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Faithful Presence and Theological Jurisprudence: A Response to James Davison Hunter

Zachary R. Calo*

This paper considers how James Hunter's arguments, presented both in his address¹ and his book *To Change the World*,² might inform the development of a constructive religious legal theory based in the particular resources of Christian theology. In speaking of religious legal theory, I mean something quite different than a theory of law and religion. For some time, the academic conversation about law and religion has centered around issues concerning church-state relations and, more broadly, the place of religion within the liberal political order. Yet, the regnant methodological concerns that have shaped this discourse reflect the boundedness of law to a modern secular imaginary. This being the case, pulling theology into deeper conversation with legal thought will require freeing law from its lingering state of captivity. Hunter's work is particularly useful in this ground-clearing task because it offers a dense critique of the sociological assumptions that have shaped legal modernity. While his concern is not with religious legal theory as such, Hunter's normative account of Christian being in the world, captured most fully in the idea of faithful presence, contains important resources for developing a model of Christian engagement with law.

Hunter proposes that we now inhabit a "late modern, post-secular world."³ Post-secularity, as Hunter defines it, involves "the empirically undeniable persistence of religion in the late modern world, the recognition

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1. James Davison Hunter, *Law, Religion and the Common Good*, 39 PEPP. L. REV. 1065 (2013).

2. JAMES DAVISON HUNTER, *TO CHANGE THE WORLD: THE IRONY, TRAGEDY, AND POSSIBILITY OF CHRISTIANITY IN THE LATE MODERN WORLD* (2010).

3. Hunter, *supra* note 1, at 1069.

of the limits of secular epistemology and reason, and the ethical puzzles and political quandaries these developments pose.”⁴ Perhaps most importantly for the purposes of this paper, Hunter also sees late modern post-secularity finding expression through “an intensifying and unstable pluralism.”⁵ This pluralism is particularly challenging and unsettling because it not only raises the specter of difference, but deep “*moral and metaphysical differences*” that implicate how communities understand the nature of humanity and indeed the cosmos.⁶ Radical tension at such an elemental level means that difference cannot be “absorbed” and thus tests “the limits of tolerable diversity.”⁷ Under such conditions, the very possibility of achieving even thin consensus about the meaning of “collective identity” and the common good is called into question.⁸

The moral and metaphysical pluralism of late modern society is a central problem for thinking about law in its relationship to religion. Law, Hunter writes, “is the language of the state and thus, by its very nature as a language it . . . defines a particular reality—not least, the normative reality of what the state will allow and not allow.”⁹ In other words, law is densely normative in a way that “goes beyond particular statutes and codes.”¹⁰ It is an expression of culture that reflects how a community constructs and understands reality. However, in the absence of any shared moral framework within which to derive law’s meaning, law becomes a device for imposing normativity against the chaotic pluralism of cultural dissension.¹¹ As Hunter argues, law now “does the work that social mores used to do, and as a consequence, law and policy become the predominant framework for understanding collective life and addressing its problems.”¹² Law becomes a “weapon” in the culture war whose “patronage” is sought “by all parties.”¹³

Hunter is right to point out the challenges that pluralism has created for law. However, the problem of pluralism does not merely concern law’s role in the culture war. The effects of moral and metaphysical pluralism go even deeper, for these same dynamics also pose a frontal challenge to the very logic and coherence of legal modernity as it finds expression in claims to universalism. Viewed from this perspective, the post-secular is even more foundationally destabilizing than Hunter’s argument reveals. Post-secularity

4. *Id.* at 1067.

5. *Id.*

6. *Id.* at 1076.

7. *Id.* at 1077.

8. *Id.* at 1075–76.

9. *Id.* at 1071 n.14.

10. *Id.*

11. *Id.*

12. *Id.* at 1080.

13. *Id.* at 1078–79.

not only makes law the object of capture by particular interests—it negates the very idea that law possesses a universal foundation and meaning.

The jurisprudential implications of post-secularity cannot be assessed apart from considering modernity's negation of religion as a source of legal authority. Legal universality, as it took shape within the modern imagination, rested on the severing of law from religion.¹⁴ The secular, in Hunter's words, was deemed to be "rational, universal, cosmopolitan and tolerant," whereas religion was irrational, particularistic, and the genesis of conflict and violence.¹⁵ As such, recasting law as the product of a self-contained and autonomous logic offered a way to establish a universal jurisprudence removed the shadows of a theological economy. This desacralization of law included the separation of church and state, but the essence of legal modernity was the deeper ontological separation of law and religion at the conceptual level of legal meaning. From this perspective, late modern post-secularity is destabilizing because it undermines the moral foundations of this modern legal project. Recent debate about legal pluralism, concurrent jurisdiction, and religious courts are but one prominent manifestation of the collapsing architecture of the secular legal order.

