task whose “impossibility” has been forcefully argued by Winnifred Sullivan.<sup>15</sup> In turning to Tillich, however, the Court opened up a conundrum of a very different kind, a very different configuration of both possibility and impossibility.

*The Point of Departure: An Excursus on Locke*

In order to highlight the distinctiveness and provocative nature of that other configuration, I first set forth the more familiar conception from which it departs, that of John Locke. In his 1689 “Letter on Toleration,” Locke declared his intention “to distinguish *exactly* the Business of Civil Government,” particularly property, “from that of Religion,” and “to settle the just Bounds that lie between the one and the other.”<sup>16</sup> Uninhibited by the theological prudery that modern U.S. courts continually profess, Locke made the exactness of his distinction rest squarely on a pronouncement about “true religion”: “All the Life and Power of true Religion consist in the inward and full persuasion of the mind.”<sup>17</sup>

To be sure, while hardly free of ambiguity, this definition may also be read as identifying only the locus and modality of “true religion” and not its content. In this reading, the force of the adjective “true” would be that it provided a criterion for religiosity as such; a religiosity that did not reside in the “inward and full persuasion of the mind” was simply not worthy of the name. It is important to note, though, that the converse for Locke was not true—a religion that was not substantively true would not be so even if it did reside in the mind with the proper “fullness.”

This definition has enabled Locke’s text to serve as the basis for at least three enduring features of liberal conceptions of law and religion. First, it provides the basis for the distinction between belief and action which underlies the continually reiterated axiom of American jurisprudence on religion: the notion of absolute freedom of belief in contrast with the susceptibility of religious practice to regulation under a variety of conditions. Second, by seemingly defining “true religion” in terms of modality and locus, rather than content, it secures “toleration” by *creating* the very category of “religion” under which many otherwise heterogeneous traditions, practices, social forms, and so on, may be subsumed and compared: homogenization, indeed, invention, of a distinct domain of human life as the fulcrum of toleration.<sup>18</sup> Finally, as a variety of critics have pointed out, while the modern legal appropriation of Locke’s definition/invention of “religion” purports to be agnostic as to the content of religion, its core dichotomies—between inward and outward, between belief and practice, between the “conviction of the mind” and all that which signifies, implements,

<sup>14</sup> See generally, WINNIFRED F. SULLIVAN, THE IMPOSSIBILITY OF RELIGIOUS FREEDOM (2007).

<sup>15</sup> *Id.*

<sup>16</sup> John Locke, *A Letter Concerning Toleration*, in JOHN LOCKE, A LETTER CONCERNING TOLERATION AND OTHER WRITINGS 1, 12 (Mark Goldie ed., William Popple trans., Liberty Fund Inc. (2010) (1689).

<sup>17</sup> *Id.* at 13.

<sup>18</sup> Cf. Jonathan Z. Smith, *Religion, Religions, Religious*, in CRITICAL TERMS FOR RELIGIOUS STUDIES 269–84 (Mark C. Taylor ed., 1998); TOMOKU MASUZAWA, THE INVENTION OF WORLD RELIGIONS: OR, HOW EUROPEAN UNIVERSALISM WAS PRESERVED IN THE LANGUAGE OF PLURALISM (2005).

or constructs that conviction (the “external pomp,” in Locke’s words)—give authority to a *particular* conception of religion, variously portrayed by the critics as “post-Enlightenment,” “modern,” “Western,” or “Protestant.” To be sure, the interest of historical accuracy would be greatly served if one added the phrase “a particular strand of” before each of these terms offered by the critics, as those familiar with the history of the varieties of Protestantism, let alone the “modern,” the “West,” and so on, will attest.

In perhaps the most provocative version of this critique, Saba Mahmood associates this conception with “Protestant semiotic ideology”—whose key propositions, belatedly formulated by Saussure, she sees as the radical dichotomy between “the signifier” and the “signified,” as well as the “arbitrariness” of the former.<sup>19</sup> In Mahmood’s exposition, this ideology, particularly its central dichotomy, is homologous with, and perhaps subtends, the liberal legal framework, particularly the belief/action dichotomy. She also argues that this ideology reflects an “impoverished understanding of images, icons, and signs,” and, perhaps more importantly, “fails to attend to the affective and embodied practices through which a subject comes to relate to a particular sign—a relation founded not only on representation but also on . . . attachment and cohabitation.”<sup>20</sup> In offering an alternative portrayal of the relationship to “signs,” Mahmood also offers a critique of the entire liberal legal framework concerning freedom of religion (in a manner quite different than does Sullivan). I return to Mahmood’s alternative in the concluding section of this article.

To be sure, this critique does not fully capture Locke’s own ideology, though it applies in part. Rather than positing a detachment of arbitrary signifiers from their objects—a detachment with the potential, as highlighted by post-Saussureans, for unleashing a free play of signifiers, even for reversing the hierarchy between signifiers and signifieds—Locke was suspicious of all signifiers, indeed, would perhaps “have liked nothing better than to be allowed to forget about language altogether.”<sup>21</sup> It is perhaps what one might call this “*anti-semiotic ideology*” that made Locke lump all “external pomp” under the broad category of “indifferent things” for which he had no use: thereby placing “low church” theology at the very foundation of liberal political theory on the basis of “anti-semiotic” theory. I return shortly to this suspicion of all signifiers, including “God” and its synonyms.

In any case, what might be called an “agnosticized” version of Locke’s “true religion” may be said to serve as the baseline of what American courts have generally understood as that “religion” deserving of protection, as well as the source of their putative disorientation when confronted with groups whose claims to protection were predicated on the notion that their “religions” reject those distinctions—including Amish, Native Americans, and Satmar Hasidim.<sup>22</sup> In the heyday of their Legal Realist-inspired jurisprudence, some Supreme Court justices insouciantly acknowledged (or “humble-bragged,” to use a current idiom) that Locke’s “exact” distinction had been replaced by an “elusive line,”<sup>23</sup> which they could only “dimly perceive”<sup>24</sup>—a transformation that, as so often with such Legal Realist pronouncements, at times served to authorize bold legal innovation.

19 Saba Mahmood, *Religious Reason and Secular Affect: An Incommensurable Divide?*, 35 *CRITICAL INQUIRY* 836, 841 (2009).

20 *Id.* at 841–42.

21 Paul de Man, *Epistemology of Metaphor*, 5 *CRITICAL INQUIRY* 13, 14 (1978).

22 *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988); *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994).

23 *Abington School District v. Schempp*, 374 U.S. 203, 231 (1963) (Brennan, J., concurring).

24 *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

*The Turn to Tillich*

In turning to Tillich, however, the Court, perhaps unwittingly, entered a quite different framework with quite different problems. It would be a mistake to understand Tillich’s definition of religion as “ultimate concern”—or, in its fuller form, “being grasped by an ultimate concern”<sup>25</sup>—as simply an idiomatic mid-twentieth-century pronunciation of Locke’s “inward and full persuasion of the mind.” The replacement of Enlightenment “persuasion” by Heideggerian “concern,” which in Tillich’s version is also heavily inflected by psychoanalysis, marks a sea change between two very different phases of the “modern”: the one highlighting the value of individual autonomy and a confidence in the human mind to ground the existence of God in reason, the other focusing on finitude, “thrownness,” and the giving over of the subject to pre-reflective, unconscious compulsions. “Being grasped,” Tillich declared in the same year as the draft cases, is not a state “produced by active, reflective, voluntary processes”; on the contrary, it “has already grasped us when we begin to reflect on it.”<sup>26</sup> Indeed, in the paragraph just prior to that quoted by the Court, Tillich barely stopped short of identifying the depths in which the divine resides with the psychoanalytic unconscious.<sup>27</sup>

In order to highlight different kinds of departure from Locke, one must distinguish the notion of “ultimate concern” as it appears in the Court’s rendition from that in Tillich’s work. Upon first consideration, the Court seemed to deploy Tillich’s phrase in order to ground the inquiry into “religious belief” on what one may call a “comparative functionalism”: the Court’s criterion for such a belief was that it “occupy” a specific “place” in the life of an individual. The Court nonetheless defined what one might call the “religious function” with reference to the baseline of Western convention: the required “occupation” and “place” were those that were either “parallel to” or “the same as” those of God in “orthodox beliefs” that “clearly qualified” as “religious” in the eyes of the Court and its imagined readers. I note that such an inquiry would be alien to the spirit of Tillich’s thought on a number of grounds—not the least of which was his fierce hostility to the reduction of “religion” to a “special function of man’s spiritual life.”<sup>28</sup>

In application, however, the Court replaced this functionalist inquiry with something quite different: textual interpretation. The Court made no serious inquiry into the economy of the individual applicants’ spiritual lives to determine the functional role of their beliefs therein. Rather, it quickly disposed of this kind of inquiry as a matter of “sincerity,” with which the applicants were credited without much ado. The real work of the opinion was hermeneutic, indeed a specific kind of hermeneutics—that of reading the conscientious objection applications in relation to another text postulated as authoritative: an “orthodox” religious credo.

There are two rhetorical figures that may be used to understand the Court’s hermeneutic procedure, each roughly suggested by one of the two words (“same” and “parallel”) it used to portray

25 See, e.g., PAUL TILlich, *ULTIMATE CONCERN: TILlich IN DIALOGUE* 33 (D. Mackenzie Brown ed., 1965).

26 *Id.*

27 TILlich, *THE SHAKING*, *supra* note 9, at 56–57:

[T]he so-called “psychology of depth” . . . leads us from the surface of our self-knowledge into levels . . . which we knew nothing about on the surface of our consciousness. . . . It can help us to find the way into our depth, although it cannot help us in an ultimate way, because it cannot guide us to the deepest ground of our being and of all being, the depth of life itself. The name of this infinite and inexhaustible depth and ground of all being is God.

