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Law, Religion, and the Common Good

James Davison Hunter*

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I. LAW, RELIGION, AND THE POST-SECULAR TURN

Popular debate and much of contemporary legal practice surrounding the relationship between law and religion appears to be stuck. This is not to say that there isn't creative legal theorizing taking place—indeed there is—but the framework by which most American citizens understand the association of law and religion and the structures by which legal advocacy and public policy in the United States operate are largely frozen within a zero-sum logic of gains achieved and losses suffered by competing actors in the social and political sphere.

If we understand religion rather conventionally as a distinctive body of beliefs, a moral and ritual set of practices, and the organizational structures surrounding ideas and ideals of the sacred, what should be the relationship of religion to the state? What are the boundaries of acceptable involvement in government activities and public affairs? What kind of freedoms should be guaranteed? What kind of influence should it have? In voicing its claims or grievances, what kind of voice should religious groups have, and do they have an obligation to change the way they speak as they make their claims in public?

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The narrative that has underwritten this debate has been the narrative of Western secularization—the idea was that traditional religion would eventually weaken, decline, and for all practical purposes disappear from public relevance. In the process of weakening, religion technically would be free to flourish, but only on the condition that it would be domesticated through relative degrees of privatization. Clearly, the establishment of any one religion or any one denomination was prohibited, but all religious groups—as a general rule—could hold their beliefs and practice their faith as long as they did not make inordinate claims on the common space of public life and their practices did not endanger either the life or liberty of any citizens. Within the narrative of secularization—a narrative accepted by conservatives and progressives alike—the question has mainly been one of degree: should there be less or more? Should there be a “high wall of separation or low wall?” Should the wall be impermeable or should it be porous?

Progressives have long been concerned about the dangers of religious actors imposing their particular beliefs on those who do not believe and for using the power of the state to enforce that imposition. It is against this threat that they have advocated a sharply diminished role for religion in public affairs. The law, then, is enjoined to assiduously police, restrict, or contain any expressions of religion within their proper bounds. Freedom is at stake.

Conservatives understand the important historical role of faith in nation-building and see a direct correlation between the moral decline of society and its secularization. They want to defend a stronger role for religion, if not for the goals of social cohesion and restored national greatness, then certainly for the formation of children and for the care of the needy. The role of law is to secure and preserve the liberty of religious actors in the public sphere. Here too, freedom is at stake.

In all of this the shared narrative of secularization is in the background, a view that sees the religious and the secular as separate spheres, with law serving to expand the influence of one and shrink the influence of the other. Each side fears that if you give an inch, the other side will take a mile. On this point, there is, of course, some truth.

Stepping back we can now see that the background narrative of secularization-as-decline has been one of the meta-narratives of the Enlightenment. Like the other meta-narratives of that intellectual revolution—the inevitability of progress, the knowability of everything by science, the manageability of everything by technology, the continuous expansion of freedom—this narrative is in the process of being debunked. To be sure, secularization-as-decline has not been entirely a fiction. The social norms of functionally rational, bureaucratic public institutions have often been aggressive, giving empirical merit to Max Weber’s nightmare of

disenchantment.¹ Yet where this has been true, the story of secularization-as-decline can now be seen as a historically and geographically contingent development of Western European and North American societies. Yet, even here, the story was overstated. In the end, it was not so much the reality of secularization as it was the narrative that mattered. This narrative has powerfully shaped the cultural and legal framework of the debate about the relationship of law and religion for a very long time, setting the parameters of advocacy and the logic by which actors have engaged each other.

The narrative is finally catching up to the reality. The debunking of secularization as the inevitable decline of religion is part and parcel of what is now called the post-secular. The post-secular, like secularity itself, is a pliable concept, but for the purposes of this argument, I define it fairly capaciously by the empirically undeniable persistence of religion in the late modern world, the recognition of the limits of secular epistemology and reason, and the ethical puzzles and political quandaries these developments pose. These historical, cultural, and political developments define the post-secular moment we presently occupy, and, in my view, it certainly may challenge the terms of the debate about the relationship between religion and the law and possibly even change the actual mechanisms or practical outcomes of the debate.

II. POST-SECULARITY AND RELIGION

To begin, the demystification of the meta-narrative of secularization calls into doubt what we have long meant—at least operationally—by religion. If one accepts my earlier, again, rather conventional definition of religion, then it would seem that religion no longer describes what an increasing number of Americans experience or think of as religion.

The conditions of the post-secular are found in an intensifying and unstable pluralism. As it applies to religion, this means that the religious is constituted by an unpredictable hybridization within which one will find a complex blending of conviction, opinions, sensibilities, and habits from a wide range of sources, including different religious and philosophical traditions, popular culture, secular psychology, and other technologies of the self.

