

# FEMINISM, THEOCRACY, AND RIGHTEOUS ANGER: SHERRY COLB UNBOUND

Neil H. Buchanan†

INTRODUCTION.....	1765
I. RELIGION-ON-RELIGION ACTION IN PUBLIC DEBATES .....	1769
II. THE CHANGES IN ABORTION POLITICS AFTER PROFESSOR COLB’S DEATH .....	1772
III. THE ALLURE OF USING RELIGION TO RESPOND TO RELIGION.....	1775
CONCLUSION.....	1777

## INTRODUCTION

From May through August of 2022, Professor Sherry Colb wrote an impressive series of essays in furious response to what soon became *Dobbs v. Jackson Women’s Health Organization*,<sup>1</sup> a nearly final draft of which had been leaked before its official publication date.<sup>2</sup> In “All Hail Justice Coathanger,”<sup>3</sup> “Gunning for Involuntary Pregnancy,”<sup>4</sup> and finally “Alito and the Free Exercise

---

† James J. Freeland Eminent Scholar and Professor of Law, University of Florida Levin College of Law; Visiting Professor at Osgoode Hall Law School and the University of Toronto Faculty of Law. I thank the organizers of the Conference in Honor of Professor Sherry Colb as well as my co-panelists Deborah Dinner, Sally Goldfarb, Pamela S. Karlan, and Penny Venetis for helpful comments and engagement during our session. I especially thank Michael C. Dorf for his extensive support and for feedback on drafts of this Article. Finally, my research assistants—Laura Chiu, Serina Combs, Sarah Janetzke, and Donald J. Murdaugh—were instrumental in helping me work through the ideas presented here, for which I am sincerely grateful. All errors of both form and substance are entirely my responsibility.

<sup>1</sup> *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

<sup>2</sup> Amy Howe, *Supreme Court Investigators Fail to Identify Who Leaked Dobbs Opinion*, SCOTUSBLOG (Jan. 19, 2023), <https://www.scotusblog.com/2023/01/supreme-court-investigators-fail-to-identify-who-leaked-dobbs-opinion/> [<https://perma.cc/9JXW-YN8R>].

<sup>3</sup> Sherry F. Colb, *All Hail Justice Coathanger*, DORF ON LAW (May 5, 2022), <https://www.dorfonlaw.org/2022/05/all-hail-justice-coathanger.html> [<https://perma.cc/9AXB-XQXR>].

<sup>4</sup> Sherry F. Colb, *Gunning for Involuntary Pregnancy*, DORF ON LAW (June 24, 2022), <https://www.dorfonlaw.org/2022/06/gunning-for-involuntary-pregnancy.html> [<https://perma.cc/H28A-AWXF>].

of Christianity,”<sup>5</sup> along with seventeen more essays published at *Dorf on Law* and *Verdict* along the way,<sup>6</sup> Professor Colb marshaled her formidable analytical skills in a sustained and devastatingly successful effort to expose the gaping holes in the reasoning of the Supreme Court justices who formed the *Dobbs* majority—jurists

<sup>5</sup> Sherry F. Colb, *Alito and the Free Exercise of Christianity*, VERDICT (Aug. 10, 2022), <https://verdict.justia.com/2022/08/10/alito-and-the-free-exercise-of-christianity> [<https://perma.cc/EQH3-5KZK>].

