Christianity, Islam, and Secular Law

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No issue is more central to theological engagement with law than the meaning of the secular. Indeed, the capacity of constructive religious thought to inform the modern legal order depends in large measure on developing a theological account of the secular and secular law in particular.

The secular is an elusive term with multiple layers of meaning. At its most basic, the secular might be understood as referring simply to that which is profane and not sacred. The term need not, as Robert Markus points out, “have such connotations of radical opposition to the sacred . . . .” The secular is simply the space in which persons pursue shared but limited and temporal goods. In its modern formulation, however, the secular rests on more than a mere distinction between the sacred and profane, and refers more commonly to deeper patterns of social understanding and organization. We no longer simply inhabit the secular but rather live in what Charles Taylor calls “A Secular Age.”

This secular age manifests itself in many ways, though no more clearly than in the relationship between religion and politics. As Taylor notes, while “the political organization of all pre-modern societies was in some way connected to . . . faith in, or adherence to God, or some notion of ultimate reality . . . .” politics in modern secular societies can take place “without ever encountering God . . . .” Taylor is not referring to how people engage politics so much as to the very structure of modern political order. In this respect, the disestablishment of religion is but one expression of a far more totalizing process by which public meaning was emptied of religion. Above all, politics came to be governed by its own internal

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2. Id.
3. Id. at 5.
5. See id. at 2-3.
6. See generally id.
7. Id. at 1.
8. Id.
9. See TAYLOR, supra note 4, at 2.
10. See id. at 2.
rationality divorced from any point of contact with theology. There was no longer any need for recourse to external sources, particularly religion, to warrant political authority.

Law has undergone a similar transformation. Rémi Brague observes that, “[i]n modern societies, law, far from being conceived of in any relation with the divine, is quite simply the rule that the human community gives itself, considering only ends that it proposes for itself.” As with political authority, law is grounded in sources independent of religion and derives meaning from an internal logic. Religion thus resides outside of law, tolerated, but lacking a role in structuring jurisprudence at the level of conceptual meaning. Secular law in modernity must therefore be understood above all by reference to the ways in which law is turned in on itself and rendered independent of religion.

While tension between the secular and religious is built into the fabric of modern law, there remains the possibility of constructive engagement. In fact, important, if underappreciated, lines of inquiry are attempting to overcome the binary relationship between religion and the secular that is at the foundation of law’s modernity. In varied and complex ways, Muslim and Christian thinkers are employing the theological resources of their respective traditions to redefine the idea of secular law. While these projects differ in their particularity, they share a common concern with preserving foundational aspects of the modern legal order while, at the same time, re-embedding legal discourse within a theological economy. These modes of thought aim to complicate the meaning of secular modernity, even while accepting it as the starting point from which constructive religious thought about law must proceed.

This article explores these theological developments by considering the work of four thinkers from the Christian and Muslim traditions: Abdullahi

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11. See id.
12. See id.
14. See id.
16. See id.
17. See id.
20. See, e.g., An-Na’im, supra note 18, at 4; see Witte, supra note 15, at 1, 3.
21. See, e.g., An-Na’im, supra note 18, at 4; see Witte, supra note 15, at 1, 3.
Ahmed An-Na’im,22 Abdulaziz Sachedina,23 Rowan Williams,24 and Pope Benedict XVI.25 The challenges these thinkers engage are distinct, as are their lines of argumentation. For Christian thought, particularly in the West, the central challenge involves negotiating the relationship between law and religion within cultural contexts that are increasingly defined by more doctrinaire forms of secularism.26 There is, of course, no one form of western legal secularism.27 Yet, across differences, law in the West has been commonly shaped by what Harold Berman calls “the radical separation of prevailing legal thought from its Christian philosophical roots . . . .”28 This severing of law from its theological roots has generated, in turn, a radical form of legal autonomy.29 Not only is secular law autonomous in a jurisdictional sense, but also an ontological one. Separated from its theological roots and thus its theological limits, law takes on a totalizing meaning-making role defined against religion.30 Law’s universality stands as a counter-narrative to religious universality.31 In confronting this situation, the Christian thinkers discussed aim to pluralize and upend secular law’s monism, while introducing theology as a source of secular legal meaning.32 The object of critique is not secular law as such,

