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RELIGION, HUMAN RIGHTS, AND POST-SECULAR LEGAL THEORY

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The idea of human rights embodies the moral outlook and aspirations of modernity. It is through the language of human rights that political obligations are established and articulated, and it is through the language of human rights that an account of human nature and personhood is given meaning and form. The language of human rights is our common moral vocabulary. As Michael Perry writes, "the morality of human rights—that is, the morality that grounds the law of human rights—has become the dominant morality of our time; indeed, unlike any morality before it, the morality of human rights has become a truly global morality."[1] The idea of human rights, in this respect, embodies more than simply a system of legal norms. It rather represents, more elementally, a morality that aims to transcend all particular commitments and to serve as the basis of a shared moral order. The language of human rights, argues Upendra Baxi, has become a discourse that seeks "to supplant all other ethical languages."[2]

The idea of human rights, particularly the underlying idea of human dignity, is replete with echoes of the sacred. The Preamble to the Universal Declaration of Human Rights, for instance, opens with a reference to the "inherent dignity . . . of all

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[1] Michael J. Perry, *Christianity and Human Rights*, in CHRISTIANITY AND LAW 237, 237 (John Witte, Jr. & Frank S. Alexander eds., 2008). This claim has not gone unchallenged. William Twining, for one, has questioned the strong version of the "claim that the language of human rights has become the dominant mode of public moral discourse of the last fifty years, marginalising or replacing other moral discourses." WILLIAM TWINING, GENERAL JURISPRUDENCE 173, 173 (2009).

[2] UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS 1 (2d ed. 2006).

members of the human family."[3] The International Covenant on Civil and Political Rights similarly grounds "the equal and inalienable rights of all members of the human family" in "the inherent dignity of the human person."[4] It should not be a surprise that human rights norms rest, in some sense, on the sacredly tinged language of human dignity given the extent to which religious traditions, particularly Christianity, fed the development of human rights. John Witte summarizes this linkage in characterizing the modern human rights movement as "an attempt to harvest from the traditions of Christianity and the Enlightenment the rudimentary elements of a new faith and a new law that would unite a badly broken world."[5] A number of other scholars have explored the various ways in which Christianity gave birth to the ideas that would ultimately find expression in the modern human rights movement.[6] There were many intellectual sources that shaped the idea of human rights, but none were more foundational than Christianity.[7] In fact, it is doubtful that the universal claims of human rights could have emerged without religious traditions and concepts. As Archbishop Rowan Williams argues, "there is no guarantee that a 'universalist' account of human dignity would ever have seemed plausible or even have emerged with clarity" absent "certain themes consistently and strongly emphasised by the 'Abrahamic' faiths."[8] The modern discourse of human rights is best understood as a historically contingent construct dependent on a variety of religious themes deeply rooted in the western tradition.[9]

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[3] Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10 1948).

[4] International Covenant on Civil and Political Rights, pmbl., adopted Dec. 16, 1966, 999 U.N.T.S. 171.

[5] John Witte, Jr., *Law, Religion, and Human Rights*, 28 COLUM. HUM. RTS. L. REV. 1, 9 (1996).

[6] *See, e.g.*, BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS 26–27 (1997); NICHOLAS WOLTERSTORFF, JUSTICE 324–25 (2008).

[7] For a discussion of the religious and philosophical roots of human rights, see Thorwald Lorenzen, *Towards a Theology of Human Rights*, 97 REV. & EXPOSITOR 49, 51 (2000).

[8] Rowan Williams, *Civil and Religious Law in England: A Religious Perspective*, 10 ECCLESIASTICAL L.J. 262, 272–73 (2008).

[9] John D'Arcy May proposes that
    [h]uman rights language is undeniably Western, unable to conceal its origins in the legal categories inherited from Greece and Rome. So conceived, it is an abstract universal that is logically independent of the

The idea of human rights continues to feed off the inherited moral capital of its religious roots. Yet, in spite of these intellectual links with Christianity, human rights claims—at least in many of their regnant expressions—are now often made on the basis of a secular foundation.[10] Modernity's "invention of an autonomous secular realm" created space for the development of an account of human rights sealed off from any necessary connectedness to religious concepts and categories.[11] A movement born of religious insights was recast into an autonomous moral logic that claimed no dependency on that outside itself. As Witte argues, Christian ideas "participated actively as midwives in the birth of this modern rights revolution" but were eventually eclipsed by secular modes of reasoning that rejected the dependency of human rights claims on religion.[12]

Not only did human rights discourses cut themselves off from any dependence on religion, the idea of human rights has increasingly been defined as a moral tradition that stands over and against religion. As William Twining notes, "[s]ince the Enlightenment and Grotius, most Western theorising about human rights has been avowedly or implicitly secular," such that human rights might advance universal moral principles that "transcend[ ] differences between religions."[13] The emergence of human rights as an autonomous secular morality reflected the Enlightenment's attempt to subsume the particular into the universal.[14] As Kristin Deede Johnson writes, the modern liberal tradition is rooted in the "belief that through the use of reason all people can be unified around a body of common truths and

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myths and doctrines in which the various religions seek to found the unique worth of human nature. The concept of human rights, though at home in the Western liberal context of individual autonomy and political freedoms, is for this reason communicable to cultures that construct the human differently.
John D'Arcy May, *Human Dignity, Human Rights, and Religious Pluralism: Buddhist and Christian Perspectives*, 26 BUDDHIST-CHRISTIAN STUD. 51, 56 (2006).

[10] Williams notes that given its dependence on religious themes, "a defence of an unqualified secular legal monopoly in terms of the need for a universalist doctrine of human right or dignity is to misunderstand the circumstances in which that doctrine emerged." Williams, *supra* note 8, at 273.

[11] John Milbank, *The Gift of Ruling: Secularization and Political Authority*, 85 NEW BLACKFRIARS 212, 221 (2004).

[12] Witte, *supra* note 5, at 10.

[13] TWINING, *supra* note 1, at 174.

[14] *See id.*

morals."[15] These truths, in turn, constitute, "a comprehensive philosophical doctrine" that replace the particularistic claims of revealed theology.[16] In fact, according to the widely parroted historical narrative, the turn from theology to secularity was occasioned by the need to overcome the violence of religious disagreement, particularly that of the bloody Wars of Religion.[17] Secularism was an article of peace which, by replacing the particularistic claims of religion with a universal logic, removed the source of sectarian dissent and violence.[18] The universal and the secular were intimately connected aspects of a modern project that identified religion as a threat to public life.[19] Human rights norms, by extension, became the public moral vocabulary within this new moral order.[20] By establishing human rights as an autonomous and purportedly universal logic, the secular could reign as the unrivaled story of the world.[21]

This secular approach to the construction of human rights dominates the main currents of contemporary human rights thought in the West, particularly within the academy and other elite institutions.[22] Jeremy Waldron summarizes this state of affairs by writing that, "In the circles in which I move, it is not infrequently asserted that secular morality, secular ethics,

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[15] KRISTEN DEEDE JOHNSON, THEOLOGY, POLITICAL THEORY, AND PLURALISM 2 (2007).