<sup>6</sup> Sherry F. Colb, *Why “Pro-Life” Advocates Love Late-Term Abortions*, DORF ON LAW (May 11, 2022), <https://www.dorfonlaw.org/2022/05/why-pro-life-advocates-love-late-term.html> [<https://perma.cc/E8QW-D8D3>]; Sherry F. Colb, *Alito, Rape, and Incest*, VERDICT (May 12, 2022), <https://verdict.justia.com/2022/05/12/alito-rape-and-incest> [<https://perma.cc/57CF-URY3>]; Sherry F. Colb, *Justice Aborted*, DORF ON LAW (May 13, 2022), <https://www.dorfonlaw.org/2022/05/justice-aborted.html> [<https://perma.cc/2VCW-VE89>] [hereinafter Colb, *Justice Aborted*]; Sherry F. Colb, *Rational Basis Scrutiny?*, DORF ON LAW (May 17, 2022), <https://www.dorfonlaw.org/2022/05/rational-basis-scrutiny.html> [<https://perma.cc/MR88-B8EK>] [hereinafter Colb, *Rational Basis Scrutiny?*]; Sherry F. Colb, *In Vitro Fertilization and Dobbs*, DORF ON LAW (May 19, 2022), <https://www.dorfonlaw.org/2022/05/in-vitro-fertilization-and-dobbs.html> [<https://perma.cc/8SKW-LEKA>]; Sherry F. Colb, *Alito, Syphilis, and Unwanted Pregnancy*, DORF ON LAW (May 23, 2022), <https://www.dorfonlaw.org/2022/05/alito-syphilis-and-unwanted-pregnancy.html> [<https://perma.cc/5USY-VZ77>]; Sherry F. Colb, *Sam Alito and His Big Dicta*, DORF ON LAW (May 25, 2022), <https://www.dorfonlaw.org/2022/05/sam-alito-and-his-big-dicta.html> [<https://perma.cc/MF4X-AV3F>]; Sherry F. Colb, *Rationalizing Misogynist Religious Rules*, DORF ON LAW (May 26, 2022), <https://www.dorfonlaw.org/2022/05/rationalizing-misogynist-religious-rules.html> [<https://perma.cc/GZ9N-SRJH>] [hereinafter Colb, *Rationalizing Misogynist Religious Rules*]; Sherry F. Colb, *Ah, Look At All the Potential People*, DORF ON LAW (May 31, 2022), <https://www.dorfonlaw.org/2022/05/ah-look-at-all-potential-people.html> [<https://perma.cc/8V3M-42K9>] [hereinafter Colb, *Ah, Look At All the Potential People*]; Sherry F. Colb, *Overlapping Magisteria*, DORF ON LAW (June 1, 2022), <https://www.dorfonlaw.org/2022/06/overlapping-magisteria.html> [<https://perma.cc/DQB3-CA8V>]; Sherry F. Colb, *Are Religious Abortions Protected?*, VERDICT (June 7, 2022), <https://verdict.justia.com/2022/06/07/are-religious-abortions-protected> [<https://perma.cc/7NMB-K74L>] [hereinafter Colb, *Are Religious Abortions Protected?*]; Sherry F. Colb, *Johnny Depp and Sir Matthew Hale*, DORF ON LAW (June 13, 2022), <https://www.dorfonlaw.org/2022/06/johnny-depp-and-sir-matthew-hale.html> [<https://perma.cc/LGZ9-H7FL>]; Sherry F. Colb, *The Link Between Justice Alito’s Leaked Abortion Opinion and Rape Culture*, DORF ON LAW (June 16, 2022), <https://www.dorfonlaw.org/2022/06/the-link-between-justice-alitos-leaked.html> [<https://perma.cc/H85K-48TQ>] [hereinafter Colb, *The Link Between Justice Alito’s Leaked Abortion Opinion and Rape Culture*]; Sherry F. Colb, *How to Qualify for Protection Against Violence*, DORF ON LAW (June 23, 2022), <https://www.dorfonlaw.org/2022/06/how-to-qualify-for-protection-against.html> [<https://perma.cc/F4CM-TCPF>]; Sherry F. Colb, *Impregnable*, VERDICT (July 12, 2022), <https://verdict.justia.com/2022/07/12/impregnable> [<https://perma.cc/W5AQ-6HCS>]; Sherry F. Colb, *Commander Sam Alito, At Your Cervix*, DORF ON LAW (July 20, 2022), <https://www.dorfonlaw.org/2022/07/commander-sam-alito-at-your-cervix.html> [<https://perma.cc/FWR7-KL94>] [hereinafter Colb, *Commander Sam Alito, At Your Cervix*]; Sherry F. Colb, “Pro-Life”: Delta Variant, VERDICT (July 26, 2022), <https://verdict.justia.com/2022/07/26/pro-life-delta-variant> [<https://perma.cc/N6QF-SNY5>].

whom she described at various points as “liars in robes,”<sup>7</sup> “power-judges,”<sup>8</sup> “theocrats,”<sup>9</sup> and much more.<sup>10</sup> Focusing her ire most intensely on the author of the majority opinion, Samuel Alito (whom she dismissed with a quick SA, preferring not even to use his full name,<sup>11</sup> a lead that I will follow here), she mocked “that wretched piece of writing”<sup>12</sup> and repeatedly pointed out his rank hypocrisy and his obvious disdain for women.<sup>13</sup>