22. AN-NA’IM, supra note 18.
26. TAYLOR, supra note 4, at 2.
28. Harold Berman, Epilogue: An Ecumenical Christian Jurisprudence, 1, http://www.argobooks.org/berman/pdf/ecumenical-christian-jurisprudence.pdf. Berman’s description is helpful in addressing the marginalized status of Christian theology within western jurisprudence, but also its historical influence in shaping western law. See generally id. Even as Christianity now stands as a marginalized discourse within secular legal meaning, the vestigial remnants of Christianity can be seen within liberal legal categories. See generally id. One aspect of Christian legal thought might thus be seen as an act of genealogical recovery. See id. at 2. On the relationship between theology and the categories of the modern state, see Carl Schmitt, Political Theology (1934).
29. See id.
30. This impulse might be seen with particular clarity in human rights law and though. See MICHAEL IGNATIEFF ET AL., HUMAN RIGHTS AS POLITICS AND IDOLATRY 83 (Amy Gutman ed.) (2001). Michael Ignatieff, for example, describes human rights as “the language through which individuals have created a defense of their autonomy against the oppression of religion.” Id.
31. BRAGUE, supra note 13.
32. See MARKUS, supra note 1, at 5-6.
but a form of secularism that suffocates space for religious meaning and particularity within law.33

For Muslim thought about the secular by contrast, the challenge is shaped by the post-colonial emergence of the Islamic state and the theocratic subsumption of law into religion.34 In what Khaled Abou El Fadl terms the “positivist school” of Islamic jurisprudence, “the human law” is “derived in the process of apprehending Divine law” and produces an account of the “social order” that is “seen as semi-divine.”35 Within such a framework, the very notion of an autonomous secular law is contrary to Divine decree.36 Indeed, secular law becomes an incoherent category.37 Articulating an Islamic account of secular law thus demands engaging the divine law, for the legal challenge is a theological challenge.38 The two Muslim thinkers considered both seek to cultivate a theological account of secular law that preserves space for law’s autonomy without severing law from sources of religious meaning.39

Put in these terms, the challenges confronting Christian and Muslim thinkers would seem to be of a quite different order. Yet at the same time, thinkers within both traditions are engaged in the common task of redefining the foundation and meaning of secular law.40 All four thinkers considered below advance accounts of the secular that seek a creative rapprochement between the modern inheritance and the resources of religious insight.41 If the challenge for Christian thought is to draw religion into secular law, the challenge for Islam is to distinguish religious law and secular law.42 Constructive theological work within both Christianity and Islam is redefining the normative relationship between law and religion within the secular order.43 By drawing debate about law, religion, and secular commitments into a broader theological matrix, these arguments challenge existing lines of debate and generate new points of contact between religious and non-religious thought.

John Esposito proposes that, “The issue of Islam and secularism represents one of the most contested debates in contemporary scholarship

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33. TAYLOR, supra note 4, at 2.
34. AN-NA’IM, supra note 18, at 11-12.
36. See id.
37. See id.
38. See id.
39. AN-NA’IM, supra note 18, at 4; see SACHEDINA, supra note 23, at 11.
40. See, e.g., SACHEDINA, supra note 23, at 11; see e.g., MARKUS, supra note 1, at 4-6.
41. See SACHEDINA, supra note 23, at 11; see AN-NA’IM, supra note 18, at 4; see Address to Italian Catholic Jurists, supra note 25; see Williams, supra note 24, at 263-64.
42. See e.g., TAYLOR, supra note 4, at 2; see e.g., AN-NA’IM, supra note 18, at 4.
43. See e.g., BRAGUE, supra note 13; see e.g., AN-NA’IM, supra note 18, at 4.
and policy circles,” with scholars increasingly “utiliz[ing] rigorous historical and textual analysis to reexamine the role of Islam in the secular state and related issues like Islamic conceptions of democracy, pluralism, and religious freedom.” One of the most important Muslim scholars rethinking the secular state is Abdullahi An-Na’im. An-Na’im has written widely on this subject over many years, though focus is given here to his recent book *Islam and the Secular State*.

The argument An-Na’im develops about the relationship between theology and the secular, and between Islamic law and secular state more specifically, is both radical and thoroughgoing. Instead of attempting to reconcile Islamic law with secular politics primarily through reexamining theological and textual sources, he starts from the premise that religious law and secular law are by their nature fundamentally incompatible. His project aims less at reconciliation than differentiation. Because the law of the state is by definition secular, it cannot permit a role for religious law. It is a category mistake to vest the secular state with the task of enforcing religious law. Thus against those who claim secularism is a foreign doctrine with no place in Islam, An-Na’im argues that “the state is a political and not a religious institution . . . .” As such, “whatever the state enforces in the name of Shari’a . . . will necessarily be secular,” for it is “the product of coercive political power and not superior Islamic authority.” Even more so, An-Na’im argues that the very idea of enforcing the Shari’a through the law of the state is a postcolonial innovation that depends on positivist assumptions at odds with Islamic jurisprudence. Islamists have unknowingly appropriated the modern secular assumption they aim to subvert.