[16] *Id.*

[17] Jeffrey Stout offers a typical account of this process, writing that "secularization was not primarily brought about by the triumph of a secularist ideology" but rather by the "need to cope with religious plurality." JEFFREY STOUT, DEMOCRACY AND TRADITION 102 (2004). William Cavanaugh has offered an interesting challenge to this narrative, arguing that the modern liberal state did not emerge as a response to religion but rather that the very concept of "religion" was created out of the aggrandizing impulses of the modern state. William T. Cavanaugh, *"A Fire Strong Enough to Consume the House:" The Wars of Religion and the Rise of the State*, 11 MOD. THEOLOGY 397, 397 (1995).

[18] Charles Mathewes argues that, "[t]he secularist strategy assumed that even with religious values quarantined from public, people would share enough common ground to adjudicate their differences without recourse to their 'deep' metaphysical and religious convictions." CHARLES MATHEWES, A THEOLOGY OF PUBLIC LIFE 112 (2007). Kristin Deede Johnson similar states that "liberal invocations of tolerance have their roots in a very distinct epistemology, which includes a belief that through the use of reason all people can be unified around a body of common truths and morals." JOHNSON, *supra* note 15.

[19] *See* Milbank, *supra* note 11, at 212.

[20] *See* Lorenzen, *supra* note 7, at 52.

[21] *See* STOUT, *supra* note 17.

[22] *See* Jeremy Waldron, *The Injury Done By Christian Silence to Public Debate over America's Use of Torture*, 2 J.L., PHIL. & CULTURE 1, 3–4 (2008).

secular conceptions of human rights, and secular jurisprudence can all get by perfectly well on their own without any input from religion."[23] This perspective is widely echoed in the thought of leading scholars and commentators. Louis Henkin, for one, argues that "in its contemporary articulation, the human rights ideology, aiming at universality . . . has eschewed invoking any theistic authority."[24] Henkin concludes that, "Human rights are not, and cannot be, grounded in religious conviction," which is "conceptually imperialistic."[25] Hilary Putnam similarly identifies a fundamental tension between the particularistic claims of religion and the universal secular aspirations of human rights.[26] Is it not the case, Putnam argues, "that if any one of the major faiths holds on to its triumphalist and supercessionist claims, then indeed religion is part of the problem, and not part of the solution."[27] Religious particularity, in other words, threatens the secular preserve and universal aspirations of liberal norms.[28] Human rights are thus fundamentally at conflict with strong and particularistic theological claims.[29] Only a liberal religion that relativises its truth claims might have a role within a human rights system. To cite yet another instance of this line of thinking, Michael Ignatieff argues for the need to move beyond "foundational arguments" based on religious assertions in order "to build support for human rights on the basis of what such rights actually do for human beings."[30] "Human rights," Ignatieff argues, "is the language through which individuals have created a defense of their autonomy against the oppression of religion."[31] To seek a theological grounding for human rights undermines the basic achievement of liberal modernity that established public life as a secular preserve from the encroachments of religion.[32]

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[23] *Id.*

[24] Louis Henkin, *Religion, Religions, and Human Rights*, 26 J. RELIGIOUS ETHICS 229, 230–31 (1998).

[25] *Id.* at 238.

[26] *See* HILARY PUTNAM, *Monotheism and Humanism, in* HUMANITY BEFORE GOD: CONTEMPORARY FACES OF JEWISH, CHRISTIAN AND ISLAMIC ETHICS 19 (2006).

[27] *Id.* at 22.

[28] *Id.*

[29] *See* Henkin, *supra* note 24, at 231–32.

[30] MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY 54 (Amy Gutmann ed., 2001) (emphasis omitted).

[31] *Id.* at 83.

[32] *See* Henkin, *supra* note 24, at 238.

Finally, this secular negation of religion is pushed to its logical conclusion by proposing that the very project of seeking any foundation for human rights norms, be it secular or religious, is outmoded.[33] It is better, Richard Rorty advises, to move beyond all such concerns in order to begin the work of advancing a human rights culture.[34] Human rights become not a source of critique but a mirror onto ourselves and our reigning values.

The current conversation about human rights is, of course, highly diverse in many respects. The positions described above are part of a polyphonic and often contested field of debate.[35] In fact, explicitly theological voices have also achieved currency in recent years, as have explicitly religious organizations operating within the human rights field.[36] That said, the secular account of human rights not only represents the regnant position within human rights discourses but also, it would seem, the default position within modernity.[37] It should not be surprising that the secular account of human rights represents the default position in modernity because human rights reflect—and indeed were born out of—modernity's efforts to strip the world of a sacred story and advance what Charles Taylor terms the "progress of disenchantment."[38] Modernity is defined by "the breakup of both the ancient and the medieval senses of a synthesis of God, self, and cosmos."[39] At the heart of the modern project is thus what Robert Jensen describes as "the attempt to live in a universal

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[33] *See* Stacy Humes-Schulz, *Limiting Sovereign Immunity in the Age of Human Rights*, 21 HARV. HUM. RTS. J. 105, 127–28 (2008).

[34] *See* Richard Rorty, *Human Rights, Rationality, and Sentimentality*, http://web1.uct.usm.maine.edu/~bcj/issues/three/rorty.html (last visited Oct. 2, 2011).

[35] For a helpful typology of current approaches to human rights thought see TWINING, *supra* note 1, at 173–77.

[36] The culture of the human rights movement has been profoundly impacted in recent decades by the emergence of explicitly religious actors. For example, on the contribution of evangelical Christians to the human rights movement, see Zachary R. Calo, *"The New Internationals": Human Rights and American Evangelicalism, in* IS THE GOOD BOOK GOOD ENOUGH 149, 150–51 (David Ryden ed., 2011).

[37] *See* Zachary R. Calo, *Pluralism, Secularism, and the European Court of Human Rights*, 26 J.L. & RELIGION 261, 271–72 (2010–2011).

[38] CHARLES TAYLOR, MODERN SOCIAL IMAGINARIES 49 (2004).

