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Jason E. Whitehead

Jason.Whitehead@tulsa.edu

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## FAITH, REASON, AND LIBERAL LEGAL NEUTRALITY

Jason E. Whitehead\*

FRANCIS J. BECKWITH, *TAKING RITES SERIOUSLY: LAW, POLITICS, AND THE REASONABLENESS OF FAITH* (CAMBRIDGE UNIVERSITY PRESS 2015). PP. 225. HARDCOVER \$99.99.

RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY (JEAN L. COHEN & CÉCILE LABORDE EDS.) (COLUMBIA UNIVERSITY PRESS 2015). PP. 456. HARDCOVER \$120.00.

### INTRODUCTION: THE CONTINUING “WARS OF RELIGION”

Nearly 370 years after the Peace of Westphalia, the conflict between religious faith and modern political sovereignty continues to rage. Whether the issue is the right of religious citizens to exempt themselves from generally applicable public laws or the legitimacy of public laws motivated by religious values, Western liberal democracies continue to have trouble deciding what to do about religious practices and beliefs. The United States legal system has struggled in recent years, of course, with religiously motivated laws against same-sex marriage.<sup>1</sup> More recently, American courts have been dealing with the ability of Christian business owners to refuse to engage in legally-mandated activities they consider sinful, such as providing contraception to their employees<sup>2</sup> or providing wedding-related services to gay couples.<sup>3</sup> Europe has seen similar controversies, such as France, Switzerland, and other nations restricting Muslim women wearing the Hijab, the Burka, the so-called “Burkini,” and other religiously motivated modest clothing in public places,<sup>4</sup> and Italy’s allowance of crucifixes in public

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\* Associate Professor of Political Science and Director of Legal Studies Program, California State University, Long Beach. I would like to acknowledge and thank my student, June Yoo, for helping me with some of the initial research for this essay. I am also grateful to my friend Dr. Paul Chen for all our fruitful conversations about Christianity and postmodernism.

1. *See, e.g.*, *United States v. Windsor*, 570 U.S. 744 (2013); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

2. *See* *Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

3. *See, e.g.*, *Washington v. Arlene’s Flowers, Inc.*, 389 P.3d 543 (Wash. 2017); *Craig v. Masterpiece Cakeshop, Inc.* 370 P.3d 272 (Colo. Ct. App. 2015); *Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013).

4. *See, e.g.*, *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 447; Alissa J. Rubin, *French “Burkini” Bans*

schools coupled with the suppression of Muslim religious symbols and practices,<sup>5</sup> to name just a few.

Francis Beckwith<sup>6</sup> and the authors published in the Cohen-Laborde volume<sup>7</sup> ably document and analyze at least part of the problem giving rise to these sorts of controversies, which is our lack of agreement about the nature of religious faith compared to other beliefs and practices. Specifically, is a belief or practice that is motivated by religious faith somehow “special,” in the sense that it deserves to be treated with extra respect or even treated with extra caution by the legal system, or should religious beliefs and practices be treated the same as any others?<sup>8</sup> These authors also ably demarcate the stakes of this debate. Whatever choice the legal system makes – to favor, disfavor, or even ignore the religious quality of beliefs and practices – it seems to risk violating key liberal democratic norms such as popular sovereignty, neutrality, equality, and pluralism.<sup>9</sup>

It would be impossible for one essay to fully describe and respond to each argument in these books on its merits. Rather than attempt to dissect each carefully argued conclusion or challenge each closely guarded premise, this essay focuses more narrowly on a few key issues where additional clarity might shed light on the whole debate. First, the essay briefly summarizes the structure and themes of the two books. Second, the essay addresses a foundational issue at the heart of each volume: whether there are any truly neutral standards for distinguishing and adjudicating between secular and religious claims. I will document the different standards of neutrality discussed in both books and argue that these standards are either illogical or unworkable, mainly due to their problematic modern foundationalist view of rationality. Third, the essay points the way toward a more contextual and situated view of rationality, which accounts for the socially constructed character of knowledge claims while still allowing for the pursuit of truths outside of a liberal framework. The essay concludes that this alternative approach to rationality can treat religious claims and practices with the legitimacy they deserve and improve the quality of liberal legal decisionmaking overall.

#### OVERVIEW OF STRUCTURE AND THEMES

Both volumes discuss the proper role of religious beliefs and practices in liberal legal and political systems using a variety of philosophical, theological, and other types of abstract analysis, along with a wealth of concrete legal, historical, and sociological examples. The Cohen-Laborde volume,<sup>10</sup> *Religion, Secularism, and Constitutional*

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*Provoke Backlash as Armed Police Confront Beachgoers*, N.Y. TIMES (Aug. 24, 2016), <https://www.nytimes.com/2016/08/25/world/europe/france-burkini.html>.

5. *See* *Lautsi v. Italy*, App. No. 30814/06, 50 Eur. H.R. (G.C. 2011).

6. FRANCIS J. BECKWITH, *TAKING RITES SERIOUSLY: LAW, POLITICS, AND THE REASONABLENESS OF FAITH* (2015).

7. *RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY* (Jean L. Cohen & Cécile Laborde eds., 2015).

8. *See, e.g.*, Cécile Laborde, *Is Religion Special?*, in *RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY*, *supra* note 7, at 423–33; BECKWITH, *supra* note 6, at 18–22.

9. *See, e.g.*, BECKWITH, *supra* note 6, at 179–87; Jean L. Cohen, *Introduction*, in *RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY*, *supra* note 7, at 2–3; Cécile Laborde, *Liberal Neutrality, Religion, and the Good*, in *RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY*, *supra* note 7, at 265–67.

10. Jean L. Cohen is the Nell and Herbert M. Singer Professor of Political Thought and Contemporary

*Democracy*, combines deep philosophical and theoretical insight into the proper relationship between religion and secular liberalism with concrete analysis of legal and political conflicts at the national, sub-national, and international level. Part One, “Freedom of Religion or Human Rights,” engages the history and theory of the relationship between religious claims and liberal secularism, with applications to the female genital mutilation and circumcision controversy and the treatment of Islam and Christianity in the European Court of Human Rights.<sup>11</sup> Part Two, “Nonestablishments and Freedom of Religion,” examines and interrogates the tightrope that U.S., European, Indian, and other legal systems walk between state-religious separation on the one hand and respect for the rights of believers to practice their faith on the other.<sup>12</sup> The essays in Part Three, “Religion, Liberalism, and Democracy,” defend and challenge various views concerning acceptable substantive arguments and justifications in a liberal democratic framework, including whether religious arguments pass muster.<sup>13</sup> Finally, Part Four, “Sovereignty and Legal Pluralism in Democratic Societies,” examines the relationship between modern political-legal authority and religious-legal authority, demarcating and illustrating the proper boundaries in family law, contract law, property law, and others.<sup>14</sup>

Cohen and Laborde themselves, and virtually every one of the other authors in their volume, are convinced that religious arguments and practices pose at least a potential threat to the liberal democratic order, especially when the religion in question disadvantages women, children, and other vulnerable groups.<sup>15</sup> Despite this concern, most of these authors are not particularly religion-phobic. Indeed, with a couple of exceptions, there is unexpectedly broad agreement between Beckwith and the Cohen-Laborde contributors that religion does not necessarily pose a danger to a liberalism.<sup>16</sup>

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Civilization at Columbia University. She holds a Ph.D. from the New School for Social Research and she teaches a variety of political and legal theory courses in Columbia’s Department of Political Science. *Jean Louise Cohen*, COLUM. POL. SCI., <https://polisci.columbia.edu/content/jean-louise-cohen>. Cécile Laborde is Professor of Political Theory and the Nuttfield Chair of Political Theory in the Department of Politics and International Relations at Oxford University. She holds a D.Phil. in Politics from Oxford and is a Fellow of the British Academy. *Cécile Laborde*, UNIV. OXFORD: DEP’T POL. & INT’L REL., <https://www.politics.ox.ac.uk/academic-staff/cecile-laborde.html>. For a summary of the backgrounds of each contributor to the volume, see RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY, *supra* note 7, at 435–37.

11. RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY, *supra* note 7, at 27–109.

12. *Id.* at 113–225.

13. *Id.* at 249–337.

14. *Id.* at 341–422.

15. See, e.g., Anne Phillips, *Religion: Ally, Threat, or Just Religion?*, in RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY, *supra* note 7, at 51, 61 (concluding that liberal democracies should “recognize and respect each other’s agency and freedom of conscience” with regard to religion or other modes of “self-transcendence,” unless they “actively harm others” such as by “threatening the scope for gender equality”).

16. See, e.g., Samuel Moyn, *Religious Freedom and the Fate of Secularism*, in RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY, *supra* note 7, at 34–39; Phillips, *supra* note 15, at 55, 61–62; Rajeev Bhargava, *Is European Secularism Secular Enough?*, in RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY, *supra* note 7, at 158–59; Tariq Modood, *State-Religion Connections and Multicultural Citizenship*, in RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY, *supra* note 7, at 189–90; Cécile Laborde, *Liberal Neutrality, Religion, and the Good*, in RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY, *supra* note 7, at 263; Cécile Laborde, *Conclusion: Is Religion Special?*, in RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY, *supra* note 7, at 428–29 [hereinafter Laborde Conclusion]. But see Aurélie Bardou, *Religious Arguments and Public Justification*, in RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY, *supra* note 7, at 273–92 (contending that religious arguments are always a threat to liberalism because they are based on an absolutist logic).

Still, Beckwith's overall aim is more aggressive: he wants to show that legal and political claims motivated by Christian faith are not only rational and welcome but that they are also a necessary support for the liberal legal project.<sup>17</sup> Mostly limited to Christian legal claims in the U.S., *Taking Rites Seriously* shows Beckwith deftly combining his legal, philosophical, and apologetics training<sup>18</sup> to engage in abstract legal-theoretical argument and examine concrete legal conflicts. Part One, "Reason and Motive," defends the rationality of religious beliefs and arguments and critiques a number of ways scholars and judges discount these beliefs, especially in First Amendment controversies.<sup>19</sup> Part Two, "Dignity and Personhood," defends the Judeo-Christian conception of human dignity against its materialist critics and then addresses legal debates over issues like embryonic stem cell research and abortion.<sup>20</sup> Finally, Part Three, "Nature and Sex," defends a Christian teleological view of human nature against both scientific materialism and secular liberalism, drawing out the implications for education, same-sex marriage, adoption, and public accommodations.<sup>21</sup>

Overall, most of the authors in both books are united in their attempt to (1) describe and critique various versions of liberal legal neutrality toward religious and other value claims, (2) describe and defend other versions of liberal neutrality, and (3) distinguish between legitimate and illegitimate religious practices and claims under their preferred standards of neutrality.

#### INTERROGATING THE CLAIMS OF LIBERAL NEUTRALITY

Francis Beckwith and the contributors to the Cohen-Laborde volume assume or explicitly argue that liberalism requires some sort of standard for distinguishing between acceptable and unacceptable values, including religious values, especially when these values are behind the passage of certain laws or claims for legal exemptions. In what follows, I will sort out and assess the various standards of liberal neutrality they discuss. I will then agree with Beckwith and some of the Cohen-Laborde contributors that any such neutrality standard is problematic for a number of logical and epistemological reasons, including, especially, its modern foundationalist view of rationality.

##### A. *Degrees of Liberal Neutrality*

The main versions of liberal neutrality discussed by these authors can be organized along a continuum from most to least permissive toward religious claims. Standards that accept more religious influence on law would be at the more permissive end of the

17. BECKWITH, *supra* note 6, at 3–4 (arguing that "religious beliefs and religious believers" are "mischaracterized and seemingly misunderstood" by "those who are critical of the influence of religion and religious citizens in politics or the formation of law").

18. In addition to a Ph.D. in Philosophy from Fordham University, Dr. Beckwith holds a Masters of Juridical Studies degree from Washington University School of Law in St. Louis. He is currently a Professor of Philosophy and Church-State Studies, and Co-Director of the Program in Philosophical Studies of Religion in the Institute for Studies of Religion, at Baylor University. *Francis J. Beckwith: Bio*, BAYLOR UNIV., <http://sites.baylor.edu/francisbeckwith/23-2>. See also FRANCIS J. BECKWITH, RETURN TO ROME: CONFESSIONS OF AN EVANGELICAL CATHOLIC (2008).

19. BECKWITH, *supra* note 6, at 13–77.

20. *Id.* at 81–136.

21. *Id.* at 139–209.

continuum, while standards that accept less religious influence would be at the more restrictive end.

Toward the permissive end, we might place some of the “Indian Secularisms” described by Rajeev Bhargava.<sup>22</sup> True, the state stays aloof from “all religious and philosophical conceptions in order to perform its primary function[s],” but one of those primary functions is precisely to “promote a certain quality of sociability . . . among religious communities.”<sup>23</sup> Not that the state takes a completely benign, *laissez faire* attitude toward all religious values: it still seeks to “protect individuals from the oppressive features of their own religions.”<sup>24</sup> Still, the point of the Indian model seems to be allowing the maximum religious influence possible.

The model of secularism touted in the U.S. could be seen as even more permissive than the Indian model, given its lower tolerance for state interference with religions that engage in practices that would ordinarily be civil rights violations.<sup>25</sup> But the U.S. model could also be seen as less permissive given its ideal of “strict separation,” which would prevent government promotion of sociability among religions.<sup>26</sup>

However, truly assessing and comparing standards of liberal neutrality requires more than a nation-by-nation comparison of ideals; it requires an intensive examination of the logic behind these ideals. Indian secularism illustrates a permissive logic of neutrality used by many European states as well.<sup>27</sup> The logic is to delegitimize only those religious claims that threaten the integrity of liberalism itself.<sup>28</sup> The line is drawn here to protect the prerogatives of modern political sovereignty, which was established precisely to create peace from religious warfare through secular monopolies on force and law.<sup>29</sup> This approach obviously justifies religious disestablishment and nonestablishment, but it also justifies limits on some overt religious practices such as wearing religious headscarves or forming religious political parties.<sup>30</sup>

Moving toward the middle of the spectrum between permissiveness and

22. Bhargava, *supra* note 16, at 169–74.

23. *Id.* at 170–71.

24. *Id.* at 171.

25. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (holding unanimously that federal anti-discrimination laws, such as the Americans with Disabilities Act, do not apply to a church’s hiring or termination of its own leaders).

26. *See, e.g.*, *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (holding, in part, that laws may not have a primary effect of either advancing or inhibiting religion).

27. Dieter Grimm, *Sovereignty and Religious Norms in the Secular-Constitutional State*, in RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY, *supra* note 7, at 341, 351; Jean L. Cohen, *Rethinking Political Secularism and the American Model of Constitutional Dualism*, in RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY, *supra* note 7, at 119–20; Laborde Conclusion, *supra* note 16, at 424.

28. Cohen, *supra* note 27, at 119–20; Grimm, *supra* note 27, at 341, 351; Laborde Conclusion, *supra* note 16, at 424.

29. Cohen, *supra* note 27, at 119–21; Grimm, *supra* note 27, at 341, 349–51; Laborde Conclusion, *supra* note 16, at 423–24.