While endorsing the separation of Islamic law and the state, An-Na’im stresses that he does not endorse the separation of religion and politics, or “the exclusion of Islam from the formulation of public policy and legislation or from public life in general.” An-Na’im is attentive to the diverse forms

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46. AN-NA’IM, supra note 18.
47. Id. at 4.
48. Id. at 3, 4.
49. Id. at 4.
50. Id.
51. Esposito, supra note 44, at 1.
52. Id. at 7.
53. Id. at 20.
54. AN-NA’IM, supra note 18, at 20.
secular politics can assume and is careful to distinguish his account of the secular state from one more properly termed secularist. 56 Thus, while An-Na‘im endorses the secular state as normative for Islam, he rejects the idea that the secular need be coterminous with secularism. 57 The state must be secular only in the sense of being ordered in accord with fundamental commitments to constitutionalism, human rights, and public reason. 58 The secular serves a mediatorial role within society, but is not a totalizing ideology that aims to suffocate religion. 59 Far from establishing an impervious divide between religion and law, the secular constitutional state, properly ordered, preserves space for religion to cultivate a vibrant public role. 60

Viewed in isolation, these claims are not particularly novel. An-Na‘im is simply endorsing a broadly liberal position in which law mediates the relationship between religion and politics. 61 In so doing, he aims to establish that there is no fundamental incompatibility between secular politics and vigorous public religiosity. 62 However, arguing that a certain form of secular order preserves space for religion does not establish why Muslims should favor a secular state. Making a case for the normativity of the secular state requires An-Na‘im move his argument in different and particularly innovative directions. 63

The normative basis of the secular state, An-Na‘im intimates, is not found in particular Quranic texts, but in the character of the Quran as experienced by believers. 64 One idea to which An-Na‘im turns is the voluntary nature of religious belief. 65 Permitting the state to enforce Shari‘a makes religious observance a matter of coercion rather than choice. 66 “[T]he state,” An-Na‘im writes, “should not attempt to enforce Shari‘a precisely so that Muslims are able to live by their own belief in Islam as a matter of religious obligation, not as the outcome of coercion by the state.” 67 Far from being opposed to religion, legal secularism respects religion by acknowledging the free choice at the ground of belief. 68

56. AN-NA‘IM, supra note 18, at 2.
57. Id. at 1.
58. Id. at 6.
59. Id. at 41.
60. Id. at 6.
61. AN-NA‘IM, supra note 18, at 1.
62. Id.
63. Id. at 3-4.
64. Id. at 2-3.
65. Id.
66. AN-NA‘IM, supra note 18, at 3-4.
67. Id. at 2.
68. Id. at 3-4.
The second and more important idea An-Na’im introduces concerns the relationship between the secular state and religious doctrine. According to An-Na’im, a secular state is necessary to ensure “the formation of a fresh consensus around new interpretive techniques or innovative interpretations of the Qur’an and Sunna.” Constitutionalism, in other words, provides the “freedom and security” Muslims need to “participate in evolving new techniques and proposing and debating fresh interpretations” of the tradition. While An-Na’im’s project is ostensibly about reconciling Islam and the secular state, it is equally concerned with transforming the internal dynamics of Islamic thought. It is through a secular state that the Shari’a can develop in a dynamic and open fashion. The Shari’a, An-Na’im suggests, must be politically marginalized to preserve its vitality.

The development of theology, however, does not happen in isolation but rather through an embedded engagement with the world. The secular state, in this respect, does not simply afford space for theological innovation, but provides the normative context within which theology finds its meaning. The secular state and modern moral order pose ethical demands which theology must engage. Islam cannot be merely oppositional, but must be open itself to a transformative encounter with the givenness of the world. In other words, religion and the secular exist in what An-Na’im terms a “symbiotic relationship”: the secular frees and transforms religion, while religion subjects the secular to “drastic limitations” in its normative ambitions. While An-Na’im vests secular law with a certain necessary independence from religion, he equally pulls secular law into a necessary relationship with religion. The resulting dialectical tension maintains a balance between the preservation and transformation of moral meaning. Properly harnessed, this relationship is healthy for both religion and the secular.