28 TILlich, *THEOLOGY OF CULTURE* 5 (1964). See also 3 TILlich, *SYSTEMATIC THEOLOGY* 98–101 (1963).

the proper relationship between the two kinds of texts. First, *metaphor*: the Court's statement that the unconventional belief in question must "occupy the same place" as an "orthodox belief in God," from which it nonetheless apparently diverges in some way—a framing that insists both on identity and disparity between *doxai*—suggests the kind of relationship of similarity and difference, familiarity and unfamiliarity, signifier and signified, historically defined as metaphor. Indeed, metaphor, both etymologically and as defined by classical rhetoricians such as Quintilian (first century), involves a transfer of a word from one "place" to another<sup>29</sup>—a "place" in which the metaphorical "object is put instead of the thing itself."<sup>30</sup> The reader of the conscientious objection application should, in this view, look for an unfamiliar word in the "same place" as one would conventionally expect the name of God. It is the latter that is the true signified, the "thing itself." Not surprisingly, given this anchoring in the "thing itself," classical rhetoric also warns against the abuse of metaphor, which must be "moderate and judicious," not "mean" or "repulsive," and, most generally, not "based on a resemblance not sufficiently close."<sup>31</sup>

The Court's quote from Tillich seems, at first, to support this interpretation:

And if that word [God] has not much meaning for you, *translate it*, and speak of the depths of your life, of the source of your being, of your ultimate concern, of what you take seriously without any reservation.<sup>32</sup>

"Translation," the word that Tillich uses for the status of the three phrases that substitute for "God" ("depths," "source," "ultimate concern"), is, of course, taken from the Latin term *translatio*, which Quintilian uses for *metaphor*.<sup>33</sup> And, in the sentences prior to those the Court quotes, Tillich indeed suggests that these three phrases are mere substitutions for the proper name, "God":

The name of this infinite and inexhaustible depth and ground of all being is *God*. That depth is what the word *God* means. And if that word has not much meaning for you, translate it.

Nonetheless, the rest of Tillich's paragraph, also quoted by the Court, suggests that a different kind of trope may be at work here, one that breaks the bounds of a reassuring use of metaphor:

Perhaps, in order to do so, you must forget everything traditional that you have learned about God [perhaps even that word itself].

Despite its initial use of the word "translation," and its initial declaration that "God" is "the name" of the ground of being, the rest of the paragraph thus suggests something more destabilizing. There are at least two ways of understanding this other possibility. One is that, rather than "God" being the proper name and the three phrases mere "translations," all are somehow equivalent. We would be faced with an indefinite play of semantic references not anchored by the characteristics of a proper name—and with a correspondingly indefinite play of "religions" not anchored in those "clearly qualified." For such a play of references, the term "parallel" would seem more apt—indeed, an endless series of parallels, never converging with each other, let alone testable by the

29 2 QUINTILIAN, INSTITUTES OF ORATORY 125 (John Selby Watson trans., 1856).

30 *Id.* at 126.

31 *Id.* at 127–28.

32 *Seeger*, 380 U.S. at 187 (quoting TILlich, THE SHAKING, *supra* note 9, at 57 (emphasis added)).

33 2 QUINTILIAN, INSTITUTES, *supra* note 29, at 125.

criterion of whether they are legitimate substitute-occupiers of the “place” normally “occupied” by “orthodox” beliefs.

The Court’s willingness to envision other terms/beings as “occupying” a “place” either the “same as” or “parallel to” God considerably expands anything Locke would have countenanced. For Locke, with the suspicion of language I noted above, even the use of a single word for the deity was not decisive, “since those people who agreed in the name [of God], had, at the same time, far different apprehensions about the thing signified”<sup>34</sup>—manifesting his “anti-semiotic” ideology through scorning all signifiers in favor of the signified. Moreover, in direct contrast to the Court’s trope-based hermeneutics, he made no effort to hide his contempt for the proposition that “the variety of deities worshipped by the heathen world were but *figurative* ways of expressing the several attributes” of the “incomprehensible Being” of God.<sup>35</sup> Yet, it is nonetheless telling that the words I have placed in square brackets above (in the clause “you must forget everything traditional that you have learned about God [perhaps even that word itself]”) were omitted by the Court and replaced with an ellipsis—for this kind of unmooring from the anchor of the “thing itself” may have been too much for even this Court’s aspiration to expand the legal category of “religious belief in a Supreme Being” through a hermeneutics of figuration.

The name of the trope not anchored by a “proper” term is not metaphor, but *catachresis*, which Quintilian called a “necessary abuse” of language—necessary when no proper term exists.<sup>36</sup> This “necessary abuse” distinguishes catachresis from the path of negative theology, with its ban on affirmative terms for the divine due to the latter’s ineffability. Catachresis unleashes the very opposite of such a ban: a potentially indefinite proliferation of terms. The Court’s drawing back from the implications of Tillich’s words, signaled by its ellipsis, may be quite understandable—for, as Paul de Man explained, catachresis, unmoored from the “proper,” constantly verges on the evocation of the “monstrous”:

[Catachreses] are capable of inventing the most fantastic entities by dint of the positional power inherent in language. They can dismember the texture of reality and reassemble it in the most capricious of ways, pairing man with woman or human being with beast in the most unnatural shapes. *Something monstrous* lurks in the most innocent of catachreses: when one speaks of the legs of the table or the face of the mountain, catachresis is already turning into prosopopeia, and one begins to perceive a *world of potential ghosts and monsters*.<sup>37</sup>

I emphasize that we have been led into this realm of the “monstrous” purely through an inquiry into the *rhetoric of the divine* in the Court’s rendition of Tillich. Yet, it is by entering into the Court’s ellipsis, perhaps a mark of its fear of the “monstrous” lurking in the trope of catachresis, that we approach a crucial feature of Tillich’s theology unmentioned by the Court: the vital, yet destabilizing, role played by the “demonic.” Led by a purely *rhetorical* inquiry from “God” to the “monstrous,” we have thus reached the theme of the precarious border between the divine and the demonic, a decisive *ontological* feature of Tillich’s theology, and, as we shall see, one of the keys to the Pandora’s box opened up by the Court’s use of it in the draft cases, as well as its resonances today.

34 1 LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 59 (1795).

35 *Id.* (emphasis added).

36 2 QUINTILIAN, INSTITUTES, *supra* note 29, at 132.

37 de Man, *Epistemology*, *supra* note 21, at 21 (emphasis added).

*Trading "Places": The Demonic Double*

This dark side of Tillich's theology, as I have shown, lurks in the clause elided by the Court. The clause suggests that it may be necessary to "forget" the name of God in order to free up the indefinite "translation" process, the proliferation of terms, even religions. This "forgetting" suggests that the unmooring from the anchor of the "thing itself" is not due to a mere lack of a proper name, but to an affirmative act, an act of "forgetting" made necessary by the hollowing out of the meaning of that word by cultural-historical developments. We find ourselves here somewhere in the realm of modern philosophical discussions of "forgetting," somewhere between its very different uses in Nietzsche and Heidegger (though a full discussion of this assertion would take me way beyond this article). In any case, the loss of meaning of the word "God" and the need to "forget" it brings us squarely to the theme of "demonization," central to Tillich's theology, especially in its early, pre-emigration phases, in which Tillich was immersed in the upheavals of early twentieth century cultural modernism and the avant-garde.

For Christian tradition, in which Tillich "occupies a place," even if a thoroughly unusual place, the Court's valorization of substitution, by either the "same" or the "parallel," is deeply problematic. In that tradition, there is a word to describe the "occupation," by something that is not God, of "the place" that the Bible says should be occupied by God. It is not a flattering word: "idolatry." Tillich himself favored the word "demonic," a more provocative, and intransigent, appellation.<sup>38</sup>

Such terms signify the exact opposite of both comparative functionalism and rhetorical substitution: they entail a rejection of moving something that is not intrinsically absolute into the "place" of the absolute. Rather than an empirical-psychological or rhetorical-tropic frame, which would allow for functionalist comparison or rhetorical substitution, Tillich's "ultimate concern" is thus best understood as a prescriptive norm, a theological criterion, with both subjective and objective components.<sup>39</sup> Only that which is truly *ultimate* can properly be the object of ultimate "concern"; conversely, only that which is the object of ultimate *concern* can truly be "ultimate." It is not only the treatment of a finite as an absolute, the classic feature of idolatry, that is a fatal misprision, but also the treatment of God as a particular being, however "Supreme"—the latter deviation referred to by Tillich as "the demonization" of God.<sup>40</sup> It is important to note that Tillich uses the word "demonization" not in the conventional current sense of an exaggerated prejudice projected unjustly onto something or someone, but rather in the sense of an *ontological* transformation of something or someone into a "demonic" form. Such a demonization can befall even "the God of monotheism, the theistic god," which "can become an idol like an animal god or the half-animal gods of Egypt."<sup>41</sup>

This last formulation points to some key departures by Tillich from conventional Christian understandings of religious history. Tillich declares that "all religious history is filled with this demonization of the divine"<sup>42</sup>—epitomized in Dostoyevsky's "Grand Inquisitor," where religion, specifically the Church, "makes itself absolute and therefore must destroy the saint in whose

38 "And we call all that is not concerned with the truly ultimate—that is something finite but worshiped as ultimate—we call that idolatry. That is the idolizing danger of religion. I have also termed this the demonic danger of religion. . . . [E]ven monotheism can be idolatrous, which means that the God of monotheism, the theistic god . . . can become an idol like an animal god or the half-animal gods of Egypt." TILlich, *ULTIMATE CONCERN*, *supra* note 25, at 34.

39 *Id.* See generally Louis C. Midgley, *Ultimate Concern and Politics: A Critical Examination of Paul Tillich's Political Theology*, 20 *WESTERN POLITICAL QUARTERLY* 32 (1967). I am indebted to this excellent essay.

40 Tillich, *The Demonic*, *supra* note 1, at 95.

41 TILlich, *ULTIMATE CONCERN*, *supra* note 25, at 33.

42 Tillich, *The Demonic*, *supra* note 1, at 79.

name it is established—the demonic will to power of the sacred institution.”<sup>43</sup> At the same time, Tillich’s discussion of Buddhism took for granted that it should be viewed as a “religion” with “ultimate concern,” albeit one which, unlike Christianity, conceived of the “Ultimate in transpersonal categories”<sup>44</sup>—and which, like Christianity, was subject to a fall into “demonization.”