Because U.S. courts have long been highly deferential to religious claims,<sup>14</sup> and because the *Dobbs* Court is dominated by a group of political activists who were chosen for the bench specifically because they hold in common a particular set of political (especially religious) beliefs<sup>15</sup>—beliefs that they are more than willing

<sup>7</sup> Sherry F. Colb, *Liars in Robes*, DORF ON LAW (Aug. 1, 2022), <https://www.dorfonlaw.org/2022/08/liars-in-robres.html> [<https://perma.cc/LE9C-NEWG>] (“Some readers may be thinking that we already knew those Justices were liars . . . Each of them swore on their respective holy Bibles that they regarded *Roe v. Wade* as precedent entitled to respect, when they plainly intended to overrule the decision ASAP and annihilate the right against forced pregnancy from the moment of fertilization.”).

<sup>8</sup> Colb, *supra* note 4 (“What bothered Justice Clarence Thomas[] about the New York Law that he and his fellow power-judges invalidated was the requirement that a person who seeks a license to carry a concealed weapon in public demonstrate that they have an elevated need for a gun they might use in self-defense.”).

<sup>9</sup> Colb, *Rationalizing Misogynist Religious Rules*, *supra* note 6 (“Justice Alito’s[] religion and that of his fellow theocrats on the Supreme Court . . . .”); Colb, *The Link Between Justice Alito’s Leaked Abortion Opinion and Rape Culture*, *supra* note 6 (“Women, like our nonhuman animal friends whom most people consider resources as well, are “someones,” not “somethings,” a moral proposition that the theocrats on the Supreme Court would do well to understand.”).

<sup>10</sup> See Colb, *Ah, Look At All the Potential People*, *supra* note 6 (“The people whom SA and his buddies have conscripted into reproductive servitude are actual people who should have at least as much sovereignty over their vaginas and uteruses as Senator Ted Cruz has over the money he lent to his campaign.”); Colb, *Are Religious Abortions Protected?*, *supra* note 6 (“I regard such a challenge as very well-founded because I have no desire to be governed by a religious orthodoxy of any type, let alone one that some Trump Justices unleash on the population.”).

<sup>11</sup> Colb, *supra* note 3.

<sup>12</sup> Colb, *Commander Sam Alito, At Your Cervix*, *supra* note 6.

<sup>13</sup> Colb, *Rational Basis Scrutiny?*, *supra* note 6 (“I suppose it is easier for SA to imagine forcing a woman into reproductive servitude than it is for him to imagine having to wear a mask, receive a vaccine, or forgo some number of in-person concerts or worship services . . . .”); Colb, *Rationalizing Misogynist Religious Rules*, *supra* note 6 (referencing SA’s citation of Sir Matthew Hale who posited abortion as a great crime, “Second, SA might even like Hale’s revolting attitude toward women’s bodily integrity.”).

<sup>14</sup> See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

<sup>15</sup> AMANDA HOLLIS-BRUSKY, *IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION*, 153 (2015) (quoting Federalist Society member Randy Barnett, “the Federalist Society is the only source of conservative and

to impose on everyone else—the task of critiquing their handiwork presents a dilemma: to play nice (continuing our legal system’s longstanding respect for “sincerely-held religious beliefs”<sup>16</sup> by treading lightly) or to be blunt. Professor Colb wisely chose the latter. She was especially well equipped to do so, because she happened to have grown up in—and, much more to the point, had accumulated a deep knowledge of—what she called “my religion,”<sup>17</sup> which is “not that of a majority of the U.S. Supreme Court—the religion that regards a zygote as a person.”<sup>18</sup>

Professor Colb could criticize so-called Judeo-Christian ideology because she knew it backward and forward. But she was not in fact arguing from a religious viewpoint, because she saw through the hypocrisy and misogyny inherent in what she called “[t]he religion of my youth.”<sup>19</sup> Indeed, she had seen through it while she was still a young girl, writing at one point: “I don’t buy it, just as I didn’t buy it at ten years old.”<sup>20</sup>

In this Article, I assess how the Colb essays push back against the no longer creeping theocracy of the American conservative legal and political movement. In so doing, I will consider how much one’s particular religious belief system matters in reacting to the tragically wrong conclusion that Alito and his fellow theocrats reached: that because this Supreme Court majority views them as necessary vessels to carry out their vision of God’s plan, women can—indeed, they must—be forced against their will to endure pain, a high likelihood of medical complications, and death.<sup>21</sup>

---

libertarian legal intellectual activity in the United States . . . Republican administrations rely on the Federalist Society as a source of talent; as a farm team.”).