Whereas An-Na’im endorses the secular to free the Shari’a, Abdulaziz Sachedina’s book *The Islamic Roots of Democratic Pluralism* places the
Islamic tradition in a more direct dialogue with the foundational ideas of democratic liberal politics. An-Na’im and Sachedina share certain impulses and objectives, but develop their projects from different methodological starting points. For Sachedina, a defense of secular liberal politics must be based in Islamic sources. An account of the secular, in other words, needs to be distinctively Islamic. As he writes, “my proposed Islamic theology for human relations begins within the sacred boundaries of Islamic revelatory sources.” While An-Na’im reaches the secular in order to create space for Islamic theology to develop, Sachedina reaches the secular through a creative engagement with authoritative Islamic sources.

Like An-Na’im, Sachedina emphasizes that there are different forms of secular order. Secular is not coterminous with secularism. From this starting point, Sachedina emphasizes that a religiously pluralistic society need not privatize religion in order to preserve universal secular values. In fact, he expresses particular concern with the form of liberal politics that “while preventing the dominance of one religion over others, can also marginalize communities of faith and thus push them toward militancy, aggression, and separatism.” The privatization of religion in this way distorts the proper meaning of the secular. Secular order does not demand the exclusion of religion from politics. What rather defines secular politics is the jurisdictional differentiation between the orders of law and the orders of religion. The political order, in other words, must give due recognition to the “essential distinction between divine jurisdiction of God qua God, and the human jurisdiction of the polity.” Sachedina thus distinguishes between “secularity,” a jurisdictional category, and secularism, an ideology which “tends toward a negative characterization of anything religious as soon as it crosses the boundary from the private to the public sphere.”

84. See SACHEDINA, supra note 23, at 40.
85. See also id.; see AN-NA’IM, supra note 18, at 4-5.
86. SACHEDINA, supra note 23, at 41.
87. Id.
88. Id. at 41.
89. Id.; AN-NA’IM, supra note 18, at 4.
90. See generally SACHEDINA, supra note 23, at 3-4.
91. See generally id. at 77-78.
92. See id. at 3.
93. Id.
94. Id.
95. See SACHEDINA, supra note 23, at 3-4.
96. See id.
97. Id. at 6.
98. Id. at 3, 5.
This distinction between secularity and secularism does not, in itself, establish what role religion should play in the secular polity. In addressing this issue, Sachedina is more impressionistic and indirect. In part, he wants to avoid instrumentalizing religion or reducing this issue to a series of propositions. Religion is too dynamic—"too intimate and personal"—to be captured in this way. He acknowledges that religion can be "a key element in managing social problems and sustaining a sense of community," just as it "has been successfully used to justify a particular status quo, leading to violations of basic human rights . . . ." Religion has maintained a complex and not always constructive political role. Yet, in spite of these problems, it is in the very nature of private faith to seek "expression through a concrete social-moral vision . . . ." Sachedina describes this relationship between the personal and public aspects of faith in terms of the vertical and horizontal. An adequate account of secular politics must acknowledge this basic fact and negotiate the resulting tension between the vertical and horizontal.

Sachedina’s main concern is with constructing an account of secular plural order that gives due respect to the vertical dimension of faith without collapsing it into the horizontal. He proposes that the Islamic tradition has not adequately differentiated between the personal and political aspects of faith. This problem, though, is not intrinsic to Islam, but rather reflects the failure of traditional scholarship to adequately account for the distinction between the spheres of human and divine jurisdiction. Layers of scholarship have obscured Islam’s pluralistic vision. Therefore, the task moving forward is to return to this history, as well as to the resources of constructive theology, in order to disclose the authentic political vision within Islam.

99. Id. at 9.
100. See SACHEDINA, supra note 23, at 9.
101. Id.
102. Id. at 3.
103. Id. at 9.
104. Id.
105. SACHEDINA, supra note 23, at 9.
106. Id.
107. Id.
108. Id.
109. Id.
110. Id. at 9-10.
111. See SACHEDINA, supra note 23, at 5. Sachedina argues that while “theoretically it is true that Islam does not make a distinction between the church and the state or between spiritual and temporal, in practice the Islamic tradition recognizes a de facto separation between the religious and temporal realm of human activity, including distinct sources of jurisdiction in the Muslim polity.” Id. at 5.
112. See id. at 6.
Sachedina’s approach to this work is complex and, at times, elusive. A central concern, however, is with critiquing particularistic forms of theology that “limit salvation to those within their own creedal boundaries.”\(^{113}\) The theological mistake of circumscribing God’s revelatory and salvific action feeds, in turn, the political mistake of defining Islam in narrow ethnic-bound terms.\(^{114}\) The vertical suffocates the horizontal, and religion becomes an obstacle to realizing universal human values.\(^{115}\) This theological mistake also undergirds the discriminatory treatment of non-Muslims which, Sachedina argues, has no basis in the Qur’an or early Muslim practice.\(^{116}\) Only by overcoming the exclusionary theological impulse within Islam can the tradition support pluralistic political values.\(^{117}\)