30. Christian Joppke, *Pluralism vs. Pluralism: Islam and Christianity in the European Court of Human Rights*, in RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY, *supra* note 7, at 90–95. Joppke discusses *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R., *Refah Partisi v. Turkey*, 2003-II Eur. Ct. H.R., and *Sahin v. Turkey*, 2005-XI Eur. Ct. H.R. These cases are based on Article Nine of the European Convention on Human Rights, which protects religious liberty but allows “limitations” on religious practices “that are necessary in a democratic society.” *Id.* at 91 (quoting European Convention on Human Rights art. 9, Nov. 4, 1950, 213 U.N.T.S. 221).

restrictiveness, what Beckwith calls “justificatory liberalism” is one of the most common ways of defining liberal neutrality.<sup>31</sup> This doctrine, derived from John Rawls, requires the state to only pass laws based on a “public justification” that even non-religious citizens would or should find persuasive.<sup>32</sup> Religious believers may advance laws they prefer but only by “translating” their religious motivations into public justifications.<sup>33</sup> Beckwith stops short of defending or adopting this standard wholesale, but he argues forcefully that Christian values, such as Christian views of personhood, gender, and marriage, meet the Rawlsian standard because they are based on public reasons.<sup>34</sup>

Several of the Cohen-Laborde chapters also discuss this classic Rawlsian standard, with varying degrees of approval,<sup>35</sup> but most update it with the help of other liberal theorists who demonstrate decreasing degrees of permissiveness.<sup>36</sup> Accetti, for example, marries Rawlsian neutrality with Jürgen Habermas’s similar project.<sup>37</sup> Habermas goes beyond the simple translation of religious values into public reasons, and he imposes an additional duty of “cooperative acts of translation,” whereby religious citizens deliberate with non-religious citizens.<sup>38</sup> This deliberation is necessary for religious values to not only “count as legitimate . . . [public] reasons” as Rawls required, but also for religious values to appear as “generally accessible reasons” for the deliberative partners themselves.<sup>39</sup>

Moving even further toward the restrictive end of the spectrum, Laborde considers a newer version of liberal neutrality that purports to reject any reliance on substantive values – Ronald Dworkin’s “egalitarian theory of religious freedom” (“ETRF”).<sup>40</sup> According to ETRF, “religious and nonreligious conceptions of the good” are “on the same plane” and are “entitled to equal concern and respect.”<sup>41</sup> However, ETRF requires that the state “not draw on, promote, or enforce religious conceptions of the good [or] . . . any conception of the good.”<sup>42</sup> In other words, “[t]he liberal state should be neutral toward the

31. BECKWITH, *supra* note 6, at 178.

32. *Id.* at 178–87. See also JOHN RAWLS, A THEORY OF JUSTICE (1971); JOHN RAWLS, POLITICAL LIBERALISM (1993).

33. BECKWITH, *supra* note 6, at 178–87. See also RAWLS, POLITICAL LIBERALISM, *supra* note 32, at 218 (“As reasonable and rational, and knowing that they affirm a diversity of reasonable religious and philosophical doctrines, [citizens] should be ready to explain the basis of their actions to one another in terms each could reasonably accept and that others might endorse as consistent with their freedom and equality.”).

34. BECKWITH, *supra* note 6, at 187–99.

35. Laborde, *supra* note 16, at 249; Carlo Invernizzi Accetti, *Religious Truth and Democratic Freedom*, in RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY, *supra* note 7, at 299–300; Laborde Conclusion, *supra* note 16, at 428–29; Bardon, *supra* note 16, at 281; Modood, *supra* note 16, at 191.

36. Bardon, *supra* note 16, at 281; Laborde, *supra* note 16, at 249; Accetti, *supra* note 35, at 299–300; Laborde Conclusion, *supra* note 16, at 428–29.

37. Accetti, *supra* note 35, at 299. See also JÜRGEN HABERMAS, AN AWARENESS OF WHAT IS MISSING: FAITH AND REASON IN A POST-SECULAR AGE (2010); JÜRGEN HABERMAS, BETWEEN NATURALISM AND RELIGION (2008). Thanks to Kathryn Heard for her intelligent explanation and analysis of Habermas’s argument and its relationship to the Rawlsian liberal tradition. See Kathryn Heard, *Current Research*, <http://www.kathrynheard.com/research.html> (last updated Aug. 14, 2017).

38. HABERMAS, BETWEEN NATURALISM AND RELIGION, *supra* note 37, at 132.

39. *Id.*

40. Laborde, *supra* note 16, at 249–50, 261. See also RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW PUBLIC DEBATE (2008); RONALD DWORKIN, RELIGION WITHOUT GOD (2013); RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY (2002).

41. Laborde, *supra* note 16, at 249.

42. *Id.*

good *simpliciter* . . .”<sup>43</sup> The “liberal state” should not “evaluate – negatively or positively – the content of individual conceptions of the good,” but “leave[] it to individuals to provide, and live by, their own evaluations,”<sup>44</sup> and leave it to the state to evaluate only secular reasons for practices and laws.<sup>45</sup>

Similarly, toward the restrictive end of the spectrum, Beckwith cites numerous legal scholars and judges who think liberalism should only allow laws and protected practices motivated by a “secular rationalist” reason.<sup>46</sup> According to this standard, the liberal state must reject all religious practices and claims because they are based on (1) unprovable claims (in the sense that they are the sorts of belief that cannot in-principle be proven), (2) incontestable claims (in the sense that they are the sorts of beliefs that cannot in-principle be falsifiable), and (3) claims that cannot change or develop because they are insulated from the ordinary standards of evidence and rational justification.<sup>47</sup>

Aurélia Bardon defends a version of this third “secular rationalist” demand, arguing that liberalism cannot accept any claim motivated by “indisputable” or “absolutist” first principles.<sup>48</sup> Similarly, Anne Phillips warns against any self-transcendence arguments that are “beyond the realm of negotiation.”<sup>49</sup>

#### B. Assessing Liberal Non-Neutrality

There are good reasons to question the liberal aspiration toward neutrality across the spectrum, from permissive to restrictive. First, these neutrality standards are self-contradictory. In order to distinguish between legitimate and illegitimate normative arguments, there must exist a normative standard of legitimacy that transcends the arguments under consideration. For instance, even if we accept the requirement that harmful religious arguments should be excluded,<sup>50</sup> how do we define “harm” without contrasting it to a substantive standard of human flourishing? It would simply “be a category mistake to imagine that there could be a Neutral justification for the practice of Neutral justification.”<sup>51</sup> Indeed, even the most permissive version of liberal secularism is itself a “conception of the human good” defined in relationship to religious change and conflict.<sup>52</sup>

The non-neutrality of liberalism makes sense in light of the historical roots of European liberalism in elite and popular changes to Christian faith practices.<sup>53</sup> Contemporary postwar liberalism was even more directly affected by theological and counter-theological trends, says Samuel Moyn, through the influence of Eastern Orthodox

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43. *Id.*

44. *Id.* at 253 (citing DWORKIN, RELIGION WITHOUT GOD, *supra* note 40).

45. *Id.*

46. BECKWITH, *supra* note 6, at 22.

47. *Id.*

48. Bardon, *supra* note 16, at 282–83.

49. Phillips, *supra* note 15, at 51.

50. *See id.* at 51, 61.

51. Bardon, *supra* note 16, at 280 (quoting Bruce Ackerman, *What Is Neutral About Neutrality?*, 93 ETHICS 372, 387–90 (1983)).