This is empirically evident in the proliferation of spiritualities. Modern conditions of belief have generated, in Charles Taylor's terms, a spiritual

1. See Max Weber, *Science as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 129 (H.H. Gerth & C. Wright Mills eds. & trans., Oxford Univ. Press 1946).

“super-nova” that creates, in between exclusive theism and an exclusive self-sufficient materialism, “a space in which people can wander between and around all these options without having to land clearly and definitively in any one.”² In it, one finds “an ever-widening variety of moral/spiritual options, across the span of the thinkable and perhaps even beyond.”³ Wade Clark Roof has described it as “a brilliantly colored kaleidoscope ever taking on new configurations of blended hues.”⁴ Faith in America, he argued, has become a broad and eclectic marketplace of faiths and spiritualities that includes everyone from religious dogmatists and born-again Christians to mainstream believers and from metaphysical seekers to secularists; all are distinctive in their lifestyles, family patterns, and moral values.⁵

These developments are both accompanied and aided by a weakening of the institutional structures of religion. This is manifested in the loss of status of once powerful religious bodies (for example, all of the Mainline and Evangelical Protestant denominations and such affiliated organizations as the National Council of Churches), a waning of denominational identities, a loss of confidence in traditional religious organizations by lay people, declining religious authority not least in the capacity to ensure conformity to creeds, and a recent growth in anti-clericalism by progressive elites. Outside of their political interests, particular traditions of “religious” faith are experiencing enormous pressures of dis-integration and it takes shape in a deterioration of its organizational prominence and an enervation of its internal and external authority.

Nowhere is this more true than in the case of American Evangelicalism. For non-Evangelicals, Evangelicalism appears to be a powerful religious movement. It seems to have strong continuity with its past and coherence within the various organizations that presently constitute the movement. A closer look, however, reveals a movement that is institutionally fragmented and theologically conflicted, whose leadership is disaffected, and whose core beliefs—held by its laity—prove to be remarkably shallow, confused, and contradictory.⁶

Post-secularity has also raised questions about secularity itself. In public opinion surveys, for example, those who claim no religious affiliation

2. CHARLES TAYLOR, *A SECULAR AGE* 351 (2007).

3. *Id.* at 299.

4. WADE CLARK ROOF, *SPIRITUAL MARKETPLACE: BABY BOOMERS AND THE REMAKING OF AMERICAN RELIGION* 4 (2001).

5. *Id.* at 3.

6. See, e.g., CHRISTIAN SMITH & MELINDA LUNDQUIST DENTON, *SOUL-SEARCHING: THE RELIGIOUS AND SPIRITUAL LIVES OF AMERICAN TEENAGERS* (2005); see also JAMES DAVISON HUNTER, *EVANGELICALISM: THE COMING GENERATION* (1987); JAMES DAVISON HUNTER, *TO CHANGE THE WORLD: THE IRONY, TRAGEDY, AND POSSIBILITY OF CHRISTIANITY IN THE LATE MODERN WORLD* (2010) [hereinafter HUNTER, *CHANGE*].

have grown rapidly in number over the last half-century—from two percent in 1960 to approximately sixteen percent in 2010.⁷ To be sure, one can find many strident expressions of atheism and a small population (roughly one-third of the total) that adheres dogmatically to its hostilities. But, secularism in the general population is highly varied and saturated with all of the cross-fusion of ideas and influences—including those that are religious—noted above. Indeed, its most distinguishing collective feature is not any particular belief or non-belief, but rather their avoidance of the institutions of organized religion.⁸ As many have observed, there is not just one secularity, but multiple secularities.

In short, the acids of modernity and late modernity have eroded the capacity to believe in the old gods, but they have not diminished the need to believe in something. To paraphrase Chesterton: When a society no longer believes in God, its people thereafter no longer believe in nothing. Rather, they become capable of believing in anything.⁹ And so it is that the forms and expressions of sacredness have proliferated in the late modern, post-secular world, a development that both Weber and Durkheim partially anticipated in the early years of the twentieth century. These changes, again, mean that religion looks and feels and behaves quite differently than it has in the past.

What do these historical and cultural developments mean for the law, particularly as it bears on its relationship to religion? I think the answer here is a bit more circuitous.

III. POST-SECULARITY AND THE LAW

The power of the secularization narrative has been rooted, in part, in the idea that the secular represents “value-neutrality,” “objectivity,” or at least an inclusive realm of autonomous rationality as the basis of a truly universal ethics. The foundation for this sensibility has a distinguished philosophical pedigree in the ideas of Hume and Kant among others.¹⁰ In the law, these ideas gained force through various articulations of legal positivism that

7. Frank Newport, *In U.S., Increasing Number Have No Religious Identity*, GALLUP POL. (May 21, 2010), <http://www.gallup.com/poll/128276/increasing-number-no-religious-identity.aspx>.

8. See Michael Hout & Claude Fischer, *Why More Americans Have No Religious Preference: Politics and Generations*, 67 AM. SOC. REV. 165 (2002).