[39] David Tracy, *Public Theology, Hope, and the Mass Media: Can the Muses Still Inspire?, in* 1 GOD AND GLOBALIZATION 231, 245 (Max L. Stackhouse & Peter J. Paris eds., 2000).

story without a universal storyteller."[40] In this modern moral order, theology was replaced by an autonomous secular logic, and the codes of religion were replaced by the morality of human rights.[41] The emergence of human rights not only involved a borrowing from religion, but a supersessionist move against religion.[42] Human rights norms became an alternative theology that advanced a totalizing account of the human person and the person's place within the cosmos.[43] Theological claims were thus not only excluded from the idea of human rights, but deemed antithetical to their realization.[44] Human rights became, in Elie Weisel's phrase, the "secular religion" of the modern world.[45]

In light of this genealogy, human rights can be seen to not only reflect the impulses of modernity, but to embody the full realization of its aims and ideals. How, then, ought theological traditions relate to the idea of human rights? Is there meaningful space for religion within a discourse that, in its main currents, is defined against religion? There are different models for thinking about the constructive relationship between religion and secular human rights. The conversations are particularly well-defined within Christian thought. One approach posits religion as the necessary foundation of human rights.[46] Rather than rejecting the turn to human rights in modernity, this Article argues that the secular tradition cannot sustain itself.[47] Rowan Williams, for instance, argues that, "[t]he uncomfortable truth is that a purely secular account of human rights is always going to

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[40] Robert W. Jenson, *How the World Lost Its Story*, FIRST THINGS, Oct. 1993, at 31, 33, *available at* http://www.firstthings.com/article/2008/09/002-how-the-world-lost-its-story-13.

[41] *See* Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831, 1913–15 (2009).

[42] *See* Calo, *supra* note 37, at 272–73.

[43] The totalizing character of human rights, rooted in their underlying logical structure, is manifest in the tendency to reach into more and ever expanding spheres of human life. *See generally* Richard Stith, *If Dorothy Had Not Had Toto To Pull Back the Wizard's Curtain: The Fabrication of Human Rights as a World Religion*, 44 VAL. U. L. REV. 847 (2010).

[44] *See* Dohrman W. Byers, *The Morality of Human Rights: A Secular Ground*, 26 J.L. & RELIGION 1, 28–29 (2010–2011).

[45] Elie Wiesel, Remarks at Millenium Evening (Apr. 12, 1999), *available at* http://www.pbs.org/eliewiesel/resources/millennium.html.

[46] *See* Amos Prosser Davis, *International Civil Religion: Respecting Religious Diversity While Promoting International Cooperation*, 34 HASTINGS INT'L & COMP. L. REV. 87, 88–89 (2011).

[47] *See id.* at 89.

be problematic if it attempts to establish the language of rights as a supreme and non-contestable governing concept in ethics."[48] Nicholas Wolterstorff and Michael Perry, among others, have recently offered influential arguments that variously develop the claim that the idea of human rights is ultimately incoherent apart from religious presuppositions.[49] In essence, this line of argument seeks to overturn "the standard secularist account of autonomous human rights" by reasserting the claim that "the foundations of human rights . . . are essentially theological."[50] Religion is neither incompatible with modernity nor should it unqualifiedly embrace the secular world that modernity has wrought.[51] Religion is, rather, the foundation of human rights and, for that matter, the liberal democratic order.[52]

A different line of argument exhibits greater skepticism of the project of reconciling theology with human rights, for it views the project as necessitating the fatal capitulation of theology to an alien and foreign logic. The basic concern is that Christianity and liberal human rights "present vastly different pictures" of the human person.[53] As such, there is a risk in any theological project that allows these differences to be "occluded" so that Christianity might be "included in the current conversation."[54] It is for this reason that the use of human rights language within Catholic social thought, Paolo Carozza notes, "has sometimes attracted criticism, especially by those who see in the language of human rights an inevitable compromise . . . with fundamentally incompatible premises of secular society."[55] The temptation to be

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[48] Rowan Williams, Archbishop of Canterbury, *Religious Faith and Human Rights* (May 1, 2008), *available at* http://www.archbishopofcanterbury.org/articles. php/1161/archbishop-religious-faith-and-human-rights.

[49] *See generally* MICHAEL J. PERRY, TOWARD A THEORY OF HUMAN RIGHTS (2007); WOLTERSTORFF, *supra* note 6.

[50] Max L. Stackhouse, *Why Human Rights Needs God: A Christian Perspective*, *in* DOES HUMAN RIGHTS NEED GOD? 25, 26, 30 (Elizabeth M. Bucar & Barbra Barnett eds., 2005.) Stackhouse also offers the following turn of phrase to emphasize his central claim: "I deny that it was Kant's immaculate conception of human dignity that served as the root of human rights ideas, as a number of secularist advocates of human rights have claimed. He was not in that way Immanuel." *Id.* at 29.

[51] *See id.* at 26–30.

[52] *See id.* at 27–30.

[53] Johnson, *supra* note 15, at 223–24.

[54] *Id.*

[55] Paolo Carozza, Notre Dame Law School, The Catholic Intellectual Tradition and Human Rights, Address at St. Michael's College (Mar. 7, 2005).

relevant can induce the fatal capitulation of theology to an alien and foreign logic. To define religion as the foundation of human rights turns it into the handmaiden of liberalism and thus subsumes religious insights to a language and category that is fundamentally antithetical to religion.[56]

These descriptions provide an extremely general survey that necessarily fail to capture the full complexities of the debate. It is nevertheless the case that the broad contours of the conversation frequently center around the question of whether religion ought to reject human rights or place religion in their service. This Article, however, proposes a third way that aims to both synthesize and move beyond these dominant strategies. The idea proposed is that religion should neither reject nor embrace but rather transform the idea of human rights by entering into a constructive engagement with the logic and categories of modernity.[57] The language of human rights is the dominant moral vocabulary of the day, and the ability of religious traditions to participate in serious political discourse would be undercut if human rights were to be rejected in toto. At the same time, the task of religion is not to provide a metaphysical superstructure that might sustain the modern tradition of human rights. Rather, this Article proposes that theological traditions should advance distinct and particularistic accounts of human rights that challenge the hegemony of the secular tradition. In one respect, this project can be understood as part of the broader contest over the place of religion within liberal politics. Even within the most secular societies there is still a need, as one scholar puts it, to "grapple with faith

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[56] For a discussion of theological perspectives that "den[y] the legitimacy of the secular," see Michael Horton, *In Praise of Profanity: A Theological Defense of the Secular, in* EVANGELICALS AND EMPIRE 252, 253–54 (Bruce Ellis Benson & Peter Goodwin Heltzel eds., 2008).

[57] The need to enter into the fundamental categories of modernity is emphasized by Paul Weller, who writes that

> in a world existing on the other side of the impact of a historical condition known as modernity, the relationships between 'religion' and 'human rights' can only be appropriately considered within the context of a critical understanding of, and engagement with, the impact of another basic reality that is signified by the terminology of the 'secular.'