52. Laborde, *supra* note 16, at 261.

53. CHARLES TAYLOR, A SECULAR AGE 353–76 (2007) (documenting how modern secularism arose due to transformations in Christian belief).



philosopher Charles Malik and Catholic philosopher Jacques Maritain, as well as other “Christians critical of secularism,”<sup>54</sup> and then later by the collapse of Christian society and the immigration-fueled growth of Islam in Europe.<sup>55</sup>

This phenomenon of waning Christianity and waxing Islam has given rise to the effort, discussed above, to distinguish between those religious claims that are seen as a threat to the sovereignty of the Western European liberal order (like the headscarf in France and other places) and those that are not (like the crucifix in Italian classrooms). But, whatever their other merits, these efforts are obviously not neutral: they clearly prefer liberal secularist ideals over the competing claims of religion. And they also produce an ethnic and cultural favoritism, disadvantaging practices and claims that are more alien to liberalism while advantaging those that are more familiar.

Some, like Tariq Modood, minimize the Christian and post-Christian roots of liberal neutrality on the grounds that religion and religious values simply form the “historical-cultural character” of the society, giving rise to a number of religious and non-religious “comprehensive doctrines.”<sup>56</sup> Modood, in true Rawlsian-Habermasian-Dworkinian fashion, argues that religious doctrines are legitimate bases of law and public policy so long as they overlap with other non-religious comprehensive doctrines.<sup>57</sup> Beckwith appears to accept this overlapping requirement, preferring to base his argument on the contention that Christian claims – especially those involving same-sex marriage – should be acceptable under this standard.<sup>58</sup>

But arguments at the moderate to restrictive end of the spectrum, requiring that religious claims shed their theological roots and evolve into non-religious “reasonable comprehensive doctrines,” still display a marked distaste for explicit religious claims and a preference instead for non-religious standards like “self-transcendence,”<sup>59</sup> or even anti-religious standards like “ethical self-determination.”<sup>60</sup> Even if we accept the new standards, there needs to be an “uncontroversial, neutral way of drawing the line between matters of personal ethics . . . and the pursuit of . . . more impersonal public goods” that are the subject of normatively inspired comprehensive doctrines.<sup>61</sup> Arguments like Rawls’s, Habermas’s, and Dworkin’s “are not neutral in this sense: they are substantive arguments that take a distinctive stance” against what are clearly “religious matters.”<sup>62</sup> These versions of liberal neutrality simply cannot “avoid falling back either on a . . . form of relativism” that they are trying to disavow “or on a kind of dogmatism that mirrors the religious one these theories are supposed to replace.”<sup>63</sup>

Given these problems with liberal neutrality across the spectrum, liberal theory

54. Moyn, *supra* note 16, at 30–34, 36.

55. *Id.* at 39.

56. Modood, *supra* note 16, at 190–91.

57. *Id.*

58. BECKWITH, *supra* note 6, at 174–75.

59. Phillips, *supra* note 15, at 51.

60. Laborde, *supra* note 16, at 262–63.

61. *Id.* at 263.

62. *Id.*

63. Bardon, *supra* note 16, at 280–81 (citing STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* 13 (1993) (criticizing the idea of neutrality on the ground that it is used to conceal moral liberal claims and “the society’s broader prejudice against religious devotion”)).

needs to either find a trustworthy source of values outside liberalism that justifies liberal legal and political practices like human dignity, equality, and justice, or drop the neutrality goal entirely and explicitly reject religious practices and claims. I will pursue the first choice in the next section, but I will conclude this section by discussing the problems inherent in the second choice.

C. *The Root of the Issue: The Limits of Modern Rationalism*

Only one of the essays in the Cohen-Laborde volume embraces the challenge of explicitly rejecting religious arguments: Aurélie Bardon's essay, *Religious Arguments and Public Justification*.<sup>64</sup> The clash between this essay and Beckwith's Chapter Two<sup>65</sup> helpfully illustrates the root of the issue with liberal neutrality: its restricted modern standard of rationality.

Bardon acknowledges that liberal neutrality cannot provide its own justification and that there must be a different standard that justifies liberalism's anti-religious bias.<sup>66</sup> She then rejects three commonly-given justifications for this bias because these justifications fail to provide a reason that transcends liberalism itself.<sup>67</sup> Bardon then settles on the one justification she considers persuasive in disfavoring religious claims: religious arguments are "dangerous" to the extent that they "appeal to an absolutist conception of moral truth."<sup>68</sup> By "an absolutist conception" she means one whose claims: (1) are "prescriptive" in nature – they "tell us what to do"; (2) are based on a "first principle [that] is not dependent on the context" and that is "indisputable because there can be no rational argument for or against" it; and (3) "cannot be derived from the framework of liberal democracy."<sup>69</sup>

Bardon's first and third characteristics of absolutist conceptions, as well as part of the second, can be easily dismissed. All normative statements, religious or not, are "prescriptive," and the validity of the prescription always depends on some norm that is accepted as a sufficient reason for the prescription. Bardon says absolutist prescriptions are different because they are tautological, but this depends on the reason given for the prescription. She may be correct that if the prescription is "do X because X is true and corresponds to the nature of things,"<sup>70</sup> it is tautological. But if the prescription is "do X because Y will follow" or even "do X because God commands it," there is no circularity but only an unstated premise about why Y is good or who God is and why we should follow his commands. Depending on how these premises are defined, they may lead to infinite regression, but this is no more a problem with religious prescriptions than it is of any other prescriptions.

Of course, Bardon is correct about the third characteristic of absolutist religious

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64. Bardon, *supra* note 16, at 273–92.

65. BECKWITH, *supra* note 6, at 13–52.

66. Bardon, *supra* note 16, at 279–82.

67. *Id.* at 275–82.

68. *Id.* at 282. Of course, Bardon concedes, not all religious claims have this absolutist structure, and even those that do have an absolutist structure can shed it through a Rawlsian translation into a public reason. *Id.* at 283.

69. *Id.* at 282–83.

70. Bardon, *supra* note 16, at 281.

arguments: they cannot be derived from liberalism itself.<sup>71</sup> But this can hardly count against religious arguments or any other arguments meant to serve as a justifying standard for liberalism. If the arguments justifying liberalism *could* be derived from liberalism, then they could not provide a neutral standard outside of liberalism for distinguishing between liberal values and religious values. Further, neither can liberalism's own values of equality and justice be derived from within the framework of liberal democracy. Why should people be treated equally? What does justice require? One could answer these and other questions by pointing to other liberal values, like efficiency or individual autonomy, but this would just shift the question to *those* values: how can *they* be derived from within the liberal framework? Alternatively, questions about equality and justice can be answered by pointing to values outside the liberal framework, like inherent human dignity or the demands of Christian charity. Either way, the fact that a value does not come from the practice it is intended to justify cannot logically count against that value.

Eliminating these other characteristics leaves us with Bardon's second characteristic of an absolutist conception – that it is based on a first principle that is independent of context and is indisputable. The first part of this characteristic can also be easily dismissed as a truism. The fact that a principle is context-independent is just another way of saying the principle is “absolute” in the sense that it does not depend on other things. And, obviously, it would be tautological to say that an absolute value is illegitimate because it is absolute. So, finally, we come to the main reason Bardon and many other liberals disfavor religion: the claim that religious arguments operate according to a logic that is unfalsifiable, infallible, or otherwise outside the ordinary standards of human rationality.<sup>72</sup>

Much of Beckwith's second chapter refutes Bardon's claim that religion is outside ordinary standards of reason. For instance, Beckwith provides a wealth of citations to rigorous and well-developed intellectual defenses of the “metaphysical, epistemological, historical, and moral beliefs” of Christianity.<sup>73</sup> Beckwith then addresses some of the reasons why Bardon and others like Brian Leiter dismiss these types of arguments as based on “indisputable” premises.<sup>74</sup> First, critics like Leiter and Bardon presume a “narrow foundationalist” epistemology, which provides that “we are rationally justified in holding our beliefs if and only if they are properly basic (i.e., foundational) or are based on those foundational beliefs.”<sup>75</sup> Beckwith then argues – persuasively in my view – that this foundationalist epistemology is just as self-contradictory as the argument that liberal norms can be justified by liberal norms. Simply put: the belief that we should only hold beliefs that are properly basic or that are based on properly basic beliefs is not *itself* a basic belief or based on a properly basic belief.<sup>76</sup>

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71. *Id.* at 282.