Against an exclusivist reading of the tradition, Sachedina offers a universalistic reading of the Quranic message.\(^{118}\) He focuses on two texts. The first is K. 2:213, which speaks of the people as “one community.”\(^{119}\) The idea that “the People are one community” offers resources for establishing the equal rights of all human beings, including across religious difference.\(^{120}\) The Qur’an’s reference to the oneness of humanity does not, Sachedina argues, endorse an exclusivist Islam into which all of humanity must be subsumed. To the contrary, it “implies a universal discourse embracing all of humanity under a single divine authority, thereby relativizing all competing religious claims to spiritual supremacy.”\(^{121}\) The reality of religious pluralism is a mystery, but not a mystery to be feared or overcome.\(^{122}\) It is a fact of human existence that provides the necessary starting point for cultivating genuine “intercommunal relations.”\(^{123}\)

Sachedina’s interpretation of K. 2:213 emerges out of a broader theology of divine revelation, and it is in developing this idea that Sachedina is at his most creative. His claim, in brief, is that genuine respect for the other must be found in “the inherently pluralistic nature of the divine revelation . . . ”\(^{124}\) As such, “[t]he common attitude among the religious groups...that there is only one true religion” is the most significant obstacle for achieving a politics of pluralism.\(^{125}\) Realizing true pluralism requires a

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113. Id. at 41.
114. Id. at 81.
115. See SACHEDINA, supra note 23, at 81.
116. Id.
117. Id.
118. See generally id.
119. See id. at 23.
120. SACHEDINA, supra note 23, at 23.
121. Id.
122. Id.
123. Id. at 35.
124. Id. at 40.
125. SACHEDINA, supra note 23, at 36.
theology of pluralism that can account for God’s revelation to all of humanity.\textsuperscript{126} The political and the theological are inseparable.\textsuperscript{127}

It is not Sachedina’s primary concern to systematically develop this theology, though he gestures in the direction such a project might take.\textsuperscript{128} He gives particular attention to the Islamic doctrine of \textit{fitra}, the concept that all human persons are created in the divine image and thus naturally disposed God.\textsuperscript{129} His account of \textit{fitra} also illuminates an earlier reference to the “general religious sensibility” that is the ground of a “universal creed.”\textsuperscript{130} In speaking of general religion, Sachedina does not offer a sociological observation about religious belief in late modernity, but rather a theological claim about the nature of human religiosity.\textsuperscript{131} In short, his account of political pluralism turns on the theological claim that, “Islamic revelation presents a theology that resonates with the modern pluralistic belief that other faiths are not merely inferior manifestations of religiosity, but variant forms of individual and communal responses to the presence of the transcendent in human life.”\textsuperscript{132} A pluralistic order, grounded in genuine respect for the other and protected in law, must be found by going through, rather than around, religion.\textsuperscript{133}

Even more significant is Sachedina’s bold claim that Islam, alone among the world religions, offers a “coherent worldview” for engaging modern politics.\textsuperscript{134} This claim appears to rest on an understanding of the relationship between religious experience, pluralism, and secular politics.\textsuperscript{135} Islam holds these categories together in a conceptually coherent way, Sachedina claims, that position it to be the upholder of an authentic secular modernity.\textsuperscript{136} Unlike Christianity, which “developed . . . [a] split between the sacred and secular,” the Quranic vision is “integrated.”\textsuperscript{137} The \textit{fitra} thus discloses the “profound secularity” at the heart of Islam, in which the sacred and the secular are intertwined.\textsuperscript{138} The former discloses the meaning and possibility of the latter, and the plural responses individuals offer God mark the genesis of a universal ethic that can heal the world.\textsuperscript{139}

\begin{itemize}
\item \textsuperscript{126} See id.
\item \textsuperscript{127} See generally id. at 3-4.
\item \textsuperscript{128} See generally id. at 14.
\item \textsuperscript{129} Id. at 14.
\item \textsuperscript{130} Sachedina, supra note 23, at 6.
\item \textsuperscript{131} See generally id. at 6-7.
\item \textsuperscript{132} Id. at 14.
\item \textsuperscript{133} See generally id. at 14.
\item \textsuperscript{134} See id. at 42.
\item \textsuperscript{135} Sachedina, supra note 23, at 42.
\item \textsuperscript{136} See id.
\item \textsuperscript{137} Id. at 83.
\item \textsuperscript{138} Id. at 82.
\item \textsuperscript{139} See generally id. at 82-83.
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As referenced above, Christian engagement with the secular has developed on different terms from its Islamic counterpart. At the same time, it shares a basic impulse to advance a theologically particularistic account of secular law and politics that is concordant with the basic architecture of the liberal society. What distinguishes Christian engagement is that it must confront the liberal tradition’s complicated historical relationship with religion, a tradition that at once depended on the resources of religion but also came to marginalize religion.