Paul Weller, *'Human Rights,' 'Religion' and the 'Secular': Variant Configurations of Religion(s), States(s) and Society(ies), in* DOES GOD BELIEVE IN HUMAN RIGHTS? 147, 151 (Nazila Ghanea et al.eds., 2007).

communities."[58] The liberal secular polity, insofar as it promises to citizens the right to "live out their own pursuit of what they see as being the good life," must account for the meaning-making role of religious traditions and create appropriate political space for the cultivation of plural sources of meaning.[59] Yet, as it concerns human rights, the issue is not merely that of defining boundary lines between the secular state and religious communities, but rather that of reconceptualizing the role of religious communities in shaping the content of human rights. The elemental challenge in advancing constructive thought about the relationship between religion and human rights is thus related to, but ultimately distinct from, the issue of pluralism within legal liberalism. It demands cultivating pluralism not only within law but within our approach to the construction of legal meaning. In this respect, work in the area of human rights is part of a larger project of defining the relationship between normative theology and secular jurisprudence.

Before discussing the characteristics of this project, it is important to establish the warrant for it. After all, this methodology stands in fundamental tension with the underlying premises of human rights norms, grounded as they are in the secular foundations of modern legal thought.[60] To open the idea of human rights to theological reasoning is to open law to the intrusions of religion. Such an enceavour would seem, at least on its face, to undermine the foundational premise of the secular legal order. As one scholar notes, "[t]he Western idea of a secular basis for law and order stems from the Enlightenment and its confrontation with the political dominance of religion."[61] Human rights, in this traditional formulation, not only function without religion, but serve as a mechanism to define the political over and against religion. Yet, the political and intellectual foundations of this secular order appear increasingly imperiled, occasioning the need to rethink the idea and the foundations of human rights—particularly the relationship between religion and human rights. The space, and indeed the need, to pursue a

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[58] ANTHONY BRADNEY, LAW AND FAITH IN A SCEPTICAL AGE 143 (2009).

[59] *Id.*

[60] *See supra* text accompanying notes 35–45.

[61] Margit Warburg, *Globalization, Migration and the Two Types of Religious Boundary: A European Perspective, in* RELIGION, GLOBALIZATION, AND CULTURE 79, 96 (Peter Beyer & Lori Beaman eds., 2007).

pluralist theological turn within human rights thought is, above all, grounded in the limitations of the secular narrative upon which the modern idea of human rights has been constructed. Cracks have increasingly appeared in the edifice of secular liberalism, as we enter what is now termed a post-secular age.[62] As Rajeev Bhargava observes, "[o]ver the last three decades, secular states, virtually everywhere, have come under strain."[63] This strain, arising from both sociological and philosophical sources, need not negate the possibility of speaking coherently about human rights, but must occasion a rethinking of the terms on which this conversation proceeds. Above all, this rethinking should consider the role of religion in human rights, for into the space opened by the declension of the secular have emerged a plethora of new religious dynamics. While sociologists and social theorists have written extensively about the features of post-secularity, these developments have had little impact on law and legal theory.

One expression of this post-secular condition has been a global resurgence in religion, particularly in public life, that has upended the expectation that modernity would be marked by the ineluctable movement away from traditional religious belief and practice towards a secular future.[64] As Mark Lilla writes, "[a] little more than two centuries ago we began to believe that the West was on a one-way track toward modern secular democracy and that other societies, once placed on that track, would inevitably follow."[65] It is certainly true that unbelief of various sorts has a place in the modern world that is unique within human history. As Charles Taylor writes, "we have . . . changed from a condition in which belief was the default option, not just for the naïve but also for those who knew, considered, [and] talked about atheism; to a condition in which for more and more people unbelieving construals seem at first blush the only plausible ones."[66] To not believe is now a possibility and, as

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[62] On post-secularity, see generally ROMAND COLES, RETHINKING GENEROSITY (1997).

[63] Rajeev Bhargava, *States, Religious Diversity, and the Crisis of Secularism,* HEDGEHOG REV., Fall 2010, at 8, 8, *available at* http://www.iasc-culture.org/HHR_Archives/Fall2010/Bhargava_lo.pdf.

[64] For an account of these developments, see generally JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, GOD IS BACK (2009).

[65] Mark Lilla, *The Politics of God,* N.Y. TIMES, Aug. 19, 2007, at MM28.

[66] CHARLES TAYLOR, A SECULAR AGE 12 (2007).

Taylor observes, the only plausible one for many.[67] Yet, even as faith is now experienced in different and more contingent ways, the "global revival of religion" has made it clear that faith is not disappearing.[68] Unbelief is more prevalent and possible, but the deep secularization of Western Europe remains the exception rather than the norm.[69] Modernity has not precipitated a unidirectional move away from religion.[70] Religion continues to thrive, even if in new forms that reflect the limits and possibilities of the age.[71] An account of human rights that does not incorporate this reality is both anthropologically and sociologically corrupt, for it rests on an account of the world that denies the continuing role of religion in shaping the meaning of the human and the human in the community.

The post-secular condition refers not only to a resurgence of religious faith and practice that might be measured on an empirical basis, it also refers to a fragmentation in meaning that undermines the universal aspirations of the secular. Post-secularity must therefore be understood as involving what one scholar has described as "detraditionalisation."[72] With detraditionalisation, the secular, as a concept that took a particular shape in modernity, is destabilized and challenged.[73] Into this fragmented secular reality, religious traditions emerge as alternative sources of political and moral meaning. Post-secularity, in this respect, involves the negation of an autonomous secular and the opening of the public to overlapping

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[67] *See id.*

[68] *See generally* MICKLETHWAIT & WOOLDRIDGE, *supra* note 64.

[69] *See id.* at 185. On secularism in the United Kingdom and its implications for law and politics, see generally BRADNEY, *supra* note 58. Bradney notes, for instance, that "[s]ecularism runs through contemporary British society," and has produced a skepticism about total truths. *Id.* at 16–17.

[70] *See* MICKLETHWAIT & WOOLDRIDGE, *supra* note 64, at 11–12.