72. *Id.* at 284 (quoting Richard Rorty, *Religion in the Public Square: A Reconsideration*, 31 J. RELIGIOUS ETHICS 141, 148–49 (2003) (arguing that their reliance on indisputable first principles make religious claims “conversation-stoppers”).

73. BECKWITH, *supra* note 6, at 26–30, 61–82. Agree or disagree with the conclusions reached by these authors, anyone looking for a good set of readings by Christian academics and others who take both their faith and the demands of their intellectual discipline seriously could do much worse than starting with the sources Beckwith cites in this section.

74. *Id.* at 33–46 (citing BRIAN LEITER, WHY TOLERATE RELIGION? (2013)).

75. *Id.* at 23.

76. *Id.* (citing ALVIN PLANTINGA, WARRANTED CHRISTIAN BELIEF 94–97 (2000)).

Similarly, when Bardon and others reject “absolutist” religious arguments as based on “indisputable”<sup>77</sup> or “incontestable”<sup>78</sup> first principles, they are not basing their own argument on indisputable and incontestable first principles. Faced with this dilemma, Leiter and many other scholars fall back on science as a possible reservoir of contestable and disputable techniques and principles that can justify their distaste for religion.<sup>79</sup> But this produces the same conundrum because the scientific method itself cannot, even in principle, demonstrate that the scientific method is the only proper method of arriving at knowledge.<sup>80</sup> Also, this sort of rank scientism betrays a startling romanticism and naiveté about how science works. Scientific progress occurs through shifts in socially constructed and maintained “paradigms” that determine what questions are relevant to ask and what constitutes good answers.<sup>81</sup>

These problems with the clearest and boldest defenses of liberalism’s rejection of religious claims push us to either find some better first principles for rationality – principles that make sense of, but that are not derived from, our rationality itself – or else retreat into a narrow dogmatism more cramped than that of any fundamentalist believer. Beckwith begins to point the way toward the discovery of new and better principles of rationality. In contrast to narrow foundationalism, he notes that “there are all sorts of ways that one can try to ‘prove’ one’s point of view.”<sup>82</sup> But any mode of proving or convincing – “whether in science, law, theology, mathematics, logic, history, or casino gambling” – will require a set of “rationality norms” or “methodological principles” that “provide direction to one’s reasoning.”<sup>83</sup> In short, proper reasoning proceeds from the “standards of evidence and rational justification” that are “ordinary” for the type of rational practice in which one is engaged.<sup>84</sup> But having established the need for such “ordinary standards,” Beckwith is content to show that Christian legal arguments rationally proceed from such standards. He does not explain what it means to have “ordinary” standards or how such standards compare to the standards held up by liberal secular critics of religion. The concluding section of this essay will tackle this issue head-on.

#### FAITH, REASON, AND THE SOCIAL CONSTRUCTION OF KNOWLEDGE

The problem with modern liberal neutrality is not merely that it disfavors or rejects the legitimacy of religiously motivated practices and claims. The bigger problem is that modern liberal neutrality is premised on a modern view of human reasoning that is static and self-referential. In this section, I will defend some alternative views of rationality that acknowledge the socially constructed nature of human knowledge without giving up the

77. Bardon, *supra* note 16, at 283–84.

78. BECKWITH, *supra* note 6, at 23 (quoting Suzanna Sherry, *Enlightening the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 473, 479–95 (1996)).

79. *Id.* at 33 (citing BRIAN LEITER, *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* (2007)). See Brian Leiter & Michael Weisberg, *Do You Only Have a Brain?*, NATION, Oct. 22, 2012, at 27–31. But see Bardon, *supra* note 16, at 282–83 (preferring scientific claims to absolutist claims, but placing science alongside “political values, common sense, and logic”).

80. See Herman Daly, *Feynman’s Unanswered Question*, 26 PHIL. & PUB. POL’Y Q. 13, 13–17 (2006).

81. See THOMAS F. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

82. BECKWITH, *supra* note 6, at 27.

83. *Id.* at 35, 37.

84. *Id.* at 39.

pursuit of a truth that transcends liberalism and can legitimate its key normative commitments.

A. *“Ordinary” and “Appropriate” Ways of Knowing*

As the previous section has demonstrated, the issue of whether religious beliefs are a legitimate basis for protected practices and legal arguments is what most divides the scholars in these two books. But, using modern foundationalist logic, there is no principled reason for believing that non-religious claims are any more rational than religious claims. In this section, I will try to provide a more contingent and dynamic view of rationality that places religious and non-religious claims on the same existential and epistemological footing by seeing them both as attempts to know the truth about reality.

“We have knowledge of something,” says philosopher Dallas Willard, “when we are representing it (thinking about it, speaking of it, treating it) as it actually is, on an appropriate basis of thought and experience.”<sup>85</sup> The “appropriate basis of thought and experience” will, of course, depend on the “nature of the subject matter,”<sup>86</sup> just as Beckwith acknowledges when he discusses “ordinary standards of evidence and rational justification.”<sup>87</sup> So the question becomes: how to decide what is “appropriate” or “ordinary” evidence in support of a claim?

In his classic work on epistemology, *An Essay in Aid of a Grammar of Assent*, John Henry Newman provides some useful advice on this topic.<sup>88</sup> With Beckwith and Willard, he acknowledges that there are different modes of holding, and expressing our relationship to, the truth of various propositions: we can doubt, we can infer based on conditional logic, or we can assent based on categorical assertion.<sup>89</sup> But in any mode, I must “apprehend” or know some sort of information in order to arrive at the truth I hold.<sup>90</sup> Perhaps what I know is information about logic, or sense data, or memory, or even my reasons for trusting the person who tells me the information.<sup>91</sup>

Depending on the circumstance, any one of several modes of apprehension and assent may be an “appropriate basis of thought and experience,” to use Willard’s phrase, or an “ordinary standard of evidence” to use Beckwith’s phrase. What is appropriate to the child at home is not appropriate to the undergraduate writing a paper or to the pilot of an airliner crossing the Atlantic. But all ways of holding truth require “assent to first principles . . . with which we start in reasoning on any given subject-matter.”<sup>92</sup> These first principles are things like instinct, logic, and conscience, which we acquire from the world around us.<sup>93</sup> We need to take for granted certain background assumptions that we acquire from the social world, “from friends or strangers whom we fall in with in the course of our day, the conversations or discussions to which we are parties, the newspapers, the light

85. DALLAS WILLARD, *KNOWING CHRIST TODAY: WHY WE CAN TRUST SPIRITUAL KNOWLEDGE* 15 (2009).

86. *Id.*

87. BECKWITH, *supra* note 6, at 39.

88. JOHN HENRY NEWMAN, *AN ESSAY IN AID OF A GRAMMAR OF ASSENT* (Ian T. Ker ed., 1985) (1870).

89. *Id.* at 25–26.

90. *Id.* at 32.

91. *Id.* at 32–35.

92. *Id.* at 66.