Thus, on the one hand, “ultimate concern” as the definition of “religion” seems to allow no possibility of limiting its range by anchoring it in conventional models of “clearly qualified” religions, or indeed in any model. Tillich’s proclamation of the “God above the God of theism” only highlights the destabilization of conventional creeds to which he was devoted.<sup>45</sup> Comparison among religions in this vein seems only possible, to appropriate the Court’s term, as a series of “parallels” without a privileged referent, without any way of stopping the signifying train. On the other hand, however, Tillich insisted on a distinction between “demonized” and holy gods—a distinction that seemed to provide a criterion for distinguishing between monstrous, catachretic names and “ultimate,” proper names, between true and false religions.

How can we understand the relationship between the broadly ecumenical Tillich, whether in the Court’s version, or even that of a more exacting application of “ultimate concern,” and his fiercer, demon-haunted twin? This question about the relationship between these two Tillichs may be posed not only to the Court, but to all interpreters of Tillich, as well as to Tillich himself. The former figure could come to be viewed as the “unacknowledged theoretician” of the “entire enterprise” of academic Religious Studies, setting the agenda for the putatively objective, comparative study of “world religions.”<sup>46</sup> Indeed, this use of Tillich would even come to be criticized as having infused that supposedly scientific study with a hidden theological bias.<sup>47</sup> The same critique, one could add, might be marshaled to convict the Supreme Court in the draft cases of transgressing the values of the Establishment Clause by adopting a particular theology. Conversely, the spirit of the second Tillich, the theologian of the demonic, might lead one to reject the self-construction of Religious Studies as a neutral and objective field of inquiry of homogenized “religions.” With its lack of existential “concern,” such a discipline might be construed as precisely a “demonization” (or at least “profanization”) of “religion” (that is, “ultimate concern”)—thus inevitably eliding, or distorting, its professed object of study.<sup>48</sup>

Indeed, this second Tillich could even be imagined in the role of a rigorously, if unconventionally, “strict scrutinizer” of conscientious objection applications. Rather than an insouciant embracer of an uncontrolled proliferation of religious “translations,” this Tillich might be bound to question the “ultimacy” of many of them, on the grounds that they may absolutize a finite being, or reduce an infinite being to a finitude. In the latter vein, he might be constrained to reject applications from conventionally pious Christians or Jews for having “demonized” their God, while accepting those of nontheistic Buddhists, or even, rather more unexpectedly, Cubists, as we shall see. Indeed, since none are immune from the danger of “demonization,” this Tillich would make a rather fearsome member of a draft board.<sup>49</sup>

43 *Id.* at 80.

44 *See generally* TILlich, CHRISTIANITY AND THE ENCOUNTER OF WORLD RELIGIONS 82 (1963).

45 TILlich, COURAGE TO BE 188 (1952).

46 Jonathan Z. Smith, *Tillich[s] Remains*, 78 JOURNAL OF THE AMERICAN ACADEMY OF RELIGION 1139, 1140 (2010).

47 *Id.* at 1139. For a critique of the construction “world religions,” see MASUZAWA, THE INVENTION OF WORLD RELIGIONS, *supra* note 18.

48 *Cf.* Smith, *Tillich[s] Remains*, *supra* note 46, at 1151.

49 It should go without saying that the speculations in these paragraphs about the “second Tillich” do not relate to how the empirical Paul Tillich might have viewed the Vietnam War or might have actually acted on a draft board!

Even more fundamentally, if one really takes “being grasped by ultimate concern” seriously, one can even imagine a Tillichian disapproval of conscientious objection as a legal exception. Conscientious objection, after all, is designed to uphold the general legitimacy of the Selective Service system precisely by granting a narrowly tailored exemption from its rules. From a certain Tillichian perspective, it could be viewed as perversely moving the “place” of what should be “ultimate concern” to the sidelines of public life, rather than its proper locus at the center. Conscientious objectors opt out of war, the “ultimate” act of power a society can undertake, as a purely personal act, constructing a marginal site in which to sit out the violence. While at times it may be the only way to refuse to take part in an immoral war, and while the writer of these lines would most certainly have sought that refuge during Vietnam, it hardly seems to comport with Tillich’s lifelong opposition to the relegation of “religion” to a marginal role in the life of societies, as well as individuals.

Indeed, as early as 1919, in what would prove to be something of a manifesto for his life’s work, Tillich wrote that the “autonomy of the life of the spirit is in danger, even annulled [*aufgehoben*]” when,

in any form, science stands next to a dogma, society next to a “community [*Gemeinschaft*],” the State next to a Church, with each claiming a distinct sphere for itself. There would then emerge a double truth, a double ethics, a double law. . . This doubleness, under all circumstances, must be annulled [*aufgehoben*]. It is intolerable . . . it destroys consciousness.<sup>50</sup>

In short, if religion is “directedness toward the unconditional,” then the “specifically religious spheres of culture” must be “fundamentally annulled [*aufgehoben*].”<sup>51</sup> In light of such statements, there is an evident irony in Tillich serving as an authority for a religious exception to state law—an irony, as I discuss in this article’s penultimate section, that must be examined in light of the ambivalent evaluation of the existence of distinctly religious institutions in his later work. For the moment, and as a necessary preface to that examination, I turn to an exploration of the often surprising paradoxes of the divine/demonic relationship in Tillich, in which the two dimensions, which at first seem to be necessarily and absolutely opposed, as we have seen above, turn out to share profound affinities and origins, even to the point of intextricability, rendering the task of distinguishing between them difficult and dangerous. I present this exploration in the context of a theme I have been pursuing from the outset, that of signification and representation.

#### FROM ONTOLOGY TO AESTHETICS, OR, “RELIGION” AND THE AVANT-GARDE

“In the depths of the divine, there is both a divine and a demonic.”<sup>52</sup> This kind of metaphysical pronouncement, suggesting a primordial, dangerous intimacy between opposites, points to the path toward understand the baffling relationship between the “two Tillichs” evoked above. Tillich portrays this primordial intimacy between opposites in complex and not always compatible ways, sometimes as a relationship between two forces, sometimes, and, in my view, more profoundly, as different configurations of divergent features of the divine—or, more precisely, of the depths that precede the crystallization of the distinction between divine and demonic.

<sup>50</sup> Tillich, *Über die Idee einer Theologie der Kultur* (1919), in 9 *GESAMMELTE WERKE* 13, 17–18 (1959–75). For my translation I have borrowed from those of James Luther Adams and Nicole Grondin.

<sup>51</sup> *Id.* at 19.

<sup>52</sup> Paul Tillich, *Philosophical Background of My Theology* (1960), in 1 *MAIN WORKS: PHILOSOPHICAL WRITINGS* 411, 415 (Gunther Wenz ed., 1989).

In the latter strand, Tillich locates the genealogy of the distinction in a paradox, situated on both the ontological and experiential levels. On the one hand, the primordial divine (or proto-divine) is the “Unconditioned” and can never be “reduced to form.” It is a vital force that “bursts form open,” and is thus “perceptible in the ecstatic, the overwhelming, and the dreadful.”<sup>53</sup> No particular being, therefore—whether a creature, a word, or an institution—can fully express or embody the divine. Particulars can be “symbols” that “point” to the divine, or in their best form, be that “through which” the “divine appears,”<sup>54</sup> but must never be taken for the divine itself. On the other hand, the divine gives rise to form and is itself “never formless.” It is thus both that which makes creation possible and which transcends all particular creatures. Religious experience, in which the “unconditional element” becomes a matter of “ultimate concern,” can thus only occur when the divine “appears in a concrete embodiment”<sup>55</sup>—and yet must never confuse that concrete embodiment with the ultimate. To recur to the terms of the discussion above, religious signifiers, indeed entire religious systems, should neither be fetishized nor be experienced as “arbitrary.”

Nonetheless, confounding a “concrete embodiment” with the “unconditional”—or, on the contrary, viewing the two as distinct—are not mere errors, but rather, possibilities inscribed in the basic conditions of both human experience and divine ontology.

The possibility of the demonic is based on: first, that the sacred is at the same time the absolute support and the absolute demand, that it is the depth and the form, abyss [*Abgrund*] and ground [*Grund*]; and, second, that, in the creature, these elements may separate.<sup>56</sup>

In this passage, it is in the ever-present possibility of the dissociation of the two dimensions of the [proto-]divine that the demonic lies. “Living form,” results from “the conjoined effect” of the two dimensions, “depth and form,” “abyss and ground.” The demonic, by contrast, results from their dissociation, and the danger lies at both poles, as we shall see throughout this discussion.

To complicate matters further, Tillich also asserts that the demonic, no less than the divine, only exists insofar as it embodies itself in form, albeit disharmonious form. Demonic entities, no less than holy entities, contain both a dimension of form and that which transcends form. When it comes to demonic forms, Tillich calls this the relationship between the dimensions of “form-creation” and “form-destruction,” which is the demonic equivalent of the dimensions of “ground” and “abyss” in the divine. That the divine and demonic mirror each other makes the distinction between them dangerously indeterminate, for we now see that it is not the complete dissociation of form and abyss that characterizes the demonic but rather their perverse, “destructive” combination. This mirroring relationship makes distinguishing one from the other highly fraught, and highly pertinent to questions of the existence of a homogeneous category of “religion,” and thus of comparability, of finding “parallels” and “translations” among diverse “religions.”

The question of cross-cultural comparison reaches an acute form in Tillich’s early discussions of “primitivism” in visual art, that fascination with the “eruption” of the “exotic Other” so central to

53 Paul Tillich, *Basic Principles of Religious Socialism* (1923), in *POLITICAL EXPECTATION* 67 (James L. Adams & Victor Nuovo trans., 1971).

54 Paul Tillich, *The Formative Power of Protestantism* (1929), in *THE PROTESTANT ERA* 212 (James Luther Adams trans., 1948).

55 3 TILlich, *THEOLOGY OF CULTURE*, *supra* note 28, at 28.

56 Paul Tillich, *Der Begriff des Dämonischen und seine Bedeutung für die systematische Theologie* (1926), in 8 *GESAMMELTE WERKE*, *supra* note 50, at 285, 286. This somewhat free translation, which I have slightly modified, is taken from JAMES LUTHER ADAMS, *PAUL TILlich’s PHILOSOPHY OF CULTURE, SCIENCE AND RELIGION* 230 (1970). I thank Kevin Goldberg for help with this translation.