One of most provocative contributions to this engagement appeared in a lecture by the then-Archbishop of Canterbury Rowan Williams, subsequently published as “Civil and Religious Law in England.” The question Williams takes up is whether there ought to be space made within English law for recognition of religious law, particularly Sharia law. There is an expansive literature addressing the topic, but William’s contribution is distinct in that it considers the issue on theological terms. In fact, Williams proposes that the question of legal and religious pluralism can be fully addressed only through a “theology of law.”

Williams argues that debate about legal pluralism has been hindered by the governing account of law within secular modernity. He notes that,

So much of our thinking in the modern world, dominated by European assumptions about universal rights, rests, surely, on the basis that the law is the law; that everyone stands before the public tribunal on exactly equal terms, so that recognition of corporate identities or, more seriously, of supplementary jurisdictions is simply incoherent if we want to preserve the great political and social advances of Western legality.

There is a fundamental tension, in other words, between legal modernity and supplemental religious jurisdiction. The universalizing impulse within modern legal thought stands against the interjection of particularity, especially religious particularity. It is this tension between the universal and the particular that Williams aims to critique, arguing that the totalizing

140. See generally Markus, supra note 1, at 4-5.
141. See generally id.
143. Williams, supra note 24.
144. See id. at 262-263.
145. See id. at 263-64.
146. Id. at 272.
147. Id. at 270.
148. Williams, supra note 24, at 270.
149. Id.
150. Id.
grip of legal universalism has limited the capacity to think fully about law in relation to other aspects of human life and community.  

Williams is no blind critic of the modern age. In fact, he affirms much of legal modernity, noting that the universal norms of human rights are fundamentally expressive of religious insights. The Enlightenment achievement, far from negating religion, drew upon “themes consistently and strongly emphasized by the ‘Abrahamic faiths.’” Religious legal pluralism must therefore operate within the bounds of human rights, because these basic norms “prevent the creation of mutually isolated communities, in which human liberties are seen in incompatible ways and individual persons are subjected to restraints or injustices for which there is no public redress.” The universal norm of human dignity stands in dialectical tension with all particular loyalties, thereby disrupting the possibility that discrete communities will claim “finality for their own boundaries of practice and understanding.”

While Williams affirms the universal scope of secular human rights, he remains concerned with how this universality stifles religion. Secular law, particularly as expressed in the form of human rights claims, has increasingly exhibited totalizing meaning-making ambitions. Its universality is defined against, rather than with the grain of religion. Under such conditions, law comes to be defined against particularistic loyalties. The problem is therefore not with legal universalism, but with a particular expression of legal universalism that vests the secular law with “a ‘monopoly in terms of defining public and political identity.’”

Against the monistic impulse within modernity, Williams defines rule of law not as “the enshrining of priority for the universal/abstract dimension of social existence but the establishing of a space accessible to everyone in which it is possible to affirm and defend a commitment to human dignity as

151. Id.
152. See id. at 272-73.
153. Williams, supra note 24, at 272-73.
154. Id. at 272.
155. Id. at 272-73.
156. Id. at 271–72.
157. Id. at 272.
158. Williams, supra note 24, at 265.
159. Id. at 265.
160. See id. at 265-66 (quoting Maleiha Malik, Faith and the State of Jurisprudence, in FAITH IN LAW: ESSAYS IN LEGAL THEORY 129 (Peter Oliver, et al, eds., 2000)).
161. See id.
162. Id. at 265.
Universal commitments are affirmed, but in a manner that draws them into relationship with the particular. He develops this theme by reference to the negative and positive functions of law, offering the provocative claim that “it helps to see the universalist vision of law as guaranteeing equal accountability and access primarily in a negative rather than a positive sense.” It would appear that Williams ascribes to universal legal norms the role of protecting “certain elementary liberties of self-determination,” the so-called negative functions of law. This negative function creates space within which persons and communities seek fulfillment according to deep and particular sources of meaning, the positive aspect of law. The problem, Williams argues, is that secular legal universalism has increasingly arrogated to itself the negative and positive dimensions of law, so as to circumscribe the ability of persons to cultivate and enact deep particularistic loyalties. Religious pluralism has been suffocated by a secular universalism that claims finality over legal meaning.