<sup>16</sup> See, e.g., *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022).

<sup>17</sup> Colb, *Rationalizing Misogynist Religious Rules*, *supra* note 6. The religion of Professor Colb’s youth was orthodox Judaism. See Sherry F. Colb, *Decoding “Never Again,”* 16 RUTGERS J.L. & RELIGION 254, 255 (explaining how, as the child of two Holocaust survivors, she “attended Orthodox Jewish schools for nursery, kindergarten, elementary, and high school.”).

<sup>18</sup> Colb, *Rationalizing Misogynist Religious Rules*, *supra* note 6.

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

<sup>20</sup> *Id.*

<sup>21</sup> Examples of severe and life-threatening medical situations abound post-*Dobbs*. In Wisconsin, hospital staff feared violating the state’s abortion ban if they removed fetal tissue from a patient who suffered an incomplete miscarriage, risking hemorrhaging and life-threatening sepsis. Human Rights Watch, *Human Rights Crisis: Abortion in the United States After Dobbs* (Apr. 18, 2023), <https://www.hrw.org/news/2023/04/18/human-rights-crisis-abortion-united-states-after-dobbs> [https://perma.cc/P65G-G6WX]. Ectopic pregnancies have not been ended to the risk of the mother’s health because physicians could hear a fetal heartbeat. *Id.* Adolescent girls are at higher risk of not receiving healthcare. *Id.* Post-traumatic stress disorder and suicide risks have increased

Professor Colb reached powerful and reasoned conclusions, using her knowledge of religion to parry the Court's illogical and inhumane arguments. I was reared in a different religious tradition, and my experience suggests that one can also reach those conclusions via other routes. Even so, calling out the hypocrisy and arrogance of people whose entire "brand" is an avowedly sincere and unwavering commitment to the Christian God's supposed commands is important, and we should celebrate the fact that Professor Colb was able, even during her final months, to shine such an uncompromising light on the work of a tyrannical religious minority that gained power over women's bodies and lives through illegitimate means.<sup>22</sup>

## I

## RELIGION-ON-RELIGION ACTION IN PUBLIC DEBATES

It is worth taking a moment to explain the title of this Article: *Feminism, Theocracy, and Righteous Anger: Sherry Colb Unbound*. That word choice intentionally refers to a famous gothic novel by Percy Shelley. One of the themes in *Prometheus Unbound* is that the title character bears notable similarities to Satan in Milton's *Paradise Lost*. Prometheus, like Satan, rebels against the established order of the world. There is, however, an essential difference between these characters. As one scholar explained:

Milton's Satan is ambitious, envious, aggressive and vengeful; as well as a rebel. Prometheus is a better symbol of a rebel. His rebellion, defeat and bondage are not the result of his faults, but of his love for humanity. While Satan makes mankind suffer in order to achieve his personal gain, Prometheus suffers in the process of liberation of mankind.<sup>23</sup>

---

in women who cannot receive adequate physical or mental health treatment for their pregnancy. *Id.*

<sup>22</sup> The conservative Christian Supreme Court majority is in part the result of Senate Republicans' hypocritical and inconsistent treatment of judicial nominations by "lame duck" outgoing presidents. Compare David M. Herszenhorn, *Mitch McConnell Tells Garland the Senate Will Not Act*, N.Y. TIMES (Mar. 16, 2016), <https://archive.nytimes.com/www.nytimes.com/live/obama-supreme-court-nomination/mcconnell-tells-garland/> [https://perma.cc/YK2Z-QYGS], with Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), <https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html?smid=url-share> [https://perma.cc/5B49-XDCU].

<sup>23</sup> Piyas Mukherjee, *Shelley's Prometheus and Milton's Satan: Exploring an Uneasy Kinship*, 1 EUR. ACAD. RES. 1173, 1185 (2013).

Unlike Satan, then, Prometheus seeks to help others rather than to enhance his own position. Viewed in this way, “Prometheus symbolises Christ, who sacrifices himself for the good of his people; humanity, which struggles towards freedom under the guidance of the spirit of love . . . .”<sup>24</sup> I am quite confident that Professor Colb would not feel comfortable being likened to Christ—indeed, she would have found it ironic—and I am not making that comparison here. Instead, I used the word “unbound” in the title of this Article to describe the transformation in Professor Colb’s writing in the last months of her life—from a constrained, patient, calm style to a more aggressive style with boundless disdain for the likes of SA and his fellow theocrats. It is, however, amusing to think that her stylistic liberation carries with it an unintended parallel to the deity whom people like SA and so many others hold up as their reason for putting women into bondage today.