Western artistic innovation in the early twentieth century. Thus, at one extreme, the demonic emerges from the “isolation and formless eruption of the abyss,” the “*form-destroying eruption of the creative basis of things*.”<sup>57</sup> Such an “eruption” of the “creative abyss” can yield artistic creations Tillich experienced as disharmonious, even “monstrous.” For the Tillich of the 1920s, still the era of the primitivist fascinations of cultural modernism and the avant-garde, a key example was the “art of primitive peoples and Asiatics,” which “disrupt[s] the organic form . . . violate[s] radically the organic coherence presented in nature . . . mocks all natural proportion.”<sup>58</sup> In this art, the “organs of the will for power, such as hands, feet, teeth, eyes, and the organs of procreation, such as breasts, thighs, sex organs, are given a strength of expression which can mount to wild cruelty and orgiastic ecstasy.”<sup>59</sup> With quintessential cultural modernist ambivalence about the “primitive” within and without, Tillich declares that this art, which he pronounces geographically Other, nonetheless expresses “depths of reality which had, to be sure, escaped our consciousness, but in subconscious strata had never ceased to determine our existence,” a depth also revealed by the “new psychology of the subconscious”<sup>60</sup>—an allusion to the “Id” of psychoanalysis. It is, of course, self-evident from this passage that this ambivalence was associated with racialized fears and fantasies, widely shared by other cultural modernists, particularly those whose “primitivism” was such a key feature of the art of the period. And it is, of course, the question of the commensurability of Judeo-Christian religion with that of the cultural Other that was partly at stake in the draft cases, as the Douglas opinion makes explicit.

This ambivalence took many expressions throughout Tillich’s career. Most strikingly, the disruptive force that the early Tillich named “demonic”—and which seems indistinguishable from the divine “abyss”—he later described as the “tremendous religious power” of such art.<sup>61</sup> As I discuss below, he described the avant-garde artistic movements most inflected by various forms of primitivism, such as Expressionism, Cubism, and Surrealism, as impelled by the desire to “look into the depths of reality, below any surface and any beautification of the surface and any organic unity,” to “see the elements of reality as fundamental powers of being out of which reality is constructed.”<sup>62</sup> It is the disruption of the surface that Tillich views as the key to “religious” experience—even though, if that disruption perversely fuses with form, it can lead to demonic distortions. It may be that Tillich could characterize the primitivism of avant-garde movements as both “demonic” and “religious” because that distinction was both crucial and indeterminate—or, perhaps, because the experience of the “demonic” was necessary for the “religious.”

It is, indeed, the key paradox of Tillich’s vision that the “same” abyss [*Abgrund*] can “appear, by turns, as divine and demonic.”<sup>63</sup> This “appearance” occurs as an “eruption” in both cases. In Tillich’s early, pre-emigration, writings he reserved a different German word for each of the two kinds of eruptions.<sup>64</sup> This rather unpersuasive terminological difference only serves to highlight the ontological and interpretive ambivalence it attempts to manage.

57 Tillich, *The Demonic*, *supra* note 1, at 85.

58 *Id.* at 77–78.

59 *Id.* at 78.

60 *Id.* at 77.

61 Tillich, *Existential Aspects*, *supra* note 2, at 139.

62 *Id.* at 137.

63 Jean Richard, *Le démonique comme perversion du divin d'après Paul Tillich*, 5 *THÉOLOGIQUES* 89, 93 (1997) (my translation).

64 *Id.* *Durchbrechen*, for the “eruption” of the divine, *Hervorbrechen*, *Eimbrechen*, and *Zerbrechen*, for the “upsurge,” “effraction,” and “rupture” of the demonic.

I now turn to the second kind of “demonization.” If I have, up to this point, described the demonization resulting from form-destroying energy, the danger at the other extreme lies in the absolutization of a particular form, its claim to definitively embody, or, more precisely, to “exhaust,” the primordial creative force. At this pole,

the creature desires to take possession of the inexhaustibility of the divine depth, to have it for its own. By this means the creative potency becomes destructive.<sup>65</sup>

In the religious domain, this can take the familiar form of idolatry. But Tillich also extends it to the “highest god of monarchial monotheism” who “remains a demon, a finite thing that wants to exhaust the absolute.”<sup>66</sup> If the challenge of “primitive art” is its strangeness, confronting the Western subject with its repressed and disintegrative unconscious, the challenge of the “finite that wants to exhaust the absolute” is its uncanny familiarity, the confrontation of the holy with its all-too-solid double—the divine god with the demonic god, the divine church with the demonic church—a doubling made possible by the seizure of the energies of the abyss by the finite form. At its most terrifying in the period of rising fascism, this confrontation was posed, as Tillich wrote in 1934, when the “totalitarian claim of the state upon man clashed with the unconditional claim which God makes upon him.”<sup>67</sup> Fascinated and repelled by this confrontation, Tillich set forth an elaborate set of what can only be called “parallels” between the totalitarian demonic and the unconditional divine.<sup>68</sup> Terrifying disruption and monstrous reification—these were the twin dangers of the demonic, both rooted in the primordial depths, that of the “demonic divine.”

Tillich was also concerned with a rather different danger, that of “profanization,” a challenge seemingly less formidable, though perhaps more insidiously pervasive, than the demonic. “Profanization,” as Tillich uses it during his early period, is much more akin to Weber’s “disenchantment,” a form of rationalization that affects the religious as well as the secular domains, than to conventional notions of secularization. “Profanization” is a “form of the combatting of the demonic,” not through opening up finite forms to transcendent life forces, but rather, through

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65 Tillich, *Der Begriff*, *supra* note 56, at 286.

66 Tillich, *The Demonic*, *supra* note 1, at 107.

67 Tillich, *The Totalitarian State and the Claims of the Church*, 1 SOCIAL RESEARCH 405, 425 (1934).

68 Tillich identified these parallels as follows:

The totalitarian claim of the state upon man clashed with the unconditional claim which God makes upon him. The myth of the German nation and empire confronted the message of the people and Kingdom of God; the myth of blood, the community of sacrament which transcends blood relationship; the unconditional tie of the individual to his nationality, the requirement to be able to leave homeland and father’s house for the sake of God; the disparagement of the individual, the doctrine of the absolute value of the human soul; the leadership of the national state, the sovereign claims of Christ; the coordination of the spirit, the directing judgment of the Spirit of God; the consecration of the present, the hope of the future. The destiny of both the totalitarian state and the German churches, with either their possible union or their fundamental irreconcilability, is involved in the conflict between these opposing currents.

*Id.* at 425–26.

suppressing all consciousness of cosmic depth. The lance of profanization in both ancient and modern times was philosophy: both “Greek” and “modern” philosophy

sought to see and make visible divine clarity in the perfection, completion, and rationality of form. But in the emphasis on divine clarity, the divine depth was lost: that which is inexhaustible, self-manifesting, unconditioned, and transcendent.<sup>69</sup>

Thus, “profanization,” often against its intentions, only overcomes the demonic “by tearing itself free from the divine at the same time.” Indeed, given Tillich’s metaphysics of the primordial intimacy between the divine and demonic, it is hardly surprising that the experience of the demonic is inextricable from that of the divine, that “demonic disruption” and “religious power” may almost be indistinguishable.

It was, of course, precisely the flattening of human experience wrought by this kind of “profanization” that had led avant-garde Western artists to fantasize about the raw, vital energies they projected onto a “primitive” by turns racialized, Orientalized, ethnicized, sexualized, and sought in their own unconscious. And it is precisely this kind of “profanization” that cultural modernist-era theologians like Tillich most disdained in the liberal theology of the late nineteenth century. Whether projected onto the art of the cultural “Other” or onto that internal otherness explored by psychoanalysis, highly charged ambivalence toward the “primitive” was central to early twentieth century cultural modernism, well encapsulated in theological language by Tillich’s “divine demonic.” This primitivism was deeply linked in cultural modernism across a wide variety of domains with the seemingly opposite emphases on radical experimentation with form and technique.<sup>70</sup> Indeed, Tillich’s early work may provide the most explicit, self-conscious link between the diverse manifestations of the quintessential cultural modernist “alliance” between innovative creativity and primitivism. There are good reasons to think that Tillich modeled his entire theology of the paradoxical “divine/demonic,” creative/destructive, energy of the cosmos on the image of the avant-garde artist, who drew on “demonic” energies to shatter the ossified forms of nineteenth-century art and create bold, often shocking, forms.<sup>71</sup> The French phrase *monstre sacré*, often applied to Picasso, the artist much venerated by Tillich, might suggest the experience that underlies Tillich’s early theology.<sup>72</sup>

Although I have written mostly in terms of “paradox” and “ambivalence,” Tillich also, and centrally in his later work, uses the word “ambiguity” to portray the inextricability, as well as opposition, of divine and demonic in all spheres of life:

One can call this ambiguity divine-demonic, whereby the divine is characterized by the victory of the creative over the destructive possibility of the holy, and the demonic is characterized by the victory of the destructive over the creative possibility of the holy.<sup>73</sup>

69 Tillich, *Der Begriff*, *supra* note 56, at 286. The translation is from ADAMS, PAUL TILlich’s PHILOSOPHY OF CULTURE, SCIENCE AND RELIGION, *supra* note 56, at 230, with minor changes by the author.

70 J.C. Middleton, *The Rise of Primitivism and Its Relevance to the Poetry of Expressionism and Dada*, in *THE DISCONTINUOUS TRADITION: STUDIES IN GERMAN LITERATURE IN HONOUR OF ERNEST LUDWIG STAHL 182, 194* (P.F. Ganz ed., 1971) (“The alliance of primitivism and abstraction is one of the most copiously documented facts of the [cultural modernist] period.”). I have argued, in a series of studies, for the usefulness of this “alliance” in understanding the transformation of international law after World War I. See, e.g., Berman, *Modernism, Nationalism, and the Rhetoric of Reconstruction*, 4 *YALE JOURNAL OF LAW AND THE HUMANITIES* 351 (1992).