9. See G.K. CHESTERTON, *THE INCREDULITY OF FATHER BROWN* 71–72 (Waking Lion Press 2006).

10. See DAVID HUME, *A TREATISE OF HUMAN NATURE* (David Fate Norton & Mary J. Norton eds., Oxford Univ. Press 2000) (1739); IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (Mary Gregor ed. & trans., Cambridge Univ. Press 1996) (1797).

attempted to tease apart law and morality.¹¹ They also gained influence through a liberal rationalist tradition in political theory that posited the state as a neutral actor or at least fair arbitrator between competing notions of the good life, whose normativity was to be more political than metaphysical, by which the state would operate in ways that are “independent of controversial philosophical and religious doctrines.”¹² In this view, the secular (in world view, philosophy, legal theory and practice, or the state) is rational, universal, cosmopolitan, and tolerant, and it stands in opposition to religion, which is non-rational, particularistic, sectarian, narrow-minded, parochial, and often-enough bigoted.

Though legal positivism has been mostly dismantled philosophically, and Rawlsian liberalism is being revised where it has not already been discredited, the disposition of secularity as neutrality still powerfully informs public debate. One prominent articulation of this is found in President Obama’s 2006 autobiography:

What our deliberative, pluralistic democracy does demand is that the religiously motivated translate their concerns into universal, rather than religion-specific, values. It requires that their proposals must be subject to argument and amenable to reason. If I am opposed to abortion for religious reasons and seek to pass a law banning the practice, I cannot simply point to the teachings of my church or invoke God’s will and expect that argument to carry the day. If I want others to listen to me, then I have to explain why abortion violates some principle that is accessible to people of all faiths, including those with no faith at all.

. . . [I]n a pluralistic democracy, we have no choice. Almost by definition, faith and reason operate in different domains and involve different paths to discerning truth. Reason—and science—involves the accumulation of knowledge based on realities that we can all apprehend. Religion, by contrast, is based on truths that are not provable through ordinary human understanding—the “belief in things not seen.”¹³

Such a view, as I say, remains influential, but the conditions of our late modern, post-secular world make it less and less plausible. From the

11. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 597 (1958).

12. John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 223 (1985).

13. BARACK OBAMA, *THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM* 219 (2006).

vantage point of the sociology of knowledge and even legal philosophy, the basic argument against this position would seem to be non-controversial to the point of banality.¹⁴

The implication, however, remains highly controversial, at least in political theory and legal practice. The distinction between religion and the law as discrete spheres of discourse and activity is overdrawn. The public square may be “naked” of explicitly traditional religious values and symbols, but it is by no means naked of normativity. Indeed, there can be no neutrality in the law, and therefore, the state cannot be neutral with regard to the public good. Secularity is its own form of normative particularity, so much so that even the possibility of fairness is called into question.

To the extent that the “secular” passes as neutrality, universality, or both, it is only because its particular normativity is concealed within a *habitus* or system of dispositions, tendencies and inclinations within which

14. My own version draws from the sociology of knowledge and begins by recognizing that every human society is an enterprise of world-building. The world, of course, is culture and its fundamental purpose is to provide the structures for human life that are lacking in their biological nature. Culture represents an ordering of experience, whereby a meaningful order is imposed upon both subjective understanding and collective action.

Language is the most basic structure of culture and its use the most basic activity of world-construction and world-maintenance. Not only is the world in its particularity named, but through syntax and grammar, language provides a structure of relationships among, within, between, and around all that constitutes human experience. It is upon the foundation of language and by means of it that the cognitive and normative edifice that passes for human knowledge is built.

The power of language is the power to define reality: what is and what is not, what is right and what is wrong; what we should embrace and what we should eschew. In other words, language is powerful not just because through it justifications can be generated to explain why things are the way they are or why things ought to be different than they are. Rather, language is powerful because it contains its own justifications. The direction of civilizations and the course of a person's life both hinge on words and phrases and their meanings.

Culture is then inherently and ubiquitously normative. Culture is, by its very nature, all about “the good”—it speaks to the nature of the good person, the good life, the good society. Normativity, in short, is not one element of culture, but rather characterizes it through and through, in no small part because humans are themselves normative through and through. They are always involved in evaluative processes about what is good, sacred, desirable, or admirable, as well as what is bad, profane, undesirable, or contemptible.