93. NEWMAN, *supra* note 88, at 66–69.

reading of the season.”<sup>94</sup> We receive this information “with a spontaneous assent,” and it comes to “constitute the furniture of the mind.”<sup>95</sup> Unless we implicitly welcome “the truths, real or ostensible, which these informations supply . . . the principles, doctrines, sentiments, facts, which constitute useful . . . knowledge” about “public matters,” “morality,” “politics,” and our “social code,” we will never know anything else.<sup>96</sup> We can come at last to profess a thing as being true, not based on absolute proofs, but based instead on a kind of convergence of probabilities: our mind ranges over all it has surveyed and comes to a kind of “right judgment” (the “Illative Sense”) in favor of the truth.<sup>97</sup>

My point is not to convince readers that Newman’s argument about how we come to assent to truth is the best account. My point is simply that Newman shows us that it is possible to make a two-fold move that believers and non-believers alike have trouble making: (1) seeing that “appropriate” and “ordinary” standards of evidence are socially constructed and relative and (2) seeing simultaneously that this socially constructed way of pursuing the truth can still give us access to a reality that transcends our thoughts. Seeing these things clearly though will require more investigation of the social influences on the pursuit of truth and knowledge than Newman provides.

#### B. *The Social Construction of Worldviews*

Something like Newman’s argument that human beings arrive at truth with the aid of the social world has now become a commonplace of philosophy and social theory. We make sense of the world and our place within it by interacting with the norms and expectations of others through a “social imaginary,”<sup>98</sup> or a “plausibility structure.”<sup>99</sup> This social imaginary or plausibility structure “incorporates a sense of the normal expectations that we have of each other; the kind of common understanding which enables us to carry out the collective practices that make up our social life.”<sup>100</sup> Some thinkers call this social imaginary or plausibility structure a “worldview”: a “set of presuppositions (or assumptions) which we hold (consciously or subconsciously) about the basic makeup of our world”<sup>101</sup> or even as “the comprehensive framework of our basic beliefs about things.”<sup>102</sup> Having a worldview (or a social imaginary or a plausibility structure) is not

94. *Id.* at 61.

95. *Id.*

96. *Id.*

97. *Id.* at 270–99.

98. TAYLOR, *supra* note 53, at 146 (defining a “social imaginary” as “the way we collectively imagine, even pretheoretically, our social life”).

99. PETER L. BERGER, *A RUMOR OF ANGELS: MODERN SOCIETY AND THE REDISCOVERY OF THE SUPERNATURAL* 138 (1990) (defining a “plausibility structure” as a sense of “what people actually find credible,” regarding “views of reality,” which “depends on the social support these [views of reality] receive”); TAYLOR, *supra* note 53, at 171 (arguing that the ways in which people “imagine their social existence, how they fit together with others, how things go on between them and their fellows, the expectations which are normally met, and the deeper normative notions and images which underlie these expectations” structure and guide human actions in a deep way).

100. TAYLOR, *supra* note 53, at 172.

101. Sander Griffioen, *The Worldview Approach to Social Theory: Hazards and Benefits*, in *STAINED GLASS: WORLDVIEWS AND SOCIAL SCIENCE* 81, 81 (1989) (quoting JAMES SIRE, *THE UNIVERSE NEXT DOOR: A BASIC WORLDVIEW CATALOG* 17 (1976)).

102. *Id.* at 81–82 (quoting ALBERT M. WOLTERS, *CREATION REGAINED: BIBLICAL BASICS FOR A*

optional – it is not something that can be chosen or not chosen – but it is a required precondition for knowing anything in the first place.<sup>103</sup> Indeed, a worldview can be seen as coextensive with “the totality of the culturally structured images and assumptions . . . in terms of which people both perceive and respond to reality.”<sup>104</sup> So, “refusing to adopt an explicit worldview,” as liberal theory attempts to do, turns out to be itself “the product of a worldview or at least a philosophic position.”<sup>105</sup> For example, when judges and legislators in liberal democracies attempt to reserve judgement or remain agnostic about questions of “prime reality” or “what happens after death,” at the level of social policy or law, they are actually providing an answer to the question, “how do we know what is right and wrong?” The answer is something like: “we know what is right and wrong by considering such matters according to our private consciences.” Thus, despite wanting to remain aloof and neutral between religious and other worldviews, liberal democracy cannot escape these sorts of basic value judgments. Like all truly human enterprises of thought and action, including all the world’s other religions and ideologies, liberalism is inherently value-laden.

The value choices that are embodied in social imaginaries, plausibility structures, or worldviews, though, are not once-for-all received or discovered realities. Instead, they are culturally and socially constructed achievements: like all forms of human thought and action, social imaginaries and worldviews are situated within particular cultural, linguistic, political, and other contexts.<sup>106</sup> Even a worldview held by an individual “is communal in scope and structure” because it results from community expectations and norms about

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REFORMATIONAL WORLDVIEW 2 (1985)). Worldview theory has been advanced most prominently by conservative Christians in the United States (including Beckwith) who have taken great pains to articulate and defend a coherent system of ideas that they believe is more persuasive than its competitors, such as scientific naturalism and liberal secularism. See SIRE, *supra* note 101; MARY POPLIN, IS REALITY SECULAR? TESTING THE ASSUMPTIONS OF FOUR GLOBAL WORLDVIEWS (2014); TO EVERYONE AN ANSWER: A CASE FOR THE CHRISTIAN WORLDVIEW (Francis J. Beckwith, William Lane Craig & J.P. Moreland eds., 2004); MICHAEL W. GOHEEN & CRAIG G. BARTHOLOMEW, LIVING AT THE CROSSROADS: AN INTRODUCTION TO CHRISTIAN WORLDVIEW (2008); THINK BIBLICALLY! RECOVERING A CHRISTIAN WORLDVIEW (John MacArthur ed., 2009); J.P. MORELAND & WILLIAM LANE CRAIG, PHILOSOPHICAL FOUNDATIONS FOR A CHRISTIAN WORLDVIEW (2003); FRANCIS SCHAEFFER, HOW SHOULD WE THEN LIVE? THE RISE AND DECLINE OF WESTERN THOUGHT AND CULTURE (1976). This conservative Christian usage of worldview theory originated in the Dutch Reformed theology of Abraham Kuyper and Herman Dooyeweerd, which was a significant influence on Francis Schaeffer, who almost single-handedly created the idea of a Christian worldview in the 1970s and 1980s. See DAVID K. NAUGLE, WORLDVIEW: THE HISTORY OF A CONCEPT 16–32 (2002). But the idea of a “worldview” or “*Weltanschauung*” as a sort of comprehensive theory of or perspective on life can be traced back much further in the history of western social theory, especially to Wilhelm Dilthey. See *id.* at 73. For good histories of the concept of a “worldview” and its employment in various contexts, see Griffioen, *supra* note 101, at 84–93, and JAMES W. SIRE, NAMING THE ELEPHANT: WORLDVIEW AS A CONCEPT (2015) [hereinafter SIRE, NAMING THE ELEPHANT].

103. SIRE, NAMING THE ELEPHANT, *supra* note 102, at 37–42 (describing various thinkers who hold that a worldview consists of “pretheoretical and presuppositional concepts that are the foundation for all of one’s thought and action”).