As important as these developments have been, it is significant to note the many ways in which legal modernity has also proven resistant and resilient. Law remains deeply tethered to the logic of modernity, unable to fully break the bonds of a secular ontology. As Hunter revealingly notes, "the acids of modernity and late modernity have eroded the capacity to believe in the old gods, but they have not diminished the need to believe in something."¹⁶ And law is one of the things for which belief continues. In fact, nothing more captures this impulse than the central role of human rights discourse within modern politics. The universal claims of secular human rights, resting on a thick moral anthropology, remain one of the final expressions of the modern order. Post-secularity has fractured law, but it has not penetrated the legal imagination as completely as Hunter intimates.

In light of this situation, I want to propose that Christian theological jurisprudence must begin its constructive work by advancing a more complete and authentic post-secular turn in law. Hunter is right to point to the ways in which post-secularity has problematized the relationship between law and religion, but while Hunter focuses on the challenges of post-secular pluralism, I want to instead explore the opportunities to which it

14. *Id.* at 1070–71.

15. *Id.* at 1070.

16. *Id.* at 1069.

gives rise. In particular, post-secularity has revealed the inability of a modern ontology to ground and explain legal norms. Under the guise of a secular logic that purported to move beyond religion, legal modernity merely piggybacked on the residue of Christian culture. While this arrangement endured for some time, the post-secular postmodern condition represents the exhaustion of this possibility and the collapses of legal modernity into struggle and resentment. Legal modernity is thus revealed to have been a dependent tradition that subsisted on inherited intellectual and cultural capital. The lingering modernism of legal thought needs to be pushed to its logical end in collapse through a more complete severing of the connection between law and secularism. The issue is no longer whether there should be more or less secularism, but rather how to give law meaning within a cultural environment where there is no possibility of deep moral consensus. If, as William Connolly writes, “[t]he historical *modus vivendi* called secularism is coming apart at the seams,” there is a need and opportunity to think anew about law’s relationship to theology.¹⁷ From within rubbles of modernity, theology might now offer itself as an alternative to the secular jurisprudential imaginary. This reconstructive task is not for theology alone, though it might be the case that theology has a distinct and foundationally important role in conceptualizing the meaning of law after secular modernity.

The central challenge in developing a theological jurisprudence is to determine its shape and aims as it finds voice within the social space afforded by pluralism. The position I want to advance is that the orientation of theological jurisprudence must be at once radical and modest. It is radical in that it aims to push beyond the ontological presumptions that have shaped modern legal thought. Against modernity’s false and violent universalism, theological jurisprudence presents Christianity as the true story of law. At the same time, theological jurisprudence must resist the violence of advancing a univocal account of law in a culture devoid of any common cultural basis. This is a difficult balance to maintain, but Hunter’s account of faithful presence developed in *To Change the World* offers important resources for doing so.¹⁸

At the heart of faithful presence is the proposition that the “incarnation is the only adequate reply to the challenges of dissolution; the erosion of trust between word and world and the problems that attend it.”¹⁹ From this flows the additional claim that “it is the way the Word became incarnate in Jesus Christ and the purposes to which the incarnation was directed that are

17. WILLIAM E. CONNOLLY, *WHY I AM NOT A SECULARIST* 19 (1999).

18. See HUNTER, *supra* note 2.

19. *Id.* at 241 (italics removed).

the only adequate reply to challenge of difference.”²⁰ Against the violent and fragmented reality of the late modern world, faithful presence marks a way of being and living that resists and subverts the will to power.²¹ Rather than seeking to change the world, faithful presence calls on the church to inhabit the world through an embodied and enacted commitment to human flourishing.²²

One manifestation of faithful presence is moving away from a focus on law and politics in order that the church might “disentangle” itself “from the life and identity of American society.”²³ Faithful presence does not demand a total withdrawal from law. To the contrary, Hunter argues that an alternative to the “present impasse . . . will not be found without the creative role of the law,” for law is needed to create “space where culture, in its generative capacities, is free to do its work.”²⁴ At the same time, the role of law within Hunter’s system is largely negative.²⁵ At best, law creates and preserves space for culture, which is the proper situs for Christian engagement with justice and the common good.