It goes without saying that the law occupies a distinctive place in the world-building enterprise. Law is the language of the state and thus, by its very nature as a language it too defines a particular reality—not least, the normative reality of what the state will allow and not allow, what it requires and does not require, and the consequences of failing to abide within those strictures. The inherent normativity of the law, of course, goes beyond particular statutes and codes. It is found in the ideals of justice, systems of jurisprudence, theories of legal practice, and historical narratives that underwrite it. In short, law presupposes cosmology that is itself underwritten by implicit epistemic and moral authority. The law performs in regard to that cosmology, but it is a task mainly of legitimization and, to a lesser degree, of unconscious interpretation and expression.

such things are taken-for-granted. It is so deeply embedded in this *habitus* that secularity just seems “obvious” and “natural.” What is natural, though, is simply the taken-for-granted that has forgotten its historical origins¹⁵—the implicit that is inarticulate about its normative commitments. The neutrality or universality, or both, of the secular continues to present itself this way because it is sustained through massive plausibility structures (such as the state, market, science, and higher education, etc.) for which bureaucratic rationality provides the dominant ethos. Stanley Fish is right to note that “[t]he law . . . is continuously engaged in effacing the ideological content of its mechanisms so that it can present itself as a ‘discourse which is context independent in its claims to universality and reason.’”¹⁶

There are those who see through the pretense of formalism to the ethical and, by extension, socio-cultural dilemmas this poses. As James Miller summarized, “there is no Aristotelean mean, no Platonic idea of the good, no moral compass implicit in our ability to reason, and no regulative ideal of consensus that could help us to smooth away the rough edges of competing forms of life and enable us to reconcile their incommensurable claims.”¹⁷ And so why bother even trying? Michel Foucault takes it further arguing that “[t]he unity of society’ [*L’ensemble de la societe*] is precisely that which should not be considered except as something to be destroyed.”¹⁸

But even if we concede in the abstract that there can be no universal theory of the common good that we will all agree to, nor any way to objectively “fix” or “ground” an understanding of a common good, it is sociologically naïve to imagine that some socio-political consensus, with implicit notions of the common good, will not take shape. Cultures by their nature have hegemonic tendencies and so, by extension, does the state.¹⁹ The institutional pressures at work in all modern societies—in education, commerce, crime, defense, foreign policy, and so on—drive them to fashion some kind of uneven, if still approximate, working consensus in public life. This is no less true in highly pluralistic societies. Those institutional dynamics are at work whether we like it or not, and whether we think it is a good thing or not. Needless to say, normativity infuses the entire process and, thus, questions concerning the common good are implicit throughout. In *all* of these areas, the state makes binding decisions affecting the whole of society, in the name of society itself. To formulate law and policy is, as

15. PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* 78 (Richard Nice trans., 1977).

16. STANLEY FISH, *THERE’S NO SUCH THING AS FREE SPEECH: AND IT’S A GOOD THING, TOO* 175 (1994) (embellishing a point made in PETER GOODRICH, *LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC, AND LEGAL ANALYSIS* 175 (1987)).

17. JAMES MILLER, *THE PASSION OF MICHEL FOUCAULT* 8 (1993) (italics removed).

18. James Miller, *Foucault’s Politics in Biographical Perspective*, 97 *SALMAGUNDI* 30, 38 (1993) (brackets and italics in original).

19. See Douglas Litowitz, *Gramsci, Hegemony, and the Law*, 2000 *BYU L. REV.* 515, 528.

Robert Cover famously put it, to create and sustain a *particular nomos*, a normative universe that draws distinctions, discriminates, judges, excludes as well as includes—it is, in short, to take sides on the matter of the common good.²⁰ The distinction between law and religion as separate spheres of discourse, then, is overstated because, by necessity, both are infused with normativity; both are inextricably addressing questions of the common good.

But there is at least one critical difference. The state's involvement in such questions raises the stakes of the outcome considerably. As Weber observed, the power of the state is finally grounded in its exclusive claims to legitimate violence—that is, to exercise coercion on behalf of a particular, even if evolving, consensus.²¹ As a consequence, those who fundamentally disagree with the principles contained in law, refuse to submit to them. Furthermore, those who disagree work outside of the established channels for changing the law and are vulnerable to the exigencies of state-imposed violence.

IV. LAW AND THE EXPANSION OF PLURALISM

The dynamics of law and the state, culture and violence come into relief in the history of expanding pluralism in America. Accompanying every moment of expansion in the composition of diversity has been a new wave of challenge to the existing socio-cultural and legal consensus, and its prevailing understanding of America's collective identity and civic culture. Needless to say, this expansion has been anything but linear, gradual, or harmonious. Tension, conflict, and violence ensued as new and rising groups have challenged an existing establishment that had excluded them from full membership and participation in collective life. Up until the present moment, the power of the state was nearly always manifested in resisting, containing, or regulating this expansion through its coercive power for the sake of sustaining the existing consensus.

Consider the role of law and government in the expansion of *confessional* pluralism, differences mainly rooted in different belief systems.²² In the colonial period, Catholics were forced to pay taxes in support of the Church of England, were denied participation in politics, and in certain places, witnessed the outlawing of the mass, the sacraments, and

20. Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983).

21. MAX WEBER, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 78 (H.H. Gerth & C. Wright Mills eds. & trans., Oxford Univ. Press 1946).