104. CHARLES KRAFT, WORLDVIEWS FOR CHRISTIAN WITNESS 12 (2008).

105. SIRE, NAMING THE ELEPHANT, *supra* note 102, at 21.

106. See PETER L. BERGER & THOMAS LUCKMAN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE (1966); William M. Sullivan & Paul Rabinow, *The Interpretive Turn: Emergence of an Approach*, in INTERPRETIVE SOCIAL SCIENCE: A READER 1–21 (Paul Rabinow & William M. Sullivan eds., 1979); Charles Taylor, *The Dialogical Self*, in THE INTERPRETIVE TURN 304–14 (David R. Hiley et al. eds., 1991); THE TRUTH ABOUT THE TRUTH: DE-CONFUSING AND RE-CONSTRUCTING THE POSTMODERN WORLD (Walter Truett Anderson ed., 1995).

what it is appropriate to believe, do, and say.<sup>107</sup>

Most conservative Christians, Beckwith included, as well as some conservative adherents of other religious faiths, embrace the concept of a religious worldview or plausibility structure but staunchly resist the idea that it is socially constructed because they equate the social construction of value judgments with moral relativism.<sup>108</sup> Conversely, some scholars published in the Cohen-Laborde book affirm the contestability of value judgments implied by the social construction thesis and use it as a reason for withholding judgment on matters as central to contemporary liberal democratic theory as the enforcement of women's civil rights within religious institutions.<sup>109</sup>

But these fears of the relativism inherent in the idea of socially constructed worldviews are misplaced. According to Peter Berger – one of the originators of the idea of socially constructed plausibility structures – the main problem is not that we take the idea of relativism too far, but that we do not take it far enough.<sup>110</sup> Rather than hedging our bets by acknowledging the relativity of some social constructs, such as customs of dress and food, but not other social constructs, like religious beliefs, we have to be willing “to see the relativity business through to its very end.”<sup>111</sup>

When we see relativity through to the end, “a rather strange thing happens,” Berger notes: “the question of truth reasserts itself in almost pristine simplicity.”<sup>112</sup> If we accept the idea that all worldviews are time-bound and language-bound and culture-bound, etc., we must also accept that our *own* worldview is also time-bound and language-bound and culture-bound, etc. This acceptance of the relative truth of our current beliefs naturally raises the issue of whether we have good reasons for holding them. But, crucially, as we conduct this inquiry into whether we have good reasons for believing certain things, we are no longer free to privilege modern over ancient reasons, since both are equally socially constructed. We are no longer free to act out of the modern hubris, that we enlightened ones who acknowledge the social construction of knowledge and belief are superior to those ancient simpletons who thought that knowledge and belief were more objective. “We may say,” argues Berger, “that contemporary consciousness is such and such,” but “we are still left with the question of whether we will assent to it.”<sup>113</sup>

This conclusion about the social construction of worldviews is crucial for the fate of religious worldviews in a liberal society, particularly those that depend on some form of

107. See James Olthius, *On Worldviews*, in *STAINED GLASS*, *supra* note 101, at 29, 29–30.

108. Compare FRANCIS J. BECKWITH, *POLITICS FOR CHRISTIANS: STATECRAFT AS SOULCRAFT* 18 (2010) (embracing the idea of a Christian “plausibility structure” and defining it as “the set of ideas the person either is or is not willing to entertain as possibly true”), *with id.* at 21 (“[T]o the degree that postmodernism denies the objectivity of reality, truth, value, and reason, . . . to the degree that it believes intentionality creates the objects of consciousness, to that degree it should be resisted by Christian intellectuals.”). See also Accetti, *supra* note 35, at 294–95 (discussing Pope Benedict’s criticism of the “dictatorship of relativism,” Pope Francis’s criticism of a “tyranny of relativism,” John Piper’s assertion that moral relativism is a “perilous threat to free societies today,” and Sayyid Qutb’s critique of western societies for “losing their commitment to a set of ‘absolute’ . . . values”).

109. Phillips, *supra* note 15, at 57–59.

110. BERGER, *supra* note 99, at 44–53. For Berger’s original contribution to the idea of socially constructed plausibility structures, see BERGER & LUCKMAN, *supra* note 106.

111. *Id.* at 44.

112. *Id.* at 44–45.

113. *Id.* at 46.



historical divine revelation. *Both* the modern liberal worldview and the worldview “of the New Testament writers,” or the Q’uran, or the Torah, or the Upanishads, were “constructed and maintained by the same kind of social processes . . . Each has its appropriate plausibility structure, its plausibility-maintaining mechanisms.”<sup>114</sup> Once this is understood, “then the appeal to *any* alleged modern consciousness” (not excluding the consciousness of liberal democracy) “loses most of its persuasiveness.”<sup>115</sup> As a result, “an important shift takes place in the argument on the alleged demise of the supernatural in contemporary society,”<sup>116</sup> or, we could also say, in the argument that a liberal legal or political system can remain aloof or neutral between competing conceptions of religion or the good. Namely, “relativizing analysis, in being pushed to its final consequence, bends back upon itself” and modern liberal relativizers of value positions are themselves relativized—“indeed, relativization itself is somehow liquidated.”<sup>117</sup> And what follows is not, as some conservative Christians, Muslims, and others fear, “a total paralysis of thought”<sup>118</sup> or a “passive acceptance of any form of injustice”<sup>119</sup> and totalitarianism, but rather “a new freedom and flexibility in asking questions of truth,” including questions that could have religious answers.<sup>120</sup>

#### CONCLUSION: A “MESSAGE IN A BOTTLE” FOR MODERN LIBERAL LEGAL THEORY

The preceding sections documented the problems with the liberal project of abstract neutrality toward religious claims, using some of the best arguments found in the Beckwith and the Cohen-Laborde volumes, supplemented by a more thorough exploration informed by Newman’s epistemology and the social theory of worldviews. This exploration illustrates the possibility for western legal and political systems to deal with religious claims and practices in a more humble and contingent way, one that is more conscious of the socially constructed and relativistic nature of its own claims to adjudicate these controversies. In this concluding section, the essay points toward an alternative post-liberal mode of treating religiously motivated legal claims. Constructing a fully articulated explanation of this post-liberal project is an enormous task that is well beyond the scope of this work. Nevertheless, painting in broad strokes, there are some themes that could be helpful for such a project.

First, since religious practices and legal claims are based on different sorts of experiences in the world, liberal legal systems must become more adept at listening to and valuing different existential experiences that lead to different religious conclusions. Instead of merely examining the public justification for religious claims in the abstract, judges and legislators should follow Anne Phillips’s advice about “taking seriously” religious believers’ “own self-descriptions and the meaning they themselves attach to their

114. *Id.*

115. BERGER, *supra* note 99, at 46.

116. *Id.*

117. *Id.* at 47.

118. *Id.*

119. Accetti, *supra* note 35, at 297 (citing Pope Francis, *Encyclical Letter: Lumen Fidei* (June 29, 2013), [http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco\\_20130629\\_enciclica-lumen-fidei.html](http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20130629_enciclica-lumen-fidei.html)).

120. BERGER, *supra* note 99, at 47.

practices and beliefs.”<sup>121</sup>

Taking religious experience more seriously requires us to take seriously Martin Heidegger’s insight that there is a foundational ontological difference between dealing with a “what” and dealing with a “who.”<sup>122</sup> In dealing with a “what”—an object or a thing in the world such as a claim to legal protection or an argument about the social consequences of a law—it makes sense to isolate various aspects of how the thing acts and reacts within a particular system. Indeed, this sort of data may be all that is necessary to understand the material structures and processes of an object. But the same approach does not make sense in dealing with a “who.” To be a person means that something can be true *about* me, just as with an object, but also that something can be true *for* me. Persons can certainly be objects of concern to other people, and to governmental systems; but to be a person at all means to be concerned about one’s own existence.<sup>123</sup> In turn, being concerned for one’s existence can only take shape within a “world” toward which that concern is directed.<sup>124</sup> This is another way of saying that liberal legal systems need to become more “personalist,”<sup>125</sup> working “*from* a relationship with the other as person” and proceeding “*to* an account of the other still as person.”<sup>126</sup>

Second, treating human beings as persons means being sensitive to the stories that people tell when articulating the reasons for their religious actions and beliefs. Rather than treating human actions and claims as objective inputs into an objective political “system,” a personalist focus would seek to understand the narrative of a person’s life and how that narrative affects what they are claiming about their religious practice or motive.<sup>127</sup> Storytelling and narrative political praxis are subversive ways to counter and critique the hegemonic liberal discourse of objective neutrality. As Hannah Arendt showed, storytelling and narrative can sometimes give witness to the truth in a more powerful way than seemingly straightforward propositions and concepts.<sup>128</sup> “I form an opinion,” she argues, “by considering a given issue from different viewpoints, by making present to my mind the standpoints of those who are absent,” and “[t]he more people’s standpoints I have present in my mind while I am pondering a given issue, the better I can imagine how I would feel and think if I were in their place,” and “the more valid” will be “my final conclusions, my opinion.”<sup>129</sup> The unique value of narrative in expressing a viewpoint or a standpoint that tends to be marginalized by dominant discourse is a hallmark of certain forms of feminist and critical race scholarship, where it is thought to serve an emancipatory

121. Phillips, *supra* note 15, at 51.

122. MARTIN HEIDEGGER, *BEING AND TIME* 71 (John Macquarrie & Edward Robinson trans., 7th ed. 2008).

123. *Id.* at 84–85.