[71] *See id.*

[72] Lieven Boeve, *Europe in Crisis: A Question of Belief or Unbelief? Perspectives from the Vatican*, 23 MOD. THEOLOGY 205, 222 (2007) (internal quotation marks omitted). Beoeve's description of detraditionalization, which is grounded in the European context, refers not only to a decline in the secular, but also traditional religious beliefs and practices. *See id.* at 222–23. Detraditionalization, as Boeve reads it, refers to a process in which there is no longer any one dominant culture force, religious or secular. *See id.*

[73] *See id.* at 222.

and contested meanings.[74]   Within the secular public emerges "space for multiple publics, overlapping yet each marked by its own telos, doctrine, and practices."[75]

This destabalization of secular meaning presents a fundamental challenge to the legal and political order of modernity.   At the heart of the modern project was the construction of law and politics as ontologically and spatially separate from religion.[76]   What José Casanova terms the "differentiation of the secular spheres" involved "the transfer of persons, things, meanings, etc., from ecclesiastical or religious to civil or lay use, possession or control."[77]   The construction of secular politics was thus not merely about jurisdictional matters such as disestablishment, but equally about the source of deep political meaning, for the "differentiation of the secular sphere[ ]" severed law from any participation in divine economy and emphasized the autonomous nature of its logic.[78]   Law contains its own reason that transcends and ultimately judges the particularistic claims of theology.[79]

To speak of post-secularity in this context is not to deny that the order wrought by modernity continues to inform social and political life.   Legal systems in the West remain creations of this fusion between liberalism and secularism.[80]   Post-secularity does not then augur a return to the premodern fusion of the religious and the political.   It is not a rejection of modernity so much as a development within modernity.   All the same, this development does mitigate against "the principles of Enlightenment and secular democracy" by blurring "the boundary of the secular versus the sacred."[81]   As such, our inherited conception of the secular, and of the political norms and institutions it has generated, cannot remain stable.   In particular, the post-secular

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[74] *See* JOHNSON, *supra* note 15, at 225.

[75] *Id.*

[76] *See* ROBERT CUMMINGS NEVILLE, RELIGION IN LATE MODERNITY 160–61 (2002).

[77] José Casanova, *Rethinking Secularization: A Global Comparative Perspective,* *in* RELIGION, GLOBALIZATION, AND CULTURE, *supra* note 61, at 101, 101.

[78] JOSÉ CASANOVA, PUBLIC RELIGIONS IN THE MODERN WORLD 30 (1994).

[79] *See id.*

[80] *See* MILAN ZAFIROVSKI, LIBERAL MODERNITY AND ITS ADVERSARIES 434 (2007).

[81] Warburg, *supra* note 61, at 93.

challenge to political meaning problematizes the idea of universality upon which the idea of human rights has been constructed.

Out of the constructed reality of secular modernity emerged the language and law of human rights as an ordering morality.[82] Human rights became the morality of the liberal public while religion was sequestered in the private.[83] The idea of human rights retained a "quasi-religious" character, but it rested on a totalizing secular logic closed off to the religious.[84] Human rights norms were universal precisely because they made no recourse to the particular, that is, the religious.[85] Yet, the breakdown of the strong secularization narrative has called into question "the Enlightenment ideals of a purely secular basis for the law."[86] It certainly calls into question the viability and prudence of an approach to law and politics premised on the creation of a purely secular public. Part of the challenge for human rights thought is therefore to wrestle with how the concept, born of these ideals of Enlightenment and secular liberalism, might remain meaningful in a context where the secular and the sacred are not so clearly differentiated. What does it mean to speak of the universal when the secular political basis for such a claim is under assault? The post-secular challenge has profound consequences for law and politics, for it raises questions about whether a unitary description of the public might meaningfully account for, and do justice to, the multiple publics that exist.

An initial step in assessing the meaning of human rights in a post-secular context involves critiquing the purported neutrality of secular logic. Universal secular logic is not neutral.[87] As Michael McConnell argues, "[a] genuinely pluralistic liberalism must recognize that secularism is no more neutral than religion."[88] Secularism, in other words, is not the mere absence of

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[82] *See* MICHAEL J. PERRY, TOWARD A THEORY OF HUMAN RIGHTS 4 (2007).

[83] *See id.*

[84] *See generally* MICHAEL IGNATIEFF, *Human Rights as Idolatry*, *in* HUMAN RIGHTS AS POLITICS AND IDOLATRY 53–96 (Amy Gutman ed., 2001).

[85] *See id.* at 55–56.

[86] Warburg, *supra* note 61.

[87] Michael W. McConnell, *Old Liberalism, New Liberalism, and People of Faith*, *in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 5, 23 (Michael W. McConnell et al. eds., 2001).

[88] *Id.* Lisa Cahill similarly argues that "no language about the concrete conditions of human life enjoys such neutrality." *See* Lisa Sowle Cahill, *Rights as Religious or Secular: Why Not Both?*, 14 J.L. & RELIGION 41, 46 (1999–2000).

religion but is an ideology that advances a normative account of the world.[89] It is an ideology, a way of thinking and encountering the world, that aims to desacralize the meaning of politics.[90] Secularism, Craig Calhoun proposes, "is not simply a creature of treaties to end religious wars, the rise of science, or the Enlightenment. It is informed by a long history of engagements with the temporal world and purposes that imply no transcendence of immanent conditions."[91] The resultant liberal tradition, William Connolly similarly argues, endorses "a self-sufficient public realm" that "strains metaphysics out of politics" and "insists upon the sanctity of an authoritative line of division between religion in private life and public political discourse."[92] Secular neutrality must therefore be identified as committing a certain form of violence against religious citizens. For many, it might be understood as a necessary and justified form of violence, but it cannot be maintained that secular logic is anything but a constructed account of reality competing for normative superiority. Post-secular conditions have drawn into the open that which the mythology of modernity had hidden.[93] Moving forward, the challenge is to determine what it would mean to develop an account of law and legal thought that moves beyond the universal contours of secularism.

One of the most thoughtful and significant reflections on questions of law, religion, and universality came recently when Archbishop of Canterbury Rowan Williams delivered a controversial address regarding civil and religious law in England.[94] In discussing the subject of "supplementa[l] jurisdiction," Williams advanced the claim that "legal universalism [is] a negative thing."[95] On one level, this comment was intended to critique a theory of law that rejects *a priori* the possibility of there being space for religious law, particularly

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[89] *See* McConnell, *supra* note 87.

[90] *See id.*

[91] Craig Calhoun, *Rethinking Secularism*, HEDGEHOG REV., Fall 2010, at 35, 35, *available at* http://www.iasc-culture.org/HHR_Archives/Fall2010/Calhoun_lo.pdf.

[92] WILLIAM E. CONNOLLY, WHY I AM NOT A SECULARIST 21–22 (1999).

[93] Lorenzo Zucca's comments are revealing. He argues that, "[t]he concept of constitutional secularism has shaky theoretical foundations." Lorenzo Zucca, *The Crisis of the Secular State—A Reply to Professor Sajó*, 7 INT'L J. CONST. L. 494, 509 (2009). "Religion," he adds, "is not the prime problem of the secular state" and "may even help the state" establish a better foundation. *Id.*

[94] *See generally* Williams, *supra* note 8.

[95] *Id.* at 270–71.