22. See JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* 76 (1991) [hereinafter HUNTER, *CULTURE WARS*].

the founding of Catholic schools.²³ As the number of Catholic immigrants from Ireland and Germany increased from the 1830s through the 1860s, their marginality was reinforced through institutional, physical, and symbolic coercion.²⁴ It was not only groups such as the Know-Nothing Society that were bent on purging the country of “foreign influence, Popery, Jesuitism, and Catholicism,” but it was a sentiment deeply embedded within the economic, educational, and status structures of the society.²⁵ The emergence of Mormonism also generated a reception that was anything but hospitable.²⁶ Mormons suffered forced expulsion from their homes and towns, endured imprisonment, as well as faced attacks from numerous state and county militias in “wars” taking place in Illinois, Missouri, and Utah.²⁷ Needless to say, Jewish immigration in the 1880s and 1890s brought about a similar reaction.²⁸ Though never as virulent as it was in Europe, anti-Semitism was part and parcel of the Jewish experience in America from the beginning.²⁹ In the discrimination of Jews in employment, membership in social clubs, enrollment in colleges and universities, and property ownership, the state was tacitly complicit in their exclusion from full participation in society.³⁰

Similar dynamics are found in this history of expanding *ascriptive* pluralism—of gender, race, ethnicity, and nationality. Women, of course, were denied the right to vote in the United States until 1920 and until then, were subject to arrest and imprisonment for protesting the fact.³¹ Various Native American tribes were, from the founding of the Republic through the better part of the nineteenth century, forced off of traditionally held territory (i.e., the Indian Removal Act³²), denied rights to own land, and exterminated in acts of war.³³ The Japanese were not only incarcerated at internment camps for over three years during World War II, but their bank accounts

23. EMBERSON EDWARD PROPER, *COLONIAL IMMIGRATION LAWS: A STUDY OF THE REGULATION OF IMMIGRATION BY THE ENGLISH COLONIES IN AMERICA* 59–60 (1900).

24. JOHN R. COMMONS ET AL., *HISTORY OF LABOUR IN THE UNITED STATES* 414 (1918).

25. U.S. CATHOLIC HISTORICAL SOC’Y, *HISTORICAL RECORDS & STUDIES* 35 (Thomas F. Meehan et al. eds., 1920).

26. See RICHARD LYMAN BUSHMAN, *MORMONISM: A VERY SHORT INTRODUCTION* 43 (2008) (“Wherever Mormons settled they met specific accusations—collusion with Indians, interference with slaves, theft, counterfeiting—but underlying them all was this fear of fanatics in power.”).

27. See generally *id.*

28. LEONARD DINNERSTEIN, *ANTISEMITISM IN AMERICA* 35 (1995) (“From the end of the Civil War until the beginning of the twentieth century, the United States witnessed the emergence of a full-fledged anti-Semitic society. . . . As immigration figures soared, and as a significant Jewish presence emerged in the United States, people of every walk of life . . . increasingly focused on the alleged deleterious characteristics of Jews that they believed impinged on American lives.”).

29. See *id.*

30. See *id.* at 35–43 (describing various forms of anti-Jewish discrimination).

31. See DORIS STEVENS, *JAILED FOR FREEDOM* 94–96 (1920) (recounting the arrests of several suffragists protesting in front of the White House).

32. Indian Removal Act of 1830, ch. 148, § 1, 4 Stat. 411 (1830).

33. See STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW* 22–31 (2010).

were seized by the Treasury Department, and other property confiscated. Clearly, the history of African-American experience is the longest and most difficult and painful story of all, beginning with legally-enforced enslavement, but including state-enforced discrimination through Jim Crow laws and other hidden forms of institutional racism and social prejudice.

The role of law in reinforcing existing understandings of collective identity and consensus (and therefore some conception of the “common good”) is also seen in its use in prohibiting the expansion of pluralism from the outset. The Naturalization Law of 1790 limited naturalization to immigrants who were “free white person[s]” of “good character.”³⁴ The Naturalization Act of 1870 allowed the naturalization of “persons of African descent,” but continued to exclude Asians and Native Americans from citizenship.³⁵ The Chinese Exclusion Act of 1882 sought to restrict Chinese immigration, but also formed the basis for other race-based exclusion measures including successful efforts to deny naturalization to South Central Asians, Middle Easterners, and East Indians.³⁶ The Expatriation Act of 1907 declared that an American woman who married a foreign national would lose her citizenship.³⁷ And the California Alien Land Law of 1913 prohibited “aliens [all Asian immigrants] ineligible for citizenship” from owning land or property.³⁸ In all of these cases, the law functioned conservatively to protect the prevailing consensus along with its implicit ideals of the “common good.”

All of this is well-known. The obvious point is that tension, conflict, and violence are inherent within pluralism and particularly at the points of expansion. Hostility, prejudice, exclusion, and violence are not so much debates carried too far, but rather tensions inherent to the contest over social space and collective identity.³⁹ The state has never been neutral in this nor, by contemporary standards, particularly fair. It has always taken sides.