71 See TILlich, *ON THE BOUNDARY* 28 (1966) (1936).

72 DANIEL HENRY KAHNWEILER, *MES GALÉRIES ET MES PEINTRES* 55–56 (1961).

73 TILlich, *DYNAMICS OF FAITH* 15 (1957). I thank Mary Ann Stenger for directing me to this passage and for a very instructive e-mail exchange. The “ambiguous,” divine/demonic composite of all areas of life is perhaps the central theme of volume 3 of Tillich’s *SYSTEMATIC THEOLOGY*, *supra* note 28.

At the human level, an irreducible form of this “ambiguity” permeates every moment of life:

[S]elf-integration is countered by disintegration, self-creation is countered by destruction, self-transcendence is countered by profanization. Every life process has the ambiguity that the positive and negative elements are mixed in such a way that a definitive separation of the positive from the negative is impossible: life at every moment is ambiguous.<sup>74</sup>

Since both divine and demonic have dimensions of form and disruption of form, “ambiguity” highlights the difficulty of interpretation, of distinguishing between these putative antagonists—a difficulty that can have the gravest moral and religious, let alone legal, consequences, a task in comparison with which identifying the line between “religious” and “nonreligious” seems a child’s game, or, perhaps, a diversionary defense mechanism. The issue here is not that of the “arbitrariness of the signifier,” but of the impossible, yet unavoidable, necessity of distinguishing between intimate opposites—a distinction made no less necessary, though perhaps all the more impossible, for a thinker whose early work continually affirmed that

[f]rom the demonic depth arise all the higher . . . forms of religion; in the battle with the demonic they gain their peculiar form; in the demonic element, which never disappears as the basis, they exert their compulsory power over consciousness.<sup>75</sup>

#### FROM THE THEOLOGY OF AESTHETICS TO THE AESTHETICS OF POLITICS

Three decades after the essay in which he identified the demonic as the “basis” of the “higher forms of religion,” Tillich framed a complex discussion of the relationship between religion and art by distinguishing between two “senses” of “religion.”<sup>76</sup> On the one hand, “religion in the narrower sense,” the more conventional notion, is defined by “a set of symbols, normally of divine beings or a divine being, having symbolic statements about activities of these gods or this god, having ritual activities and doctrinal formulations about their relationship to us.”<sup>77</sup> On the other hand, “religion” in the “largest and most basic sense” means “being ultimately concerned, asking the question of ‘to be or not to be’ with respect to the meaning of one’s existence.”<sup>78</sup> This distinction, which had become well established in Tillich’s work by the time of this essay (1956), had broad interdisciplinary roots in the intellectual ferment of Europe in the early twentieth century—forming a series with such related, though by no means identical, distinctions as that between “religiosity” and “religion,” formulated by the German sociologist Georg Simmel and taken up by theologians like Martin Buber;<sup>79</sup> between the “left sacred” and “right sacred,” central to the work of avant-garde French thinkers like Georges Bataille;<sup>80</sup> and between “grace” and “religion,” central to the Swiss theologian Karl Barth.<sup>81</sup> Tillich himself further complicated our discussion by adding the couple “antireligious/religious” to this series:

74 3 TILlich, *SYSTEMATIC THEOLOGY*, *supra* note 28, at 169.

75 Tillich, *The Demonic*, *supra* note 1, at 107.

76 Tillich, *Existential Aspects*, *supra* note 2, at 132–33.

77 *Id.* at 132.

78 *Id.*

79 SIMMEL, *ESSAYS ON RELIGION* (H.J. Helle trans., 1997).

80 E.g., Bataille, *Attraction and Repulsion II: Social Structure* (1938), reprinted in *THE COLLEGE OF SOCIOLOGY* 1937–39, 121–22 (Denis Holier ed., B. Wing trans., 1988).

81 BARTH, *THE EPISTLE TO THE ROMANS* (1923) 229–70 (Edwyn S. Hoskins trans., 1968).

Religion in the larger sense is . . . a special consequence of events in some of the great religions which are in a sense antireligious. Jesus was antireligious and Buddha was antireligious, and there are others like them.<sup>82</sup>

To make matters worse, and to further highlight the destabilization effected by Tillich, the term “religious” in this “religious/antireligious” couple does not at all track its meaning in the “religious/nonreligious” couple to whose complex vicissitudes, so crucial for current discussions as well as for the draft cases, I now turn.

In his 1956 essay, Tillich described the relationship between art and religion by dividing artistic works into four categories, along the two axes of “content” and “style”: (1) nonreligious content, nonreligious style; (2) nonreligious content, religious style; (3) religious content, nonreligious style; (4) religious content, religious style.<sup>83</sup> It is the relationship between the second and third of these categories that is of particular interest for my discussion here. By “religious content,” Tillich intends images drawn from “religion in the narrower sense,” such as depictions of Jesus. By “religious style,” he intends the kind of artistic technique capable of evoking the “depth dimension,” the “abyss,” that which transcends form and makes it possible, the dimension whose “eruption” can give an experience of the divine.

Tillich’s discussion of the second category (nonreligious content, religious style) focused on the series of pathbreaking artistic movements associated with cultural modernism and the avant-garde. Tillich saw Cubism as a key example of the way “religious” experience can be evoked in the absence of any its conventional symbols, indeed, any coherent images at all:

The forms of our existence are no more organic. They are atomistic, disrupted. These disrupted forms of our existence are taken by themselves by modern artists as the real elements of reality. . . . They reduce the colorful world of the impressionists and of the beautifying idealists of the past to more and more cubic forms. . . . Cubic forms are the unorganic forms out of which the world is constituted. But the artists do not accept the statement that these forms are only unorganic. Embodied in this very unorganic form is the power of being itself. In this way the disruptedness of expressionism, surrealism, and all the other recent forms of styles, such as cubism and futurism, is nothing else than an attempt to look into the depths of reality, below any surface and any beautification of the surface and any organic unity. It is the attempt to see the elements of reality as fundamental powers of being out of which reality is constructed.<sup>84</sup>

It is significant for my analysis here that Tillich associated such works with a verse fragment from the Book of Job, part of an extended passage about human mortality, which Tillich translated as “and his place does not know him anymore.”<sup>85</sup> Indeed, it is precisely the loss of “place,” as we have seen throughout, that unmoors religion from conventional words and symbols and launches its indefinitely proliferating “parallels.” This privilege accorded to loss of place in authentic modern religious and artistic experience renders deeply problematic the Supreme Court’s use of Tillich in anchoring the sphere of “religion” in the “place occupied by God.”

When read in relation to Tillich’s portrayal of the divine as both a force of “eruption” and as a force of form-creation, of *Abgrund* and *Grund*, one can understand his assertion that Cubist works—with their “disruption” of the “surface,” their refusal of conventional beauty, their “dissolution” of the taken-for-granted world into the “*Urelemente* . . . which in the physical realm

82 TILlich, *ULTIMATE CONCERN*, *supra* note 25, at 34.

83 Tillich, *Existentialist Aspects*, *supra* note 2, at 133–44.

84 *Id.* at 136–37.

85 The King James Version translates the entire verse, Job 7:10, thus: “He shall return no more to his house, neither shall his place know him any more.”

are cubes, planes, colors, lines, and shadows”—exert a “tremendous religious power.”<sup>86</sup> Tillich emphasizes the “nonreligious content” dimension of this religiously powerful art by giving, as his key example, Georges Braque’s painting of a Cubistically dissolved “table.”<sup>87</sup>

If one recalls Tillich’s earlier writings, associating this power of disruption of conventional form and beauty with the demonic and “the art of primitive peoples,” one becomes even more acutely aware of the unstable nature of the relationship between the putatively opposite realms of divine and demonic, and its implications for the relationship between “clearly qualified religions” and those whose status is in doubt, or cultural Self and Other. If “disruption,” the source of “religious power,” may be identified with the demonic and the cultural Other, then the stability offered by conventional Western religions (those “clearly qualified” creeds in the eyes of the Court) may be the very opposite of Tillichian religiosity.

And, indeed, by contrast with his praise of “religious style/nonreligious content,” epitomized in Cubism and other avant-garde movements, Tillich portrays works with “religious content/nonreligious style” in the harshest terms.

In Germany towards the end of the nineteenth century, and in America with the building of Riverside Church in New York, many pictures were produced by two men, Oude and Hoffman. These pictures all portray Jesus either in terms of a sentimental, religious man, as does the Hoffman work in Riverside Church, or in terms of a rheumatic or otherwise sick, dull school teacher walking through little villages. Now, this kind of picture was supposed to be very religious at that time. I would say that for me, however, religious art must show something of God and the basic structures out of which He has made His reality, and not these sentimentalisms.<sup>88</sup>

It is not, however, aesthetic and theological impoverishment alone with which Tillich charged these conventionally religious works. Rather, such “religious content/nonreligious style” works are actually “dangerously *irreligious*.”<sup>89</sup> Indeed, they are in league with the very worst danger of the twentieth century, fascism, in their attempt to deny the fundamental depths of reality, the *Urelemente*, especially in the modern era of disrupted forms. Tillich associated this denial with the attempt by fascism to maintain an old social and political order in the face of its dissolution, an effort which can only be launched through violence. And thus, Tillich declared, it should come as no surprise that the same “petty bourgeoisie” that rejected modern art was also a fertile ground for the Nazis:

The petty bourgeoisie of Germany also went to these exhibitions [of avant-garde art] and I will never forget the smiling and laughing, or hostile and malignant faces in front of these pictures. What they expected in a museum was idealized naturalism. These pictures, however, had neither nature in the surface sense of the word in them, nor idealizing beauty. Instead of this they had shocking disruptions, distortions, elements of reality brought out of the depths to the surface by the painter. These petty people fought against this. This was, in the realm of art, the fight between the coming Nazism, produced by the same petty bourgeoisie, against the progressive intelligentsia which realized the dangerous situation in the industrial society. The petty bourgeoisie did not want to see that its situation had fundamentally changed, and Fascism was the attempt to maintain the old situation by means of suppression and terror.<sup>90</sup>

86 Tillich, *Existential Aspects*, *supra* note 2, at 139.

87 *Id.* at 139. Braque painted a number of Cubist “tables,” and Tillich does not specify which painting he has in mind. I speculate that it was one of the “Analytic Cubist” renderings of 1910, such as “The Table (Still Life with Fan)” or “Candlestick and Playing Cards on a Table.”