Sharia law, within the civil law.[96] Yet, we might also understand Williams's critique of legal universalism in a broader jurisprudential context. Williams is doing more than putting supplemental jurisdiction on the table. In fact, to focus on this aspect of the argument is to miss the larger and more explosive jurisprudential project at work. The critique of legal universalism is rather part of a broader challenge to the "unqualified secular legal monopoly" that defines human rights talk.[97] What is needed as an alternative, Williams proposes, is the development of a "theology of law" that might reconceptualize the normative relationship between law and religion within the context of late modernity.[98] The issue of supplemental jurisdiction, which has generated increased debate in recent years, must be located within the more foundational issue of how the positive law relates to other systems of moral order.

Williams's intervention in the debate about supplemental jurisdiction provides a roadmap for assessing the relationship of religion to the idea and law of human rights. The defining characteristic of this project is the shifting of focus from the universal to the particular. Rather than articulating an account of human rights on neutral universal terms, it does so on the basis of particularistic normative worldviews, including religious traditions. It thus replaces a universal logic with a theological logic and invites communities of religious meaning to participate in discourse concerning human rights and human goods without starting from a secular premise.[99] This task is fundamentally anthropological in its focus, for at the heart of secular legal

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[96] In discussing "supplementa[l] jurisdiction," Williams is considering whether Islamic law courts ought have jurisdiction in certain areas, such as family law or inheritance. *See id.* at 268–69 (internal quotation marks omitted).

[97] *Id.* at 273. Williams, it should be emphasized, was only attacking a certain kind of universalism. The claim that "legal universalism [is] a negative thing" should not be understood as attacking the notion that there ought be universally binding legal norms. *Id.* at 271. The target of Williams's critique was not universalism, as such, but rather a certain account of universalism that doggedly admits of no space for the opening of law, and politics more generally, to the multiplicity of sources of meaning and identity that shape our lives. *See id.* at 273.

[98] *Id.* at 272.

[99] This work might be pursued fruitfully within different theological traditions, though the Abrahamic faiths of Judaism, Christianity and Islam will likely be places of particular creativity and possibility given their theological resources and location at the center of these conversations. For an example of this work within the Abrahamic faiths, see generally HUMANITY BEFORE GOD (William Schweiker et al. eds., 2006).

universalism is an artificial human being divorced from the
particular sources of human meaning.[100]   As John Milbank
writes, the liberal tradition required the invention of

> a wholly artificial human being who has never really
> existed . . . .   This is the pure individual, thought of in
> abstraction from his or her gender, birth, associations, beliefs
> and also, crucially, . . . from the religious or philosophical beliefs
> of the observer of this individual as to whether he is a creature
> made by God, or only material, or naturally evolved and so
> forth.[101]

This artificial person is the starting point from which the
universal claims of human rights are established.[102]   However,
the rejection of pluralism that necessarily undergirds this
anthropology not only advances an abstract and contentless
account of the human person, but also grants to secular
government, in Williams's words, "a monopoly in terms of
defining public and political identity."[103]   Rather than subsuming
particularity under a totalizing universal secular logic, this
project proposes a theological turn that opens human rights to
distinct and contingent accounts of personhood.[104]

While there is a risk in opening public life to such intrusions
of particularity, only by so doing can human rights be grounded
in genuine respect, understanding, and dialogue.   As Charles
Mathewes argues, "Modern thought in general . . . is ill-
equipped" to advance such encounters because it is committed
"more to avoiding than to confronting the challenge" of
otherness.[105]   Genuine personhood is hidden behind the
abstractions of liberal anthropology.[106]   Yet, to regard another
person as a bearer of dignity and rights requires confronting that
person in her distinctiveness and particularity, a task which the
modern secular project undercuts and avoids.[107]   Pluralism is

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[100] *See* Milbank, *supra* note 11, at 213.

[101] *Id.*

[102] *See id.*

[103] Williams, *supra* note 8, at 265.

[104] *See id.* at 266 ("[T]here is a risk of assuming that 'mainstream' jurisprudence
should . . . bypass the variety of ways in which actions are . . . understood by agents
in the light of the diverse sorts of communal belonging in which they are involved.").

[105] Charles T. Mathewes, *Pluralism, Otherness, and the Augustinian Tradition*,
14 MOD. THEOLOGY 83, 84 (1998).

[106] *See id.* at 92–93.

[107] *See* Scott Cummings, *Affirmative Action and the Rhetoric of Individual
Rights: Reclaiming Liberalism as a "Color-Conscious" Theory*, 13 HARV.

thus not antithetical to human rights, as the universalist strategy proposes,[108] but arguably a precondition for genuinely encountering the other as an equal bearer of dignity. In this respect, pluralism ought not to be viewed as a threat to universal moral norms, but rather as the basis for sustaining a genuine human rights culture.[109] The modern project, premised as it is on a depersonalized universal logic, is a frail and unstable creation that cannot organize a strong human rights order.[110] It destroys the human even as it endeavors to affirm her.[111] As Javier Martínez writes, "secular reason cannot found a real sociality or a true humanity."[112] True sociality, which ought to be the basis for a culture of human rights, can only be found in respecting and acknowledging the true humanness of the human person.[113]

The breakdown of the secular and the universal—the twin hallmarks of modernity and its human rights progeny—makes it permissible, perhaps inevitable, that theological concerns will explicitly engage debates about the meaning and content of human rights. However, even as this breakdown opens secular human rights to theological critique, this process should not be understood as inaugurating a theological contest against modernity. The injection of theological particularity challenges the truncated secular logic of modernity but does not seek to overcome modernity.[114] Indeed, accepting the idea and language

BLACKLETTER L.J. 183, 190 (1997) (discussing the "conflict thesis," in which a liberal state's individual rights are at odds with, for example, racial distinctiveness).

[108] NEGOTIATING CULTURE AND HUMAN RIGHTS 5 (Lynda S. Bell et al. eds., 2001).

[109] Pluralism can serve to deny the meaningfulness of particular claims as much as it can recognize others in their particularity. Pope Benedict XVI, for instance, has written about "a peculiar Western self-hatred that is nothing short of pathological." Jean Bethke Elshtain, *While Europe Slept*, FIRST THINGS, Mar. 2009, at 33, 35–36 (2009) (internal quotation marks omitted). Thus pluralism, just like universalism, might equally be a tool of evasion rather than engagement.

[110] Stephen A. Hansen, *The Right to Take Part in Cultural Life*, in HUMAN RIGHTS IN THE WORLD COMMUNITY 223, 226 (Richard Pierre Claude & Burns H. Weston eds., 2006).