The expansion of difference in a society, then, *always* generates instability that necessitates some kind of resolution. Eventually, as history suggests, some kind of resolution is found in an expanded and more inclusive consensus. Over time, difference tends to be absorbed into new

34. Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103 (1790).

35. Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254 (1870).

36. Chinese Exclusion Act of 1882, ch. 126, § 1, 22 Stat. 58 (1882).

37. Expatriation Act of 1907, ch. 253, § 3, 34 Stat. 1228 (1907).

38. California Alien Land Law of 1913, 1913 Cal. Stat. 113.

39. See James Davison Hunter & David Franz, *Religious Pluralism and Civil Society*, in *A NATION OF RELIGIONS: THE POLITICS OF PLURALISM IN MULTIRELIGIOUS AMERICA* 256 (Steven Prothero ed., 2006).

working agreements about the common good. Again, this is more and less true depending on the difference in question—race being perhaps the most puzzling and difficult of cases.

All parties are changed by the encounter. On the one hand, space eventually, even if only grudgingly, opens up and new boundaries of acceptable diversity become normalized. Minorities of whatever kind achieve some measure of acceptance within the public imagination and their inclusion is eventually reinforced within public institutions, not least the state. On the other hand, the minority itself becomes “assimilable,” not only tolerated, but somehow tolerable to others through ways that soften or domesticate those features which set the minority apart in the first place. Thus, to give one example, both self-imposed privatization and theological liberalization were, in their net effect, strategies that diminished the hard, jagged differences among various religions. It is where the differences among groups and identities cannot be moderated or domesticated, where the expansion of pluralism continues to generate friction and conflict.

V. THE CHALLENGE OF MORAL AND METAPHYSICAL PLURALISM

At the end of the twentieth and the beginning of the twenty-first centuries, we observe the continued expansion of pluralism in America. The Immigration and Nationality Act of 1965 abolished the national origins quota system and opened the doors to another expanding wave of confessional and ascriptive pluralism—Hindus, Buddhists, Sikhs, and Muslims, from Asia, the Middle East, and beyond.⁴⁰ Perhaps most politically intriguing is the expanding number of Muslims from the Middle East, particularly in light of the growing global assertiveness of political Islam. Many in the Muslim community understand the tangled and difficult nature of American immigrant history and, with legitimate trepidation, read themselves into it.

Yet arguably, the most important way pluralism expands at present is through the proliferation of *moral and metaphysical differences*. I call such differences *moral* to highlight the deeply normative nature of the disparities—the sharpness of disagreement over what is permitted and what is not to be done. Whether birth control, abortion, or homosexuality, these differences manifest themselves behaviorally. I call such differences *metaphysical* to highlight the way in which these differences are rooted in different ontologies—different conceptions of reality itself and the epistemologies that underwrite them. The differences that are moral and metaphysical constitute our most pressing dilemmas for they are, on the face

40. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, § 2, 79 Stat. 911 (1965).

of it, most incommensurable philosophically and, therefore, deeply antagonizing socially and politically.

And so, to take the obvious cases, the debate over abortion is not only a debate about the nature of a gestating child, but about the meaning of motherhood. And homosexuality is not only a debate about the nature of human intimacy and sexuality, but about the meaning of the family. Both are also debates about the range, extent, and meaning of human freedom. Even more, all of these disputes are finally about what the laws of nature and the laws of God will and will not permit. Thus, these debates are incommensurable because they are symbolically freighted with questions—and competing answers—about the moral foundations of goodness and truth.⁴¹

The question, then, is can late modern American society absorb differences as deep as these? And if it can, how will they be absorbed? The answer, in my view, is that we don't yet know.

Although the origins of these differences and the conflicts they generate are outside of the law—in broader movements of the social and cultural change—the law is invariably involved as a means of social control in adjudicating these challenges. What is at stake, as always, is the collective identity and the limits of tolerable diversity. In the unstable, fragmented pluralism that defines our late modern, post-secular moment, the patronage of the state in its power to enforce conformity is the brass ring. The power of law is the power to define the parameters of formal consensus—of what is allowed and not allowed, of who is in and who is out.

The current dilemma was, in some ways, anticipated by the challenge of Mormon polygamy in 1874. George Reynold's claim to the right to practice polygamy was based in the First Amendment—polygamy was allowed and even encouraged by his religion.⁴² Not only did the First Amendment guarantee the free exercise of his religious faith, his argument further implied a challenge to the state's endorsement of monogamy. Because the law only allowed monogamy, and monogamy was a tenet of Christianity and Judaism, was there not, in the government's favoring of the Judeo-Christian practice of monogamy, a flagrant violation of the Establishment Clause? Among other things, the Supreme Court argued that,

41. For a more extensive articulation of this argument, see HUNTER, *CULTURE WARS*, *supra* note 22.

42. *See Reynolds v. United States*, 98 U.S. 145 (1878).