88 *Id.*

89 *Id.* at 142 (emphasis added).

90 *Id.* at 145.

With this final turn in the essay, Tillich seems to definitively close the door on the Court's notion of anchoring comparison in "clearly qualified religions," certainly when it makes that phrase synonymous with "orthodox belief."

The puzzle I broached above of the relationship between the "two Tillichs"—the broad ecumenicist and the divisive demon-hunter—should now seem less baffling. Tillich both thoroughly dispersed the possibility of religious experience beyond anything like a separate social sphere, and yet insisted that the dividing line between divine and demonic cuts through all spheres. And even the demonic is divided in two: the eruption of the form-disruptive demonic may be a precondition for true religious experience, as in avant-garde art; the form-absolutizing demonic, by contrast, closes off further experience, as in the case of demonized churches.

All of these considerations point to an inescapable conclusion: for Tillich, a Conscientious Cubist may well be more entitled to the appellation, "religious," than a Pious Parishioner.

### INSTITUTIONAL DEMONOLOGY: THE CHURCH, THE LAW, AND THE STATE

This portrayal of Tillich's simultaneous dispersion and division of religion begs the question of his stance toward specifically religious institutions—for, someone may well ask, was not Tillich a man of the Church?—as well as other social institutions of a distinct character, of which the two most important for our purposes are the law and the state. Tillich's call in 1919 for the "specifically religious spheres" to be "fundamentally annulled [*aufgehoben*]" was consistent with the dispersion of religion ("in the larger sense") stressed in his 1956 art essay. Much of his post-1919 writing on the Church, though, took a somewhat different turn, affirming its value as well as its danger, while emphasizing its necessarily "ambiguous," divine/demonic nature.<sup>91</sup> This same strategy may be seen in his analyses of the law and the state. And it is through an analysis of this theology/demonology of the three institutions most crucially involved in conscientious objection issues, the Church, the law, and the state, that I will return to the themes with which I began this article.

In the third volume of his late magnum opus, the *Systematic Theology* (1963), Tillich seemed to relativize his youthful call for the "annulment" of the "specifically religious spheres," as well as the view expressed in the art essay about the "dangerously irreligious" character of traditional religious forms. While declaring that "according to the definition of religion as the self-transcendence of life, there should be no religion, individual or organized, as a particular function of the spirit," and that, "in accordance with their essential nature, morality, culture, and religion interpenetrate one another," he nonetheless contended that they must "separate in order to become actual."<sup>92</sup> "Becoming actual" refers to the conditions of human life in which form and the disruption of form, sacred and profane, divine and demonic are locked in eternal struggle, rendering every moment "ambiguous."

While distinguishing "religion," the particular, historically contingent forms, from "revelation," a distinction central to Karl Barth, he nonetheless declared,

[T]heologians have protested against applying the term "religion" to Christianity. They have contrasted religion with revelation and have described religion as man's attempt to glorify himself. This is indeed a correct

91 Readers of a Hegelian disposition may find a bridge between the 1919 essay and the later work by pointing to the complexity of the word *aufgehoben* (literally, "lifted up"), which in the Hegelian tradition can mean a simultaneous preservation and transcendence.

92 3 TILlich, *SYSTEMATIC THEOLOGY*, *supra* note 28, at 95.

description of demonized religion, but it ignores the fact that every revelation expresses itself in a religion.<sup>93</sup>

The ever-present possibility of the demonization of religion, however, is not a contingent circumstance, but indelibly inscribed in its nature, particularly in the Church:

One can read the history of religion . . . as a continuous inner religious struggle against religion for the sake of the holy itself. Christianity claims that in the Cross of the Christ the final victory in this struggle has been reached, but even in claiming this, the form of the claim shows demonic traits; that which is rightly said about the Cross of the Christ is wrongly transferred to the life of the church, whose ambiguities are denied, though they have become increasingly powerful throughout its history.<sup>94</sup>

To be sure, already in 1926, Tillich had declared that it was “beyond any human effort, even the Christian, to escape from the demonic control of everything real,” and, thus, “even the Church has again and again succumbed to demonry.”<sup>95</sup> But by 1963, Tillich viewed this phenomenon not as an avoidable “succumbing,” but as inscribed in the “ambiguous” nature of religious and ecclesiastical institutions—a trait they shared with all areas of human life. Referring to ecclesiastical institutions and their representatives, he declared that the

power of the bearers of the holy is the unconditional character of the holy. . . . the source of the solidity of holy institutions, sacred customs, divinely ordered systems of law [etc.]. . . . But this very solidity betrays its divine-demonic ambiguity.<sup>96</sup>

Church history is thus beset by “all the disintegrating, destructive, and tragic-demonic elements which make historical life as ambiguous as all other life processes.”<sup>97</sup> In short, in the kind of paradoxical statement about the relationship between divine and demonic pervading Tillich’s entire oeuvre, he proclaimed that

the churches may even represent the demonic kingdom. But the demonic kingdom is a distortion of the divine Kingdom and it would have no being without that of which it is the distortion.<sup>98</sup>

In the 1964 *Theology of Culture*, Tillich summarized the “ambiguity” of religion, and his ambivalence toward distinctly religious institutions, by declaring that “religion as a special sphere among others, in myth, cult, devotion, and ecclesiastical institutions” is due to the “tragic estrangement of man’s spiritual life from its own ground and depth.”<sup>99</sup> While “religion” may be necessary in such a tragically estranged world, one must never forget that “beside its glory lies its shame.”<sup>100</sup>

I now turn to Tillich’s reflections on law. These reflections mostly focused on the moral law, participating in a long tradition of Protestant polemics about antinomianism.<sup>101</sup> On the one hand,

93 *Id.* at 104.

94 *Id.*

95 Tillich, *The Demonic*, *supra* note 1, at 107.

96 3 TILlich, SYSTEMATIC THEOLOGY, *supra* note 28, at 105.

97 *Id.* at 165.

98 *Id.* at 375.

99 3 TILlich, THEOLOGY OF CULTURE, *supra* note 28, at 8.

100 *Id.*

101 My discussion of Tillich and moral law is indebted to Kimberly R. Miller, *How Does the Letter Kill? The Tillichian and Lutheran Understandings of Law*, 29 NORTH AMERICAN PAUL TILlich SOCIETY NEWSLETTER 14 (2003).

“Protestantism denies the security of sacramental systems with inviolable forms, sacred laws, eternal structures. It questions every claim of absoluteness.”<sup>102</sup> Any “identification of grace” with such “finite forms” is “demonic *hybris*.”<sup>103</sup> Indeed, law only appears as something external to a person, as command, when that person is estranged from his or her essence:

[M]oral law is experienced *as* law only because man is estranged from ... his essential being ... It is his nature, and it would never become a commanding law if he did not try to break through it. But if he is estranged from it, if he contradicts it in his existence, it *becomes law* for him.<sup>104</sup>

Legality as such thus comes perilously close to a form of demonization. When experienced as an external command, even a religious code becomes “an arbitrary law laid down by a heavenly tyrant, who is strange to our essential nature and therefore whom we resist justifiably”<sup>105</sup>—a formulation reminiscent of Gnostic imprecations against the demon whom they identified with the god of the Old Testament.

On the other hand, Protestantism does not call for a thorough “dissolution of form,” or what he called “venture in general.”<sup>106</sup> At the experiential level, Tillich referred to this necessity to retain form as the “unity of ecstasy and structure.”<sup>107</sup> Tillich longed for “finite forms,” including norms, that “point beyond themselves” and through which the “divine appears,” which he called “forms of grace.”<sup>108</sup> These forms are not experienced as external, as in a command-obedience relationship, but neither are they exhaustively identified with the subject, as in a Kantian autonomy: for both of those experiences would be forms of demonization. Rather, they are experienced as coming from within, but as pointing beyond, an experience that Tillich dubs “theonomy.”<sup>109</sup> In most of human experience, however, there is a disjunction between the “essence” of a person and his “existence”—a disjunction that results in morality appearing as an external, “commanding law.”

Tillich’s description of the vicissitudes of the moral law highlights dangers of demonization similar to those I have described above. Dissociation between the two poles of “theonomy” can lead either to demonic law-fetishism or to dissolution into a pure antinomianism—the latter, indeed, a charge which has been made against Tillich by his traditionalist critics.<sup>110</sup> Yet Tillich never embraced the antinomian possibility lurking in his “divine demonic” in the way he embraced the “disruptive” forces of the “primitive” or Cubist “dissolution” in the realm of artistic representation. Despite his elaboration of the dangers of the demonization of law, he never welcomed the antinomian dissolution of ossified normative systems to break open the “depths,” the abyss, the *Abgrund* of morality.

An explanation for this reluctance to embrace the implications of what might have seemed to be a clear analogy between the realm of art and the realm of law may lie in the crucial experience of the growth of fascism during the formative years of Tillich’s thought—and here we are brought to his reflections on the state. Writing in 1938, Tillich portrayed a number of “dialectical tensions”

102 Tillich, *Formative Power*, *supra* note 54, at 215.

103 *Id.* at 212.

104 PAUL TILlich, *MORALITY AND BEYOND* 48 (1963) (emphasis added).

105 *Id.* at 24.

106 Tillich, *Formative Power*, *supra* note 54, at 212.

107 3 TILlich, *SYSTEMATIC THEOLOGY*, *supra* note 28, at 116.

108 Tillich, *Formative Power*, *supra* note 54, at 212.

109 *Id.* at 220.

110 *See, e.g.*, JOHN GERSTNER, *PRIMITIVE THEOLOGY* (2003).

between “the State and the Gospel,” the first of which is that between “power and law.”<sup>111</sup> The cleavage between power and law, on the level of the state, is closely analogous to that which produces the experience of the moral law as external command on the personal level: a disjunction between the “essence” of the state, as a just order, indeed an anticipation of the Kingdom of God, and its “existence” as the “demonic will to power” that is “connected with everything which has [a] State character.”<sup>112</sup> As long as this disjunction exists, law is necessary to restrain the state in its demonized form.<sup>113</sup> Tillich expressed the fear that an antinomian stance would eliminate the possibility of any critical stance in relation to the state’s “demonic will to power,” a familiar fear of the legal imagination that became acute for many during the period of rising fascism.