[111] *Id.*

[112] Javier Martínez, Archbishop of Granada, Beyond Secular Reason: Some Contemporary Challenges for the Life and the Thought of the Church, as Seen from the West, Remarks at the Conference Organized by Russia Cristiana on Orthodox Theology and the West in the Twentieth Century (Oct. 2004), *available at* http://www.thedivineconspiracy.org/Z5205F.pdf.

[113] *See* Milbank, *supra* note 11, at 235 (describing the "futile circle" caused by reliance on liberalism as the source of human rights).

[114] *See* Williams, *supra* note 48.

of human rights as a starting point for reflection is to tie theological engagement to this modern inheritance and to accept in some measure its legitimacy.[115] It is an act of what Rowan Williams terms "[s]alvaging" because "the language of rights is indeed the only generally intelligible way in modern political ethics of decisively challenging the positive authority of the state to do what it pleases."[116]

The task of opening human rights to theology is not supersessionist. It is dialogical and ultimately corrective. The task might be understood as a critical yet constructive engagement over the nature of the human person, human freedom, and human flourishing. Theological traditions hold distinctive perspectives on the meaning of the human that should be at the center of contests over the meaning and content of human rights norms. There will certainly be matters of agreement between secular and theological traditions, a fact that should not be surprising given the ways in which modernity's account of the person draws from religious traditions, even as it seeks to mask this inheritance behind claims of universality. Yet, this task will also reveal significant points of conflict between religious traditions but, even more importantly, between religious and secular traditions. If, as one scholar has proposed, the fundamental dividing line in modernity is "not that between different religious cultures, but that between the radical emancipation of man from God, from the roots of life, on the one hand, and the great religious cultures, on the other," then this will surely express itself in competing accounts of the meaning of human rights.[117]

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[115] *See id.*

[116] *Id.*

[117] Boeve, *supra* note 72, at 213. Many religious commentators have made just this point. The Islamic legal scholar Mohamaad Kamali has written of the "differences between the theistic view of right and freedom when compared to what they mean in a secular context," MOHAMMAD HASHIM KAMALI, SHARI'AH LAW 206 (2008), while Jewish legal scholar David Novak has pointed to the "great difference . . . between religious members of a democracy and its secularist members, especially in the ways they affirm human rights and even in the way they determine what some of these rights are." DAVID NOVAK, IN DEFENSE OF RELIGIOUS LIBERTY 106 (2009). For a discussion of tensions between liberal and Catholic accounts of human rights, see generally Zachary R. Calo, Catholic Social Thought, Political Liberalism, and the Idea of Human Rights (unpublished manuscript), *available at* http://www.samford.edu/lillyhumanrights/papers/Calo_Catholic.pdf.

These differences need not be fatal to the work of advancing a human rights culture and even achieving a meaningful consensus.[118] The tension between religious and secular accounts of human rights takes places within the bounds of modernity. It is a debate about the moral life of modernity and, more specifically, the role of religion within the public and political life of the modern world. The problem for religious thought is thus not the secular, as such, but rather a secularism that promotes what Pope Benedict describes as the "total separation" of religion and politics.[119] The problem for religion is not the liberal tradition writ large, but a certain account of liberalism that presents itself as being what McConnell calls a "comprehensive ideology"—a totalizing and self-contained story of the world that admits of no space for religion.[120] While it is commonplace to think of the secular as a creation of modernity, the secular is in fact the creation of the long history of western Christendom.[121] The secular, in its older formulation, was not an ideology but rather a jurisdictional concept concerning the relation of the ecclesial and the political—the sacred and the profane.[122] Going even further, one might posit that the secular is a creation of Christian theology, particularly creational and incarnational theology.[123] Robert Markus has, along these lines, proposed that, "[t]he idea of the secular is present within the Christian tradition from the start," and was given a particularly significant expression in the thought of Saint Augustine.[124] More recently,

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[118] Lisa Cahill notes that, "[s]ince most or all historical societies are internally pluralistic, public discourse need not and indeed cannot be purely and intransigently 'secular.' . . . Commonality and particularity are not mutually exclusive." Cahill, *supra* note 88, at 45–46.

[119] Pope Benedict XVI, Address to the Participants in the 56th National Study Congress Organized by the Union of Italian Catholic Jurists (Dec. 9, 2006), *available at* http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/december/documents/hf_ben_xvi_spe_20061209_giuristi-cattolici_en.html.

[120] McConnell, *supra* note 87, at 19.

[121] *See generally id.*

[122] *See generally id.*

[123] *See* ROBERT A. MARKUS, CHRISTIANITY AND THE SECULAR 13 (2006).

[124] *Id. See generally* R. A. MARKUS, SAECULUM: HISTORY AND SOCIETY IN THE THEOLOGY OF ST. AUGUSTINE (1988).

Pope Benedict has sought to recover the tradition of Christian "secularity" for constructive social and political thought.[125]   In short, secularism does not have a univocal meaning but rather expresses itself in multiple contingent forms, all of which relate to religion in different ways.

As such, opening the idea of human rights to theological perspectives invites a contest over the meaning of liberal modernity. It is a contest within modernity over the meaning of modernity. Theology might identify much in the modern order that   can   be   affirmed,   while   also   rejecting   modernity's disenchantment—its closing off to transcendence that followed what Charles Taylor terms the "Great Disembedding" of moral order and cosmic creed.[126] We should therefore reject any simple dualism between theology and secular modernity and instead identify   the   existence   of   multiple   modernities.[127]   The Enlightenment account of human rights is but one historically contingent tradition among many, not the tradition to end tradition. The secular liberal tradition represents the dominant account of modernity, but this need not be the end of the story, for theology might give birth to alternative modernities that neither reject secularity entirely nor capitulate to the dictates of its Enlightenment formulation.

Out of these different modernities will emerge different understandings of the foundations, content, and possibilities of human rights discourses and politics. The theological turn thus takes the modern construct of human rights as a starting point while offering theology as a corrective to the dominant logic undergirding it. The challenge is to cultivate, within the modern moral order—a moral order responsible for universalizing the claims of human rights—a new modernity that might contain a true and full account of the human. This task, then, does not

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[125] As an alternative to dogmatic secularism, Benedict has developed the idea of " 'healthy secularity,' " Pope Benedict XVI, *supra* note 119, which can be understood most basically as "[a] secularity including God." *To Catholic Lay Jurists*, Eternal Word   Television   Network,   http://www.ewtn.com/library/PAPALDOC/b16layjurists. HTM (last visited Oct. 5, 2011). On healthy secularity applied to the area of human rights, *see generally* Zachary R. Calo, *Human Rights and Healthy Secularity*, 7 J. CATH. SOC. THOUGHT 231 (2010).

[126] TAYLOR, *supra* note 38, at 65–66.