It was never intended or supposed that the [First A]mendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. . . . However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by *general consent* as properly the subjects of punitive legislation.⁴³

“Needless to say, the general consent invoked in this decision reflected nothing less than the state’s imprimatur upon the Jewish and Christian (and non-Mormon) moral tradition.”⁴⁴ In the end, Mormons just conformed to that general consent.

But in this case, the problem was only moral in character, not metaphysical. Mormonism, as a faith, operated and continues to operate within the extended family of Christian denominations and, therefore, within the broad consensus of Christian ontology.

Over a century later, the culture is quite different. American public culture is decidedly post-Christian, which means, among other things, that the state is no longer bound to or legitimated by an implicit or explicit Judeo-Christian public culture. This partly explains why the role of the state no longer plays just the conservative role of resisting or containing pluralism. But just as the state is not bound to or legitimated by a Judeo-Christian ethos, it is also not quite bound to or legitimated by any alternative.⁴⁵ In the present conflict over expanding pluralism, the state operates more or less as a free agent whose patronage is intensely sought after by all parties.

How will the new lines of consensus be drawn? What will be the terms of acceptable diversity? Who is included and who is excluded? And given the pressures of assimilation, what are the legal (not to mention social) pressures to adapt to the emerging consensus by those who remain minorities to become tolerable to the rest of society?

43. *Davis v. Beason*, 133 U.S. 333, 342–43 (1890) (emphasis added); *see also Reynolds*, 98 U.S. at 166–67.

44. *See HUNTER, CULTURE WARS*, *supra* note 22, at 309.

45. Although Nolan has made a convincing case that a therapeutic ethos has become the de facto alternative. *See JAMES NOLAN, THE THERAPEUTIC STATE: JUSTIFYING GOVERNMENT AT CENTURY’S END* 45 (1998); *see also JAMES NOLAN, REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT* (2001). As Nolan makes clear, therapeutic individualism is not exactly a strong cultural system.

VI. THE LAW AS A WEAPON

Because there is no social and ethical consensus on moral and metaphysical differences, the law is invoked as a means for imposing a legal and political consensus. In the case of homosexuality, the Defense of Marriage Act of 1996⁴⁶ and the military's "Don't Ask, Don't Tell" policy⁴⁷ reinforced traditional boundaries of exclusion, maintaining restrictions on the public identity and actions of gay people. By the same token, new civil rights laws have expanded the boundaries of inclusion for gay people, providing protections against any kind of discrimination. By virtue of the moral requirements of their faith, the same laws restrict the ability of traditional religious organizations from acting in public (most prominently, providing important social services such as adoption and foster child placement) insofar as those services are funded by government subsidies.

Similarly, laws legalizing abortion and permitting government funding for abortion expand the boundaries of inclusion for those who want or need the procedure, but by refusing, for reasons of faith and conscience, to provide that service, the same laws restrict the ability of those faiths that provide healthcare services.

The moral and metaphysical differences represented by rival actors may not be religious in any conventionally theistic sense, but they are most certainly religious in ways that are functional, performative, and substantively spiritual. The conflict is not between those who are religious and those who are not, but between those who have competing understandings of the good society and the terms by which it is constituted.

Given the intensity of the disagreements, it is not surprising that this conflict envelops the interpretation of the First Amendment religion clauses. The ironies here are thick. It is clearly in the interests of progressives to insist on a conventional understanding of religion for it is in traditional theism—its beliefs and organizations—that progressive moral and metaphysical positions find their greatest opposition. And though the proliferation of spiritualities is a source of what conservatives see as cultural decline, it is in their interests to latch onto an expanded, more progressive definition of religion for the simple reason that it levels the playing field. *In nuce*, progressives want a broad definition of religion for free exercise purposes but a narrow definition for no-establishment purposes.

46. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended in 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006)).

47. See 10 U.S.C. § 654 (2006) (repealed 2011).

Conservatives tend to favor the opposite: a broad definition of religion for establishment purposes and a narrow definition of religion for free exercise purposes.⁴⁸

Ideals of justice may be invoked and sincerely meant, but no one is naïve about the instrumental uses of the law in these disputes. The culture war, not least in its legal instrumentalities, becomes a high stakes negotiation over what that consensus in our public culture will ultimately look like.

VII. THE NIETZSCHEAN IMPASSE

There is a larger context within which this drama plays out. In a world in which the social mores—the habits of the heart—of ordinary citizens are no longer widely and intuitively shared, but have been thinned out, fragmented, or merely neglected; law and the mechanics by which law is produced (such as legislative politics, litigation, etc.) fill the void. Law does the work that social mores used to do, and as a consequence, law and policy become the predominant framework for understanding collective life and addressing its problems. Instead of the legal and political spheres being seen as one part of public life, all of public life tends to be reduced to the legal and political realms. The state becomes *the* incarnation of the public good: the dominant and, for some, the only adequate expression of collective life. In this development we come to ascribe impossibly high expectations to what the law can accomplish.