Perhaps the most significant contribution Williams makes is to analyze the problem of pluralism in theological terms. For Williams, the positive aspect of legal universality is ultimately a matter of theological concern because it opens the “possibility for every human subject to live in conscious relation with God and in free and constructive collaboration with others.” The universal possibilities disclosed in the theological ground pluralistic particularity. Just as religion made possible the emergence of universal claims about human dignity, so too does religion contain resources to prevent this universality from becoming allied against the particular. While theological anthropology affirms the universality of legal norms that stand outside of history, so too does it acknowledge the dynamic and contingent openness of history. The universal principle of legal right, Williams writes, “requires both a certain valuation of the human as such and a conviction that the human subject is always endowed with some degree of

164. Id. at 271.
165. Id. at 271.
166. Id.
167. Id.
168. See id. at 271.
169. See Williams, supra note 24, at 272.
170. See id. at 272–73.
171. Id.
172. See id.
173. See id. at 272-73.
174. See Williams, supra note 24, at 272-73.
freedom over against any and every actual system of human social life.” 175 Legal universality, properly understood, must leave space for “what is least fathomable and controllable in the human subject . . . .” 176 The problem with secular modernity is that it has disconnected law from this theological insight, thus freeing law to acquire an expansive role in structuring moral meaning. 177 Only by critiquing this aspect of the secular legal inheritance is it possible to think constructively about the conditions needed to foster genuine religious pluralism. 178

In a 2006 address to a group of Italian jurists, Pope Benedict XVI spoke of the need to promote a “healthy secularity.” 179 Talk of healthy secularity implies an unhealthy counterpart and, in the address, the Pope opens with a discussion of the erroneous ways in which the modern world understands the secular. 180 The fundamental problem with the secular, as understood in its dominant form, is that “it has come to mean the exclusion of religion and its symbols from public life by confining them to the private sphere and to the individual conscience.” 181 The secular has acquired “an ideological understanding” in which it “is commonly perceived today as the exclusion of religion from social contexts” and as the “total separation” of church and state. 182 This false secularism “refuse[s] the Christian community and its legitimate representatives the right to speak on the moral problems that challenge all human consciences today, and especially those of legislators and jurists . . . .” 183 Pope Benedict makes a similar point in his 2006 book Without Roots, in which he argues that secularity, in its modern understanding, “means free thinking and freedom from religious constrictions,” and thus “also involves the exclusion of Christian contents and values from public life.” 184 In short, the secular becomes equated with a rigid and ideological secularism that is fundamentally hostile to religious influence in public life. 185

As an alternative to this dogmatic secularism, Benedict offers the idea of healthy secularity, defined most basically as a secularity including God. 186 Benedict gives further content to this idea in writing that it involves

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175. Id. at 272.
176. Id. at 275.
177. See id.
178. See id. at 275.
179. Address to Italian Catholic Jurists, supra note 25.
180. Id.
181. Id.
182. Id.
183. Id.
185. Id.
186. See Address to Italian Catholic Jurists, supra note 25.
“a commitment to guarantee to all, individuals and groups, respect for the exigencies of the common good, [and] the possibility to live and to express one’s own religious convictions.” The most straightforward interpretation of healthy secularity is thus as an argument for opening secular politics to the influence of religion. Yet, this interpretation fails to fully account for Benedict’s decision to build his analysis around the concept of the secular. It is, after all, most revealing that Benedict’s critique of secularism is not coupled with a rejection of the secular, but rather with an attempt to reconstitute the idea of the secular. Treating healthy secularity as an argument for public religion thus engages it at only the most basic level. Healthy secularity aims to recover the secular from its modern distortions by postulating that the secular, properly understood, is not only compatible with Christianity, but depends on it for meaning and sustentation.

In light of these considerations, it becomes clear that the idea of healthy secularity is more than an argument for opening public life to religion. It encompasses this, but healthy secularity is more fundamentally an invitation to resacralize the political life of modernity. Healthy secularity offers an alternative account of the idea of the secular by locating the achievements of modernity within a theological context. In particular, Benedict aims to draw Christianity into an encounter with the very logic of modernity and the secular political and legal world to which it gave birth. Christianity is not simply to take the institutional and ideological norms of modernity as a given, seasoning them with the refining influence of religion, but rather to cultivate and enact an alternative modernity grounded in “a Mystery that transcends pure reason . . . ” Healthy secularity does not then find its inspiration primarily in the past, in a world that existed before modernity’s dislocation, but in the possibility of a modernity made anew.
simplistic oppositional understanding of theology and secularity, Benedict positions Christianity to become the heritor of the secular project.198