The comparison to Prometheus is not only a matter of style. Professor Colb unbound herself stylistically, after all, because it had become necessary to do so in order to fight back against evil. Far from being the Satan character, she argued that religion is being used to justify doing horrible things to people and other beings who do not deserve to be tormented, and sometimes even to die, for someone else’s religious dogma. She wrote about how religion is being used for evil ends, and she knew that the scriptural basis for such conclusions was dubious at best.

Although religion was in no way central to her arguments, she did sometimes draw upon her knowledge of religious doctrine to build counterarguments against the theocrats. This was especially true in “Rationalizing Misogynist Religious Rules,”<sup>25</sup> where she wrote about her own upbringing in a religious household, as part of which she gained a deep knowledge of Judeo-Christian doctrine. She wrote that her religion, the religion of her youth, does not believe that a zygote is a human being,<sup>26</sup> which, at a bare minimum, means that people (Orthodox Jews) who take those religious commitments extremely seriously flatly disagree with Christian evangelicals’ and the Roman Catholic Church’s anti-abortion doctrines.

---

<sup>24</sup> *Id.* at 1186.

<sup>25</sup> Colb, *Rationalizing Misogynist Religious Rules*, *supra* note 6.

<sup>26</sup> *Id.*

If one is going to rely on religious arguments to guide public policy, one would think—and Professor Colb clearly expected—that those arguments would be as doctrinally grounded and as universal as possible. The specific phrase “thou shalt not kill” is drawn from one religious tradition, for example, but it is hardly controversial in its core message. Professor Colb’s work on veganism extends that commitment to argue against the killing of innocent non-human animals, which demonstrates that those four words—thou shalt not kill—are hardly self-defining or self-limiting.<sup>27</sup> And even when limited to a call not to kill the subset of animals called humans, her work reminds us that religious writings are not at all in agreement on what counts as a human, as her distinction between ova, zygotes, embryos, and fetuses makes clear<sup>28</sup>—a distinction backed up by science, to be clear.

Again, however, when Professor Colb invoked her own religious background, it was not a matter of saying that her religious upbringing was superior to others’ religious upbringings. Indeed, she not only did not defend her own religion but affirmatively denounced it. Even though the religion of her childhood supports a better view on abortion than does the religion of the theocrats on the Supreme Court, she had also come to reject the religious views that had been imposed upon her. Among other things, she wrote about having noticed very early on that the religion of her youth was extremely misogynistic on matters other than abortion. She described, for example, all the various ways in which women were told that they must be sexually available to their husbands, mentioning in particular the cleansing rituals and the shame that go along with the simple biological facts of being a woman.<sup>29</sup>

---

<sup>27</sup> For example, in one particularly creative essay, Professor Colb argued that the Biblical verse that observant Jews read to forbid consuming meat and dairy in the same meal should instead be read to forbid the eating of baby animals and that, because modern farmers send nearly all of their animals to slaughter when they are very young (but have been genetically engineered to grow large quickly), the verse should now be taken to forbid meat consumption entirely. See Sherry F. Colb, *Baby Animals and Jewish Law*, DORF ON LAW (Apr. 15, 2010), <https://www.dorfonlaw.org/2010/04/baby-animals-and-jewish-law.html> [<https://perma.cc/E5AJ-JAAK>].

<sup>28</sup> Colb, *Rationalizing Misogynist Religious Rules*, *supra* note 6 (“The religion of my youth rejects the personhood of a zygote and indeed finds no ‘person’ present until some point during labor.”).

<sup>29</sup> *Id.*

Professor Colb also wrote about how rape culture is derivative of, and inevitably enmeshed in, the treatment of women as *things*.<sup>30</sup> The coincidence that the acronym SA could also be short for sexual assault is grimly amusing. The tolerance for, and even the encouragement of, sexual assault can be seen as central to SA's jurisprudence. As I describe in further detail below, Professor Colb was not invoking religion—any religion—in a positive sense. She was saying that even religions like that of her youth that are not explicitly anti-abortion can be, and too often are, explicitly anti-woman.