What adds pathos to this larger political culture is the growing influence of a political psychology of *ressentiment*.⁴⁹ *Ressentiment*, defined by anger, envy, hate, rage, and revenge, becomes the motive for legal and political action.⁵⁰ As I have previously explained:

Ressentiment is grounded in a narrative of injury or, at least, perceived injury; a strong belief that one has been or is being wronged. The root of this is the sense of entitlement a group holds. The entitlement may be to greater respect, greater influence, or perhaps a better lot in life and it may draw from the past or the present; it may be privilege once enjoyed or the belief that present virtue now warrants it. In the end, these benefits have been

48. One version of this dilemma was put succinctly by a representative from the United States Conference of Catholic Bishops: “It’s true that the church doesn’t have a First Amendment right to have a government contract, . . . but it does have a First Amendment right not to be excluded from a contract based on its religious beliefs.” Laurie Goodstein, *Bishops Say Rules on Gay Parents Limit Freedom of Religion*, N.Y. TIMES, Dec. 28, 2011, <http://www.nytimes.com/2011/12/29/us/for-bishops-a-battle-over-whose-rights-prevail.html?pagewanted=all> (quoting Anthony R. Picarello Jr.).

49. See HUNTER, CHANGE, *supra* note 6, at 11 (developing this specific argument).

50. *Id.* at 107.

withheld or taken away or there is a perceived threat that they will be taken away by those now in positions of power.

The sense of injury is the key. Over time, the perceived injustice becomes central to the person's and the group's identity. Understanding themselves to be victimized is not a passive acknowledgement but a belief that can be cultivated. Accounts of atrocity become a crucial subplot of the narrative, evidence that reinforces the sense that they have been or will be wronged or victimized. Cultivating the fear of further injury becomes a strategy for generating solidarity within the group and mobilizing the group to action. It is often useful at such times to exaggerate or magnify the threat. . . .

In this [cultural] logic, it is only natural that wrongs need to be righted. And so it is, then, that the injury—real or perceived—leads the aggrieved to accuse, blame, vilify, and then seek revenge on those whom they see as responsible. The adversary has to be shown for who they are, exposed for their corruption, and put in their place. . . .

. . . .

. . . The tendency now effects conservatives every bit as much as it does liberals; those who favor small government as it does those who want a larger government[; Christians as much as humanists]. It has affected everyone's language, imagination, and expectations, not least conservatives who, like others, look to law, policy, and political process as the structure and resolution to their concerns and grievances; who look to politics as the framework of self-validation and self-understanding and ideology as the framework for understanding others.⁵¹

VIII. AND BEYOND

The fluidity and instability of an expanding pluralism that define the conditions of the post-secular turn also present at least two possible directions.

51. *Id.* at 107–08.

One direction is toward a hardening of the lines of the present conflict, further stripping down democratic life to its crudest forms—a competing will to power. In this, law is less a tool of justice than a weapon to enforce compliance to whatever happens to emerge as the reigning consensus. All of our actions may be within the bounds of legitimate democratic participation, yet the basic intent and desire is to dominate, control, or rule. This is the trajectory we are presently on. This is the Nietzschean impasse.

Another possible direction would be based upon a recognition that the power of the state is an unstable and unsustainable foundation for any social order; that the tables can be turned quickly depending upon who is in power. In this, self-interest alone would compel rival actors to pursue broader and deeper agreements toward a broader and deeper justice.

Such a path would not be found in law, policy, or politics. Because the state is a clumsy instrument and rooted in coercion, it will always fail to adequately or directly address the human elements of these problems—the elements that make them poignant in the first place. The law’s role in addressing human problems can only be partial and limited. While law and policy do reflect values, they cannot generate values, instill values, or amicably settle the conflict over values.

As the language of the state, the law is finally and invariably about power—not only power, but finally about power. For the law to be about more than power, it depends upon a realm that is relatively independent of the legal and political spheres. It depends upon moral criteria, institutionalized and practiced in the larger society, that are relatively autonomous from the realm of law and politics. For this to happen, the current conflation of the “public” with the “political” would have to be disentangled, establishing a greater independence and authority for those civic institutions that do generate and enable values—faith, the arts, education, family, and philanthropy.

The law itself may not be able to offer an alternative way through the present impasse, but there is a sense in which an alternative will not be found without the creative role of the law. An alternative path will only be found if law, policy, and politics create and protect the space where culture, in its generative capacities, is free to do its work. This would certainly entail a broader understanding of religion for free exercise purposes, but also a broader understanding of religion for no-establishment purposes, and in this, a greater sensitivity toward all that oppresses in service to vision of greater freedom.