Nonetheless, siding with the normative “essence” against the will-to-power “existence” of the state was not an unproblematic stance for Tillich, who saw such disjunctions as potentially demonizing both terms of this kind of dichotomy. The ultimate example of this danger is the situation of the anti-Nazi segment of German Protestantism in 1938, the “Confessional Church,” the discussion of which brings together the three institutions under discussion here. No union of norm and power was possible, and still less desirable, at that time, for compromise with the Nazi state was out of the question. The only way left for anti-Nazi Protestants was

the way used by the old Church in the days of persecution, to become an underground church in order to save the Christian message for its members and for coming generations. This way is used today by the radical wing of the Confessional Church in Germany. It is unavoidable but it also is dangerous. It works in the direction of a sectarian seclusion, of dogmatism, pharisaism and hierarchical dictatorship. These dangers already have become visible in the life of the Confessional Church.<sup>114</sup>

These transformations (“sectarian seclusion, dogmatism, pharisaism, hierarchical dictatorship”) of the underground Church, the Church for which Tillich otherwise had much sympathy, amount to what he elsewhere referred to as the demonization of religion. This splitting-off from society of the bearer of the “Christian message” was one more aspect of the horror of the Nazi period for a thinker who would later write “sin is separation”<sup>115</sup>—a dictum made famous by Martin Luther King, Jr., in his 1963 “Letter from Birmingham Jail.” However, in the context of Tillich’s work as a whole, the problem of demonization-through-separation goes beyond the uniquely tragic dilemma of the German church under Nazism; it is inherent in the institutional forms of religion itself, and thus in all churches “in every time and place.”<sup>116</sup> And we could add the same gloss on the law and the state.

To return to the legal issue framing this article: that the dictum “sin is separation” comes from the same work by Tillich quoted by the Court in the 1965 draft cases serves to highlight the problematic quality of conscientious objection. As I suggested above, this legal category is designed to uphold the general legitimacy of the Selective Service system precisely by separating the religious objector from the system as a whole. The disjunction between the exemption and the rest of the system is accentuated by the denial of the exemption to those who object to a particular war rather than war in general.<sup>117</sup> The Supreme Court justified this denial on the grounds that such objections

111 Tillich, *The Gospel and the State*, 15 CROZER QUARTERLY 251, 253 (1938).

112 *Id.*

113 *Id.* at 254.

114 *Id.* at 260.

115 TILlich, THE SHAKING, *supra* note 9, at 154.

116 3 TILlich, SYSTEMATIC THEOLOGY, *supra* note 28, at 167.

117 See *Gillette v. United States*, 401 U.S. 437, 455 (1971).

are “likely to be political and nonconscientious,”<sup>118</sup> by which it seems to have meant “political *and therefore* nonconscientious”—in short, would involve a transgression of the proper boundaries between religion and politics, precisely the kind of transgression Tillich saw as essential in order to avoid the dangers of demonization.

Indeed, as I suggested above, one might imagine a Tillichian refusal of conscientious objection, except perhaps under extreme circumstances, such as those facing the German church in 1938. The conscientious objector does not attack the draft in general, but only as applied to himself. The objection must be constructed in terms of the individual’s characteristics *as an individual*, the claim that *this* specific person may not be drafted because of his religious particularity. Conscientious objection is thus one way the law constructs religion as a particular, very limited sphere of social life, while legitimating state power over the other spheres. Religion becomes one social “function,” among others, that repeated target of Tillich’s ire.<sup>119</sup> Moreover, as a particular, the objector claims the role of the absolute: he claims that an otherwise valid general law is inapplicable to him on the basis of his unconditional nature, transcending all social, political, and historical contingencies. A conscientious objector is precluded from arguing about the specificities of a particular war, which would require engagement in socially controversial and contingent judgments; rather, he must object to war as such to qualify. He must thus present his very being in its particularity as an absolute—almost a Tillichian textbook definition of “demonization.” The particular-absolute that is the conscientious objector then takes his place alongside an other particular-absolute that is the war-making state—a confrontation of two Tillichian “demons.”

As ever with Tillich, however, things are not so simple. To be sure, he made very clear his opposition to pacifism (though he was also very active in the movement to oppose nuclear weapons). It was perhaps both Tillich’s experience with Nazism, as well as his principled objection to separating religion in a separate sphere, that underlay his opposition to pacifism, which he saw as an abdication of the aspiration to unite “essence” and “existence.” Or, in the language of theological vision: “Spirit is the dynamic unity of power and meaning. The depreciation of power in most pacifist pronouncements is unbiblical as well as unrealistic”<sup>120</sup>—even if he thoroughly rejected the use of any tools of coercion “for spreading the message of the Christ.”<sup>121</sup>

Nonetheless, by contrast with the tragic tones of the 1938 essay about the lamentably necessary “seclusion” of the Church under Nazism, Tillich wrote in 1963 rather more affirmatively, if still ambivalently, about the value of preserving a separate sphere for “the Peace of the Kingdom of God,” including for conscientious objectors, in a world beset by war:

All this implies that the pacifist way is not the way of the Kingdom of God in history. . . . The churches must reject political pacifism but support groups and individuals who try symbolically to represent the “Peace of the Kingdom of God” by refusing to participate in the compulsory element of power struggles and who are willing to bear the unavoidable reactions by the political powers to which they belong and by which they are protected. This refers to such groups as the Quakers and to such individuals as conscientious objectors. They represent within the political group the resignation of power which is essential for the churches but cannot be made by them into a law to be imposed on the body politic.<sup>122</sup>

118 *Id.*

119 See sources cited, *supra* note 28.

120 3 TILlich, SYSTEMATIC THEOLOGY, *supra* note 28, at 385.

121 *Id.* at 388.

122 *Id.*

Pacifist churches, such as the Quakers, and individuals, the conscientious objectors, thus play a “representative” role, something like a work of art, depicting the “peace of the Kingdom of God” which cannot as yet be fully implemented in human society. Despite the evident tension between this passage and Tillich’s overall vision, it should be noted that Tillich’s support (as a non-pacifist) for pacifists is not due to their freedom from the “ambiguities” that beset all human life. It is an ambivalent support for an “ambiguous” stance, conditioned on pacifists’ acceptance of the nonabsolute value of that stance—as is evident from his implication that they must accept the “unavoidable reactions by the political power,” not to mention his earlier reference in the same work to the “theoretical error and practical failure” of what he calls “legalistic pacifism.”<sup>123</sup>

In all this, Tillich is, as ever, true to his vision of the eternal struggle and inextricable intimacy between form and the disruption of form, with the danger of demonization lurking both in their separation and in their improper conjunction. If religion and its institutions must acquire a distinct existence under conditions of human self-estrangement, they must always retain the awareness of their divine/demonic ambiguity. Even the predicate of “holiness” can only be ascribed to the Church “with the addition of ‘in spite of’”<sup>124</sup>—above all, “in spite of” the fact that the “disintegrating, destructive, and demonic features of life are shown in it as strongly, and often even more strongly, than in secular history.”<sup>125</sup> In his insistence on the irreducibility of the tension between form and disruption of form, Tillich’s social analyses ever insisted on the dialectic between institutions and anti-institutionalism, norms and antinomianism, religion and anti-religion.

Let us for the stake of contrast, imagine a very different path, an antinomian path, to resisting conscription for an unjust war: flagrant violation of the draft law, rather than its reinforcement through haggling over narrow legal exceptions; an attack on the foundations of the war-making state rather than its legitimation; anarchic political theatrics in the sober halls of power rather than respectful, procedurally proper pleas to the architects of slaughter; infusing with “ultimate concern” the critique of specific political choices, thereby collapsing the walls between discourses, rather than assigning the religious and the political to hermetically divided spheres of the timeless and the situational; making explicit “ultimate concern” with the morality of the conduct of particular wars, rather than seeking refuge in an otherworldly pacifism. I have here, of course, briefly sketched just some of the manifold tactics of the movement against the Vietnam War in the late 1960s, particularly its countercultural strand. Such tactics may be viewed as embodying the kind of “disruption” of taken-for-granted social forms analogous to the aesthetic disruptions so prized by Tillich in the works of the Expressionists, Cubists, and Surrealists. Whether Tillich, who died shortly after the 1965 draft cases were decided, and before the height of the antiwar counterculture, would have endorsed such tactics is uncertain—some of his fellow émigrés, like Herbert Marcuse, did so, while others, perhaps traumatized by the fascist youth movements of the 1930s, did not. Of course, many of the tactics described above are only feasible in situations markedly different from those that prevailed for the “Confessional Church” in 1938—except for those inclined to martyrdom.

<sup>123</sup> *Id.* at 54.

<sup>124</sup> *Id.* at 167.

<sup>125</sup> *Id.* at 166–67.

## DEMONOLOGY AND GENEALOGY: TOWARD AN ENGAGEMENT BETWEEN TWO CRITIQUES OF “RELIGION”

Much of this article has been devoted to showing that the Supreme Court, in foregrounding Tillich in the 1965 draft cases, opened the door to something very different than a simple expansion of the category of “religion.” Rather, taking Tillich seriously means a thorough undermining of the basic Lockean framework underlying American jurisprudence on religion since the nineteenth century. The “exact” divisions between social spheres, the anthropological vision of the individual as split between “inward persuasion” and “external pomp,” the clear demarcation of the competence of civil authority from that of religious faith—all these are put into question by Tillich. Above all, Tillich radically undermines the notion that one can definitively identify a proper “place” of religion, whether it be on the individual, aesthetic, or institutional level—thus rendering highly problematic the determination of what would occupy a site “parallel to” or the “same as” that “place.” If a Conscientious Cubist may well be more entitled to exemption from the draft law than a Pious Parishioner, then the legal exception has become both radically unpredictable and a constant threat to the coherence of the rule.