Against the view of law as more of a problem than a solution to the present impasse, I want to argue that faithful presence also contains resources for advancing a constructive Christian engagement with law-qua-law. Perhaps Hunter’s failure to move in this direction reflects his defining of law in terms of the exercise of power. It is certainly the case that the essence of law is power. As Robert Cover famously observed, “[l]egal interpretation takes place in a field of pain and death.”²⁶ But law is not merely about the exercise of power but equally about conceptualizing the place and meaning of power within a moral system. By focusing almost exclusively on the former, Hunter conflates law with politics, treating them both as agents of the state that offer “an unstable and unsustainable foundation for any social order.”²⁷

Hunter is certainly right in urging Christians to reassess their relationship to the violent expressions of law, but an equally important task

20. *Id.* (italics removed).

21. *Id.* at 280.

22. *Id.* at 279.

23. *Id.* at 184.

24. Hunter, *supra* note 1, at 1082.

25. On the negative and positive dimension of legal universalism, see Rowan Williams, *Civil and Religious Law in England: A Religious Perspective*, 10 *ECCLESIASTICAL L.J.* 262, 271–72 (2008).

26. Robert M. Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1601 (1986).

27. Hunter, *supra* note 1, at 1082.

for Christians is to shape the moral imaginary by which law is given meaning within the present cultural moment. In other words, the task is not simply to be faithfully present within a culture fragmented by law's violence, but to also pursue the more basic task of advancing an account of law that moves beyond the violent logic of late modernity. The primary problem is not with power as such, but with a lack of cultural resources for understanding and properly exercising it.

Pursuing this aspect of faithful presence is above all the work of constructive theology. At its most basic, it requires the development of what Rowan Williams terms a "theology of law."²⁸ Yet, it equally demands that this theology be culturally contextualized so as to offer a response to the particular jurisprudential challenges confronting late modern secular culture. I would here propose that the task of a Christian theological jurisprudence is nothing less than to redeem legal logic from modernity's ontological separation by relocating law and law's meaning within a theological economy. If, as Hunter proposes, the incarnation represents the only adequate Christian response to the dissolution of modern moral order, then the reconstitution of law must equally be grounded in an incarnational worldview that sees the naturalness of law as oriented towards, and finally consummated in, grace.

A jurisprudence of faithful presence undercuts the violence of moral and metaphysical pluralism by testifying to the ultimate univocity of legal meaning. Above all, it sees law as grounded necessarily in a basic act of trust in the meaningfulness of creation and the possibility of justice. This trust marks the beginning of the possibility of law responding to the brokenness of humanity. Yet, such trust cannot be fostered by a modern order that locates law within what Robert Jenson calls a "world without a story."²⁹ Christianity alone can thus prevent the collapse of law into violence and denigration by establishing the coherence between what Hunter terms "word and world."³⁰ In theological jurisprudence, word and world meet in the incarnate Word.

At the same time that theological jurisprudence offers a totalizing alternative to established modes of modern legal thought, it must equally be defined by a modesty about what can and ought be reasonably accomplished within a pluralistic order. The univocity of law to which theological jurisprudence points participates in the violence it endeavors to resist. This problem is, to some extent, endemic to law itself, for law is necessarily located within the brokenness and violence of the world. It cannot escape

28. Williams, *supra* note 25, at 272.

29. See Robert W. Jenson, *How the World Lost Its Story*, FIRST THINGS, Oct. 1993, at 19, available at <http://www.firstthings.com/article/2010/03/how-the-world-lost-its-story>.

30. HUNTER, *supra* note 2, at 241 (italics removed).

the moral ambiguities of politics. Yet, if law begins with brokenness—what James Boyd White describes as “the deep uncertainties of the world”—then faithful presence begins with living into the tensions to which this brokenness gives rise.³¹ This is not an act of despair and resignation but of hope grounded in an elusive peace. Faithful presence in law is thus less about transforming law than about imaging and embodying its meaning made anew. This is not an act of power that aims to change the world so much as a silent openness to surprise and possibility, for the regeneration of law is a process that is always at once incomplete. The vocation of Christians is not to capture law for the good but to be present in it, as in all creation, opposing those “frameworks of social life that are incompatible with the shalom for which we were made and to which we are called.”³²

31. JAMES BOYD WHITE, *LIVING SPEECH: RESISTING THE EMPIRE OF FORCE* 196 (2006).

32. HUNTER, *supra* note 2, at 235.