[127] *See generally* GERTRUDE HIMMELFARB, ROADS TO MODERNITY: THE BRITISH, FRENCH AND AMERICAN ENLIGHTENMENTS (2004).

seek to overcome the language of human rights but rather to enchant modernity's claims about the nature of human personality and freedom by embedding them within an alternative moral drama. This project does not represent a capitulation to the alien secularity of modernity, but an attempt to reclaim the human person hijacked by modernity.

Human rights provide a particularly fruitful case study for examining the relationship between theology and legal theory. Human rights not only maintain a dominant role within the legal and political discourse of the modern world but, because the idea of human rights embodies the full aspirations of the modern project, it draws us into conversation about the moral life and ambitions of modernity.[128] As with human rights, the constructive development of religious legal theory must take as its starting point the captivity of legal theory to the secular norms of modernity, particularly the idea of law as grounded in an autonomous moral logic. Echoing a theme that has animated the argument in this Article, Mark Modak-Truran argues that "the modern paradigm can not likely maintain the autonomy of law from political, moral and religious convictions."[129] The resultant dissolution of legal autonomy creates within legal thought, just as it has within human rights, space for a turn towards theological particularity.[130] However, much of the work seeking to integrate law and theology, particularly among Christian thinkers, has failed to seize the opening provided.[131] Most of this constructive work remains too tepid in its approach to integration and too modest in its ambitions. David Skeel, for instance, has identified four main areas in which Christian legal scholarship has taken place—natural law, Christian lawyering, First Amendment and church-state issues, and Christian legal history.[132] What is common, albeit in different ways, in all of

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[128] *See* Perry, *supra* note 1, at 237–38.

[129] Mark C. Modak-Truran, *Beyond Theocracy and Secularism (Part I): Toward a New Paradigm for Law and Religion*, 27 MISS. C. L. REV. 159, 196 (2007).

[130] *See id.*

[131] *See* David A. Skeel, Jr., *The Unbearable Lightness of Christian Legal Scholarship*, 57 EMORY L.J. 1471, 1476–78 (2008).

[132] *See id.*

these areas is that Christianity serves a largely adjectival function with respect to law, leaving the resources of theology at the fringes of legal meaning. Law and religion scholarship has failed to question the fundamental premises of the conversation—the inherited idea of law born of secularity modernity—just as it has often failed to integrate the inherited idea of human rights.

This tepidness reflects the continuing boundedness of law and religion scholarship to the logic of a certain mode of secular modernity—a logic that birthed the very concept of "religion," as if all the particularities of theological traditions could be subsumed within a universal genus. A more constructive approach would involve religious legal theory shifting the locus of its activity from law and religion to theological jurisprudence.[133] This would position religious legal thought to escape the captivity of modern logic and begin interrogating the deeper assumptions informing legal scholarship. It is, after all, not simply work in law and religion that remains captive to this modern logic. This is a problem afflicting law more generally. Much of modern legal thought remains wed to a belief in the idea of "law."[134] We continue to talk of law as if it refers to an objective ontological reality, a tendency that belies the deeper skepticism of the modern condition. This is the same problem confronting human rights talk. As Michael Perry observes, the idea of human rights "is, for many, the hardest of the great moral ideas [of the twentieth century] to integrate, the hardest to square, with the reigning intellectual assumptions of the age."[135] In particular, Perry highlights the incongruity between the strong moral claims of human rights and the reigning idea that "there is no God or metaphysical order of any kind."[136] It is, after all, peculiar that the idea of universal human rights emerged as the dominant political morality at the same historical moment when confidence in a stable and ordered universe crumbled.[137] This condition,

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[133] Rowan Williams references the need for "more reflection . . . about the theology of law." Williams, *supra* note 8, at 272.
[134] *See id.* at 270.
[135] MICHAEL J. PERRY, THE IDEA OF HUMAN RIGHTS 7 (1998).
[136] *See id.*
[137] *See id.*

which Stephen Smith labels law's "ontological gap," poses a fundamental challenge to legal thought in modernity, and it is a challenge that ought be at the center of constructive reflection about the relationship of law and theology.[138]

This ontological gap might be an occasion of despair in that it highlights the mythological architecture undergirding the legal enterprise.[139] But, it also might be an opportunity to reimagine the meaning and foundations of law. For religious legal theory, the response to this ontological gap should be neither to ignore it nor to attempt to close it with recourse to a new foundationalism. Rather, it ought to enter into this gap, seeing it as a space for religious ontologies to participate in the process of legal meaning-making. As Mark Modak-Truran argues, "[t]he different theories of law under the modern paradigm all attempt to preserve the autonomy of law so that law has a secular foundation."[140] The modern project of a universal, secular, autonomous legal enterprise, however, has failed.[141] The failure, or at least the devolution of this project, is met by some with trepidation, for it imperils that which Mark Lilla describes as the "Great Separation" of theology and politics that defined the emergence of liberal modernity.[142] "The revival of political theology in the modern West is a humbling story," Lilla writes.[143] "It is an age-old habit of mind that can be reacquired by anyone who begins looking to the divine nexus of God, man and world to reveal the legitimate political order."[144] There is certainly a risk in opening modernity to the theological, and many remain wed to the belief that the achievements of modernity are incompatible with strong theological claims. But perhaps it is the case that only by moving beyond the Great Separation that certain basic insights of

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[138] STEPHEN D. SMITH, LAW'S QUANDARY 155–56 (2004).
[139] *See id.* at 155.
[140] Modak-Truran, *supra* note 129, at 201.
[141] *See id.*
[142] Lilla, *supra* note 65.
[143] *Id.*
[144] *Id.*

modernity can be preserved. The central task for religious legal theory, both as concerns human rights as well as jurisprudence more generally, is to explore this transformative possibility.[145]

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[145] Although I lack the space to develop this theme, this mode of critique is not unidirectional. It is, rather, best understood as dialogical in its methods. The critical encounter between theological and secular modes of reason has the capacity to shape modes of religious thought and must therefore be pursued with a certain modesty. As Charles Taylor argues, it took the dethroning of established religion—in this case Christianity—to discover within its own moral resources ideas and ideals long ignored. *See* A CATHOLIC MODERNITY? 13, 13–14 (James L. Heft ed. 1999). Rowan Williams makes a similar claim to Taylor in proposing that "the Enlightenment was a necessary wake-up call to religion." Williams, *supra* note 8, at 273. The theological turn in human rights inaugurates a process of mutual critique and correction that occurs both between religion and secular traditions as well as among different faith traditions. The constructive potential of modernity's critique might be seen, for instance, in Catholic wrestling with the issue of religious freedom during much of the nineteenth and twentieth centuries. Developments within Islam might augur similar possibilities. *See generally* ABDULLAHI AHMED AN-NA'IM, ISLAM AND THE SECULAR STATE (2008).