Having noted above that I was reared in a different religious tradition, I find this especially important. My father was a Presbyterian minister, but religion was not forced upon me. More to the point, it has never made sense to me to use any specific religious dogma to drive public policy and judicial decisions, specifically because I have viewed religion as a personal matter (dare I say a *choice*?) and that the secular should remain secular. Does that mean that Professor Colb was wrong—not analytically, but as a matter of legal and political strategy—to discuss religious matters at all in this context? Maybe not.

## II

### THE CHANGES IN ABORTION POLITICS AFTER PROFESSOR COLB'S DEATH

One common criticism of feminists is that they are angry and humorless. Sherry Colb was anything but humorless. Was she angry? I believe that, for most of her life, the answer was no. Like any good advocate, she could sometimes become exercised and even irate in the heat of argument, but she was almost always able to debate calmly even in the face of what she (usually quite rightly) viewed as illogical and bad-faith arguments. She invariably employed a measured tone in her academic and online writing, seeking to give the benefit of the doubt to those with whom she engaged and to elevate the endeavor rather than to debase it.

Even so, and as noted above, she used very strong words when describing SA. In the past year or so, SA has been in the news with some of his own public statements and in reports about his serious and numerous ethical lapses. He continues to complain about the leak of his draft opinion in *Dobbs*, saying that the leak "made [Supreme Court Justices] targets

---

<sup>30</sup> *Id.* ("Hale thus viewed a wife as a thing owned by a husband and properly available to that husband for his draining his testicles whenever it pleased him.").



of assassination.”<sup>31</sup> He also claims that he knows who the leaker is but that he does not have enough evidence to prove it,<sup>32</sup> which would surely have provoked mocking laughter from Professor Colb, who taught evidence law.

More to the point, SA cannot even be bothered to get his facts straight about an issue on which he will surely again rule (and just as surely base his decision on his religious priors rather than the law), and he no longer pretends that he thinks abortion cases are legally important. For example, he casually mispronounced the name of the drug *mifepristone* as “mifestiprone” and lumped that case together with the run of so-called shadow docket cases, calling them a mere “nuisance.”<sup>33</sup> That kind of arrogance—an arrogance based on the belief that he can take control of women’s bodies without so much as even putting on a show of considering the issues carefully, is ultimately what caused Professor Colb to liken SA to one of the misogynistic serial rapists from *The Handmaid’s Tale*, writing a column with the witheringly acid title: “Commander Sam Alito, At Your Cervix.”<sup>34</sup> Power, after all, is most obnoxious when the person wielding it no longer even feigns caring about persuading people that he is right.

Because we have lost her ongoing contributions to these important conversations, we will never know exactly what Professor Colb would be saying today in response to these ongoing insults from the Court’s top theocrat. It is easy to imagine, however, the angry wit that she would unleash on various public revelations about SA. Because of her profound commitments to ethical veganism, for example, she would have had an especially heated response to the now-infamous photograph of SA posing with the carcass of a fish that he had recently tortured and murdered, smiling blithely about his own monstrous cruelty.<sup>35</sup>

---

<sup>31</sup> James Taranto & David B. Rivkin Jr., *Justice Samuel Alito: ‘This Made Us Targets of Assassination,’* WALL ST. J. (Apr. 28, 2023), <https://www.wsj.com/articles/justice-samuel-alito-this-made-us-targets-of-assassination-dobbs-leak-abortion-court-74624ef9> [<https://perma.cc/T8FW-XL4K>].

<sup>32</sup> See Michael Dorf, *If Justice Alito Doesn’t Have Enough Evidence to Name the Dobbs Leaker, Maybe He Shouldn’t Say He Knows Who It Was*, DORF ON LAW (May 1, 2023), <https://www.dorfonlaw.org/2023/05/if-justice-alito-doesnt-have-enough.html> [<https://perma.cc/E9N8-T8BH>].

<sup>33</sup> See Taranto & Rivkin Jr., *supra* note 31.

<sup>34</sup> Colb, *Commander Sam Alito, At Your Cervix*, *supra* note 6.

<sup>35</sup> Justin Elliot, Joshua Kaplan & Alex Mierjeski, *Justice Samuel Alito Took Luxury Fishing Vacation with GOP Billionaire who Later Had Cases Before the Court*, PROPUBLICA (June 20, 2023), <https://www.propublica.org/>

More to the immediate point, Professor Colb would surely have had a lot of fun with SA's bottomless, continuing hypocrisy and unearned self-regard. I shudder with glee to imagine what she would have said when SA claimed the leaked opinion was a "grave betrayal" that put the justices at risk of bodily harm<sup>36</sup> and called peaceful protests by pro-choice advocates outside his home a "concerted attack on the court and on individual justices."<sup>37</sup> Her response would surely have been something like this: "Ha! All of a sudden, *you're* worried about bodily integrity? Welcome to our world!"