124. *Id.* at 86–87.

125. A “personalist” approach is one that “regards or tends to regard the person as the ultimate explanatory, epistemological, ontological, and axiological principle of all reality.” *Personalism*, STAN. ENCYCLOPEDIA PHIL., <https://plato.stanford.edu/entries/personalism> (last updated Dec. 2, 2013).

126. R. D. LAING, *THE DIVIDED SELF: AN EXISTENTIAL STUDY IN SANITY AND MADNESS* 20 (1955) (emphasis added).

127. *Id.* at 20–21.

128. See MICHAEL JACKSON, *THE POLITICS OF STORYTELLING: VIOLENCE, TRANSGRESSION, AND INTERSUBJECTIVITY* 36 (2002).

129. Hannah Arendt, *Truth and Politics*, NEW YORKER, Feb. 25, 1967, at 49, 54, available at <https://www.newyorker.com/magazine/1967/02/25/truth-and-politics>.

role.<sup>130</sup>

Those whose worldview is more powerful in society – such as those who have the worldview of liberal democratic theory – are perceived as more credible and so they “have the power to create fact; those whose stories are not believed live in a legally sanctioned ‘reality’ that does not match their perceptions.”<sup>131</sup> Through storytelling though, these “differences between insiders and outsiders” are “played out by lawmakers, judges, witnesses and juries,” giving “outsiders . . . the right to question the legitimacy of the prevailing truth.”<sup>132</sup> Not that religious believers are all cultural outsiders – this would be hard to maintain in the U.S. context at least. But it is clear that societies governed by secular liberal democratic theory do consider that religious viewpoints, if taken too seriously, can threaten the foundations of liberalism. In this sort of context, paying closer attention to religious stories is a way to counterbalance and perhaps even to subvert the prevailing hegemonic narrative of liberal neutrality.

Third, liberal legal systems need to move beyond taking the religious worldview seriously in these ways and begin to try and understand whether the claims made within the religious worldview are actually true and what that might mean for the law. It is not enough to examine how the words of religious claimants might be true *for them*. Once we have digested Newman’s and Berger’s explanations of how religious believers are making the same sorts of socially constructed claims about reality as secular citizens are, we are obliged to consider whether they might actually be correct about that reality. This serious consideration, not only of the perspective a person holds but of the truth they see through that perspective, is becoming more and more rare in our post-truth culture. It is beginning to literally rip us apart with violence and suspicion.

The truths that religious believers hold are not limited to theological doctrines. Religious worldviews deal with issues that are crucial to a liberal democratic society, such as human dignity, the qualities and requisites of personhood, and what rights and obligations people have toward one another. Engaging properly with these and other religious values means changing our attitude from treating religious claims as a feared “other” to seeing religion as another valid way of being in the world that might be persuasive for our predicament.

In his essay, *The Message in the Bottle*, philosophical novelist and essayist Walker Percy nicely captures the attitude difference between liberalism’s abstract perspective and the post-liberal perspective I am advocating here.<sup>133</sup> Imagine, he urges us, the situation of a well-educated castaway who begins discovering bottles on the beach, each tightly corked and each containing a single piece of paper with a message written on it.<sup>134</sup> The messages

130. See, e.g., ELAINE J. LAWLESS, *WOMEN ESCAPING VIOLENCE: EMPOWERMENT THROUGH NARRATIVE* (2001); Kristin M. Langellier, *Personal Narratives: Perspectives on Theory and Research*, 9 TEXT & PERFORMANCE Q. 243 (1989); Bernie D. Jones, *Critical Race Theory: New Strategies for Civil Rights in the New Millennium?*, 18 HARV. BLACKLETTER L.J. 1, 46–73 (2002).

131. Jones, *supra* note 130, at 59. See also Kim Lane Scheppelle, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2079–80 (1989).

132. Jones, *supra* note 130, at 59. See also Scheppelle, *supra* note 131, at 2079–80.

133. WALKER PERCY, *The Message in the Bottle*, in *THE MESSAGE IN THE BOTTLE: HOW QUEER MAN IS, HOW QUEER LANGUAGE IS, AND WHAT ONE HAS TO DO WITH THE OTHER* 119, 119–49 (1975).

134. *Id.* at 119–20.

are wide-ranging and diverse, containing things like: “Lead melts at 330 degrees,” “[a] war party is approaching from Bora Bora,” “Chicago, a city, is on Lake Michigan,” “[t]he British are coming,” and “[t]here is fresh water in the next cove.”<sup>135</sup>

The castaway faces a choice about how to sort out and interpret these messages. He could sort them using objective categories like geography, chemistry, philosophy, history, etc.<sup>136</sup> That would make perfect sense for someone in a different situation, like a scientist. But it will not do for the castaway. His situation requires – indeed, it demands – an entirely different approach; he sees the messages as containing not merely statements of fact, but something much more valuable to him: “news.”<sup>137</sup> And his response to some of this “news” could very well determine whether he lives or dies. From the castaway’s perspective, argues Percy, there are not only “two kinds of sentences in the bottles,” but there are also “two kinds of postures from which one reads the sentences, two kinds of verifying procedures by which one acts upon them, and two kinds of responses to the sentences.”<sup>138</sup>

Thus, “everything depends on the situation of the hearer.”<sup>139</sup> The situation of being a castaway entails a necessary loss of some form of objectivity and an embrace of some form of subjectivity. But this does not hamper the castaway’s search for truth. In fact, it is precisely the castaway’s subjective posture of lostness, hunger, thirst, and fear that makes the truth or falsity of the news so urgent. It is not appropriate for him to assess the messages as information about some abstract truths. It is vital for the castaway’s survival that he see the messages as containing news through which he can be saved.

Just so, everything depends on our appraisal of the situation we find ourselves in at present in liberal democratic societies. We can continue to assess religious legal and political claims in the “neutral” way we did while still onboard the ship, before it began to sink. And we might even discover some good information in this way. After all, lead melts at 330 degrees for the castaway and the sailor alike. But maybe what we really need is news from an unexpected source – news about things vital to our survival, like how to respect the dignity of those we would rather ignore, how to forgive our enemies even though we have every right to be angry at them, or how to fulfill the demands of justice even in the face of powerful forces that care only about control or efficiency. These are not private issues; they fill the dockets of every court in the land. Religious worldviews claim to address these questions not merely with beliefs and opinions but with the truth about reality. But we cannot see that truth because our view of rationality is too narrow. Perhaps the time has now arrived for us post-truth castaways to look for news in expected places.

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135. *Id.* at 120–21, 123.

136. *Id.* at 122–23.

137. *Id.* at 123.

138. PERCY, *supra* note 133, at 125.

139. *Id.* at 131.