Saba Mahmood, as I noted above, links the Lockean conception to “Protestant semiotic ideology,” characterized by “the distinction between object and subject, between substance and meaning, signifiers and signified, form and essence,” associated with the Saussurean notion of the “arbitrariness of the signifier.”<sup>126</sup> It should by now be clear that this “Protestant semiotic ideology” does not adequately characterize the work of Paul Tillich, a theologian who nonetheless ceaselessly proclaimed the “Protestant Principle” as the cornerstone of his project. Tillich portrayed the kinds of divisions and dichotomies underlying Enlightenment theology, political theory, and jurisprudence as symptoms of a fallen state at best, “demonization” at worst and most of the time. Moreover, Tillich’s theological aesthetics (or aesthetic theology) cannot be associated with the notion of the arbitrariness of the signifier. Tillich devoted much effort to distinguishing among specific artistic representations in light of his ontological framework of depth and form, *Abgrund* and *Grund*, divine and demonic. In drawing a sharp contrast between the “disruptive” avant-garde art in which he found “religious power” and the sentimental “idealized naturalism” in which he found the aesthetic analogy to, even propagandistic support for, fascism, Tillich made the differences in signification a matter of existential urgency—and even a literal matter of life and death. The symbols Tillich prized were those which were neither “arbitrary” nor “determined”; they were particular forms which pointed beyond themselves—though always subject, depending on the social, cultural, political, or psychological conditions of their reception, to the possibility of demonization.

My analysis, therefore, opens up a deeper inquiry into the relationship between Tillich’s critique of the Lockean idea of “religion,” and more broadly, the pervasive critique of “religion” in radical strands of early twentieth-century European thought, on the one hand, and that posed by current “genealogists of religion,” often associated with postcolonial theory, such as Talal Asad and Saba Mahmood, on the other. To be sure, it may seem counterintuitive to search for similarities between the twentieth century’s leading Protestant theologian and those writers who seek to explicate the phenomenology of pious Muslims (both in our own time and in past periods), as well as an understanding of key portions of medieval Christianity.<sup>127</sup> And yet it is also, I think, urgent: even if, in this concluding section, I can only broach some points of contact and difference.

126 Mahmood, *Religious Reason*, *supra* note 19, at 843.

127 *E.g.*, SABA MAHMOOD, *POLITICS OF PIETY: THE ISLAMIC REVIVAL AND THE FEMINIST SUBJECT* (2005); TALAL ASAD, *GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM* 83–167 (2009).

Above all, these very different critiques share a rejection of a conceptual limitation of “religion” to a fixed, separate sphere either within the individual or society. Such a limitation makes most of human existence available for regulation by the market or the modern state, due to Locke’s notion that everything other than “inward persuasion” consists of “indifferent matters” or “external pomp”—thus necessitating exceptions, like conscientious objection, which must remain narrow in order for the system to stand. For Tillich, one is just as likely, often more likely, to find true “religious power” in a Cubist painting of a table as in a depiction of Jesus displayed in a church; for Asad and Mahmood, the formation of subjectivity through specific, routine practices, including such everyday sartorial details as headscarves, may be just as crucial to religiosity, above all to the formation of the pious subject, as the recitation of a creed.<sup>128</sup> Both conceptions reject the Lockean notion that one can, or ought to, “distinguish exactly” the “just bounds” that demarcate the sphere of “religion.” They thus both put into question the foundation upon which the legitimacy of the modern state’s authority rests.

In this light, it is perhaps not surprising to find certain overlapping formulations in the writings of the twentieth-century Protestant theologian and the postcolonial “genealogists of religion.” For example, one finds very similar rejections of the de-politicizing constructions of privatized religion. Tillich, as we have seen, declared that it was “unbiblical as well as unrealistic” on the part of pacifists to deny that “Spirit is the dynamic unity of power and meaning.” Asad, for his part, asserted that the “separation of religion from power is a modern Western norm, the product of a unique post-Reformation history.”<sup>129</sup> These two propositions—one theological, the other Foucauldian/historicist—are by no means identical, most obviously in their contrasting evaluations of the significance, or ranges of significance, of Protestantism (or Protestantisms). The “post-Reformation” history to which Asad refers might be understood by Tillich as something like the “demonized transmogrification of the Reformation.” What is clear, however, is that both stand in opposition to a Lockean separation of the religious and political spheres.

It remains, of course, self-evident that differences abound between Tillich’s conception and the kinds of portrayals advanced by Asad and Mahmood. While all find religiosity in sites that a modern Lockean would view as quintessentially secular, they do so for very different reasons. I have already alluded to the insistence by Asad and Mahmood on the formation of subjectivity as an aftereffect of specific practices; by contrast, Tillich’s subject seems to arrive (or be “thrown”) onto the scene of life already in the midst of its dialectic between surface and depth, reflection and unconscious compulsion, essence and existence. Perhaps most importantly, true religious experience is, for Tillich, most closely related to shattering the self-certainty of the subject, revealing the “abyss,” the “depth of being”; in direct contrast, in the conceptions portrayed by Asad and Mahmood, the essence of religious practice lies in the way it produces and forms the subject.

A closely related difference concerns the role of tradition. Tillich’s radical critique of the difference between the conventionally “religious” and “nonreligious” spheres is guided by a wariness of tradition—above all, by a concern that traditional practices and discourses may have lost their power to evoke the depths of being, or have even become “demonized” over time. It is for this non- or anti-traditionalist reason that one should look for “religious power” in all kinds of unexpected places, in any and every social sphere. In sharp contrast, Asad and Mahmood stress the importance of tradition, the emergence of individual and collective subjectivity as a by-product of commitment to traditional practices and discourses. Indeed, for Asad, Islam is best understood

128 See, e.g., Mahmood, *Feminist Theory, Embodiment, and the Docile Agent: Some Reflections on the Egyptian Islamic Revival*, 16 *CULTURAL ANTHROPOLOGY* 202, 214 (2001).

129 ASAD, *GENEALOGIES OF RELIGION*, *supra* note 127, at 28.

as a “discursive tradition”—which he defines as “discourses that seek to instruct practitioners regarding the correct form and purpose of a given practice that, precisely because it is established, has a history.”<sup>130</sup> To be sure, it must be immediately emphasized, it is intrinsic to Asad’s conception that that tradition is intrinsically heterogeneous, ever-changing, and that “any representation” of it is “contestable”<sup>131</sup>—that, in short, “there clearly is not, nor can there be, such a thing as a universally acceptable account of a living tradition.”<sup>132</sup> Nevertheless, although, like Tillich, Asad and Mahmood portray religiosity as cutting through the Lockean division between social spheres, they trace this feature precisely to the traditional practices that form religious subjects, however much the latter also inevitably reappropriate and transform tradition.

Finally, and this issue will take us to the limit of this essay, the status of “religion” at any given historical moment (for example, our own) differs quite markedly in the two kinds of critical writing. Tillich, as we have seen, multiplies a number of non-synonymous dichotomies—divine/demonic, religion-in-the-broad-sense/religion-in-the-narrow sense, religious/ “irreligious,” religious/“anti-religious,” holy church/demonized church, and so on—which render the very word “religion” a highly indeterminate term, at times valorized, at times condemned, often both simultaneously. The center of gravity of the divine/demonic “ambiguity” of “religion,” of a particular religion, and of particular religious symbols is conditioned not only by an individual’s relationship to them, but by changing social and historical circumstances. Thus, Tillich, in the 1956 art essay, links the affinity between “idealized naturalism” and fascist sympathies to the particular conditions in German society at that time; elsewhere in the essay, Tillich discusses how traditional religious symbols or creeds can become “empty,” detached from the depth dimension, and expresses his doubts about whether certain Christian symbols can be revived in his time with the requisite “religious style.”<sup>133</sup>

For Asad, the poles of the kinds of dichotomies Tillich evokes, particularly the “religious/secular” divide, must also be understood as inextricably and agonistically intertwined, and their meanings as historically contingent. However, in keeping with his fundamentally Foucauldian/historicist perspective, these are not situated at the level of ontology or the human condition, but rather emerge at identifiable moments in history, constituting each other through specifiable struggles. “Religion” and “secularity,” for example, emerged at the same time historically, and only through their combat with each other—a combat that is never more than provisionally and precariously resolved. There is no “religion,” for Asad, except as a domain whose contours and meaning are shaped and reshaped in struggle with the “secular,” and vice versa.<sup>134</sup>

There is no easy application of these differences to the issue of conscientious objection which frames this article. I have argued above that one could imagine a Tillichian draft board member as broadly ecumenical in relation to the definition of “religion,” with Cubism as plausible a “religion” as Buddhism or Episcopalianism, but as a strict scrutinizer of whether the would-be objector’s own relation to his creed is “religious.” For Asad, the existence of “religion” and its delimitation at any given time is an artefact—perhaps a lamentable artefact—of a power struggle between competing forces in Western modernity and the world shaped by it. However, precisely because it lacks an essence, every act defining its “place,” even its exceptional place as a refuge for conscientious objectors, participates in this power struggle—and may, perhaps must, depart,

130 Asad, *The Idea of an Anthropology of Islam*, 17 QUI PARLE 1, 20 (2009).

131 *Id.* at 23–24.

132 *Id.*

133 Tillich, *Existential Aspects*, *supra* note 2, 143–47.

134 *See, e.g.*, ASAD, GENEALOGIES OF RELIGION, *supra* note 127, at 29.

whether marginally or dramatically, from any previous such acts. For both Tillich and Asad, there is no way to legitimate legal decisions defining “religion” by grounding them in timeless essences or standing precedent, though for quite different reasons. And, of course, for both, though again in different ways, the potential pervasiveness of religion threatens the very existence of conscientious objection as a limited exception from a general rule.

In any case, in an era in which the boundaries between the religious and the secular, between religion and religion, and between rival claims to the “truth” and “perversion” of particular religions have once again become as fraught as perhaps at any other time in history, a period in which charges and countercharges of “demonization” abound, a consideration of the relationship between these very different departures from the post-Enlightenment Lockean framework has never been more urgent. Whether in the destabilization of the boundaries between public and private practice of religion in cases like *Burwell v. Hobby Lobby*,<sup>135</sup> or of the destabilization of the borders of the Middle East by forces like the so-called Islamic State, ours is an age in which “religion” cannot be counted upon to remain in a reassuringly stable “place.” Turning to the most acute thinkers of this displacement has never been more timely.

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135 134 S. Ct. 2751 (2014).