Here, however, I should pull back a bit, because although I originally imagined myself writing this Article in Professor Colb's style, I soon remembered that she had a unique voice that no one else could even hope to copy. Only she could do what she did, and the rest of us were richer for it. I will not, therefore, try to imagine her words or tone had she been here to read news reports that, for example, the new Speaker of the United States House of Representatives once proudly announced—on a public broadcast, no less—that he is a theocrat: "[W]ell, go pick up a Bible off your shelf and read it – that's my worldview."<sup>38</sup> In 2016, the now-Speaker even turbocharged the conservative talking point that the United States is a republic rather than a democracy (which is a false choice, at best), casually asserting that we are not only a republic but a "biblical" one at that.<sup>39</sup> Theocrats, indeed.

Again, we can only imagine what Professor Colb would have said when confronted with the increasingly brazen Christian nationalism being articulated by those who have spent their lives dedicated to the idea that women's bodies are public property. On the other hand, the only thing that is new here is that there is no more pretense, no more use of fig leaves or

---

article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court [https://perma.cc/KQD6-AZCC].

<sup>36</sup> Ed Pilkington, *Alito Says Leak of Draft Abortion Ruling Put Justices at Risk of Assassination*, THE GUARDIAN (Oct. 26, 2022), <https://www.theguardian.com/law/2022/oct/26/samuel-alito-supreme-court-assassination-abortion-ruling> [https://perma.cc/WV6X-JKKT].

<sup>37</sup> See Taranto & Rivkin Jr., *supra* note 31.

<sup>38</sup> See Martin Pengelly, *'Go Pick up a Bible': Speaker Mike Johnson Defends Anti-LGBTQ+ Views*, THE GUARDIAN (Oct. 27, 2023), <https://www.theguardian.com/us-news/2023/oct/27/mike-johnson-christian-bible-lgbtq-abortion-rights> [https://perma.cc/2FE8-62AU].

<sup>39</sup> See Marci Hamilton, *Mike Johnson, Theocrat: The House Speaker and a Plot Against America*, THE GUARDIAN (Nov. 4, 2023), <https://www.theguardian.com/us-news/2023/nov/04/mike-johnson-theocrat-house-speaker-christian-trump> [https://perma.cc/CW4S-UAZQ].

indirect, coded language. Everything that she wrote still applies, the only difference being that the more recent examples of the political right's embrace of theocracy are so shameless and blatant as to constitute public confessions (no pun intended).

### III

#### THE ALLURE OF USING RELIGION TO RESPOND TO RELIGION

To be clear, it is simply true that SA and the other four co-religionists who signed his *Dobbs* abomination were relying on their peculiar religious views to advance a theocratic public agenda. The question is how to engage with religious arguments offered by those who would take away the freedoms of women. I can say that the religion of my youth does not treat abortion as a sin, and Professor Colb similarly argued that the religion in which she was raised was silent on the issue. Unsurprisingly, there has been a series of post-*Dobbs* lawsuits claiming that abortion restrictions violate the free exercise rights of people whose religions support access to abortion.<sup>40</sup> In other words, in these cases, what we are seeing is an attempt to use religion, including Judaism among others, as a basis for expanding, rather than curtailing, reproductive freedom. That, however, is not an argument that religion should be the basis of judicial opinions but rather that the vast differences in religious views among Americans guarantees that any attempt to use religion to drive law and policy will amount to favoring some religious views over others.

As Professor Colb noted, there is a deep degree of sexism in the religions that dominate American life. In one of her essays noted above, she related how, at age ten, her religious instructor told the students that the religious requirement not to have sex during the time every month when a woman is "unclean" was good for women as well as men because it meant that wives would continue to be exciting and attractive to their husbands.<sup>41</sup> The men, after all, were being denied access to their sexual outlets, or as Professor Colb put it in a different essay: "[The wife] serves as her husband's ever-available blow-up doll, followed immediately by service

---

<sup>40</sup> Pam Belluck, *Religious Freedom Arguments Underpin Wave of Challenges to Abortion Bans*, N.Y. TIMES (June 28, 2023), <https://www.nytimes.com/2023/06/28/health/abortion-religious-freedom.html> [<https://perma.cc/8M4E-TWXZ>].

<sup>41</sup> Colb, *Rationalizing Misogynist Religious Rules*, *supra* note 6.

as an involuntary breeder.”<sup>42</sup> And removing that blow-up doll on a regular basis was supposed to be good for both members of the marriage, even though it is “a kind of shunning of those who menstruate—subordinat[ing] women and treat[ing] them as housing a disgusting process.”<sup>43</sup> How is that good for women?

One can point out that theocrats are being theocratic without knowing anything about their specific religious views, or for that matter thinking that it is important to know where their religious views come from. Even though religion infuses anti-abortion jurisprudence in the United States, and even though Professor Colb’s response pointedly focused on the inappropriate role that religion is playing in American life, there is a way to strip out the religion from Professor Colb’s writing and appreciate her insights and her ice-cold, righteous anger. Her arguments (and, to be clear, these are my arguments as well) are about bodily integrity, personal freedom from dangerous and deadly coercion, and so on. One can, in other words, be completely non-religious and still respond effectively to theocratically inspired legal outrages.

But there is an additional key point—a point that I can in no way claim to be original to me—which is the question of whether it is effective to call out hypocrisy. Indeed, this is one of the most common dilemmas in dealing with religious political actors in public discussions. As a matter of debating strategy, it can often feel quite effective to flip arguments back on people. But an argument of the form, “people should reject your position on this issue because you have based it on a religion that you clearly do not even take fully seriously,” is in fact an *ad hominem* attack, not a response to the actual argument.

Moreover, there is a danger that taking religiously inspired arguments seriously in a secular forum will inadvertently privilege such arguments. That opens up the possibility of listeners saying, “Well, the problem is not the use of religious arguments but that those who made them are hypocrites.” And because it is possible to be a non-hypocritical theocrat, that means that focusing on hypocrisy can unintentionally strengthen the hand of the truest of true believers. Even so, mocking SA or anyone else for claiming to care about personal safety is admittedly entertaining, and as noted above, I suspect that Professor Colb would have had a lot of fun with it.

---

<sup>42</sup> Colb, *Commander Sam Alito, At Your Cervix*, *supra* note 6.

<sup>43</sup> Colb, *Rationalizing Misogynist Religious Rules*, *supra* note 6.

Again, from the standpoint of a debater, it can feel exciting to be able to point out hypocrisy and to use one's opponents' own words against them. But there is always a danger of reinforcing something that is, deep down, not neutral and that can be—and usually is—turned against women.

Ultimately, then, it is not the hypocrisy that matters but the substance. Professor Colb pointed out again and again that the particular type of Roman Catholicism to which the majority of justices on the current Supreme Court claim to adhere treats the purpose of pregnancy, and for that matter, the purpose of women, as procreation.<sup>44</sup> As it turns out, however, we have discovered post-*Dobbs* that women are being forced to continue pregnancies even when those pregnancies are nonviable—even when, that is, the fetus that is brought to term as a delivered baby is either already dead or will not survive after delivery.<sup>45</sup>

This means that women are actually being tortured, forced to carry to term already dead fetuses when procreation has failed. Worse, they are being forced to do so even though it might well kill the women who have already endured a personal tragedy. That is a large step beyond even what Professor Colb—or any of us—imagined what post-*Roe* America might look like. This is no longer about weighing lives against lives. This is gratuitous cruelty to women. If Professor Colb were with us today to witness these grotesque results of SA's work, one could only imagine what she would have written.

#### CONCLUSION

The bottom line is that there is no right answer to the question of how to respond to the theocrats' attacks on women. Do we respond by using deliberately non-religious arguments, by fighting fire (and brimstone) with fire, or by talking about religion with the sole purpose of exposing the hypocrisy of our opponents? It is a confusing set of choices, with upsides and downsides to each. We could use Sherry Colb's angry yet witty logic to sort them out for us.

---

<sup>44</sup> Colb, *Justice Aborted*, *supra* note 6.

<sup>45</sup> Aria Bendix & Daniella Silva, *Texas Supreme Court Rules Against Woman Who Sought Abortion Hours After She Says She'll Travel Out of State*, NBC NEWS (Dec. 11, 2023), <https://www.nbcnews.com/news/us-news/texas-woman-sought-abortion-court-order-leave-state-rcna129087> [<https://perma.cc/95U5-293Y>]