Benedict’s engagement with the secular draws on established themes in Catholic social thought.199 For instance, Benedict explicitly notes the importance of Vatican II’s Dignitatis Humane (Declaration on Religious Freedom) in placing the Church in a more open engagement with modernity.200 “On the Catholic side,” Benedict writes, “Vatican II incorporated the collective efforts of theologians and philosophers from the previous two hundred years to open the gates that had divided the faith from the learning of the Enlightenment and embark on a fertile exchange between the two.”201 Yet, as Dignitatis drew the Church into an engagement with liberal freedom, it also positioned the Church as a critic of the modern inheritance.202 At the heart of Dignitatis was the claim that religious freedom is not a license to embrace indifference or falsehood, but an opportunity and obligation to pursue truth.203 Even while giving the Church’s imprimatur to church-state separation, the document was clear that the Church had not fully embraced modernity’s understanding of religious freedom, but had rather devised its own account of freedom based on the insights of theological anthropology.204

A similar approach to the freedom of modernity characterizes Gaudium et Spes.205 Noting that “the human race is involved in a new stage of history,” Gaudium defines this stage as involving an unprecedented “understanding of freedom.”206 The freedom of the modern world represents a genuine achievement that has revealed something true about the human person and the created order.207 “Only in freedom,” Gaudium states, “can man direct himself toward goodness.”208 As such, Gaudium concludes that “authentic freedom is an exceptional sign of the divine image within man.”209 However, the language of “authentic,” which mirrors Benedict’s use of healthy, represents a significant qualification, for Gaudium equally

198. See id.
199. See RATZINGER, supra note 184, at 107, 116.
200. Id.
201. RATZINGER, supra note 184, at 116.
203. Id.
204. Id.
205. See Vatican Council II, Pastoral Constitution Gaudium et Spes ¶ 7-8 (1965) [hereinafter, Gaudium et Spes].
206. Id. at ¶ 4.
207. Id.
208. Id. at ¶ 17.
209. Id.
observes that the freedom of modernity rests on an error. Modernity has brought about new forms of enslavement—spiritual unrest, economic injustice, social dislocation—born from severing freedom from “any kind of dependence on God.”

Authentic freedom, by contrast, identifies the end of the human person as being union with God. True freedom finds oneself through the giving of self to others and to God.

Healthy secularity follows the approach to freedom set forth in Dignitatis and Gaudium. Quoting Gaudium, Benedict affirms that the realization of freedom “is at once the claim of modern man and the desire of the Creator.” In fact, by identifying the secular as the conceptual starting point for Catholic social thought, Benedict pushes the Church even more fully into an encounter with modernity. In this respect, healthy secularity shares the regnant impulse of modern Catholic social thought to cultivate a constructive and critical voice from within. “The Christian model of life... in all its fullness and freedom” stands as an alternative to the “vacuous” trajectory of the modern world.

The freedom of healthy secularity is a freedom contingent upon fulfillment in Godself. The secular possesses autonomy, but it is an autonomy that finds meaning through reference to ultimate ends. Benedict writes that, it is “the task of all believers... to help formulate a concept of secularity which... acknowledges the place that is due to God...” The secular, properly ordered, must create space for religion, and—secular legal institutions, in turn, can only be understood properly when viewed in relation to the Divine economy. As Benedict stated in an address to the Bishops of the United States, “the just autonomy of the secular order... cannot be divorced from God the Creator and his saving plan.”

This paper proposes that an important movement has developed in which religious thinkers are pursuing theological reevaluations of the secular as a point of entry into debates about law and religion. Moreover,

210. Gaudium et Spes, supra note 205, at ¶¶ 4, 17; Address to Italian Catholic Jurists, supra note 25.
211. Gaudium et Spes, supra note 205, at ¶ 20.
212. Id. at ¶ 4.
213. Id. at ¶ 24.
214. See Address to Italian Catholic Jurists, supra note 25.
215. Id. (quoting Gaudium et Spes, supra note 205, at ¶ 76).
216. Id.
217. Id.
219. Id.
220. Id. at 116.
221. Address to Italian Catholic Jurists, supra note 25.
223. Meeting with the Bishops, supra note 25.
some intriguing similarities have occurred across Muslim and Christian lines, particularly the idea that religious thought must accept the basic structure of modern politics, including the idea of a universal secular law dissociated in certain respects from religion. The four thinkers highlighted here share the common idea that the public future of religion must be negotiated from within the world modernity has wrought.224 The secular is neither to be overcome nor capitulated to, but rather transformed from within.225 This is no mere abstract academic posturing but offers, in its broad contours, models by which religion can establish a voice within the modern legal order.226 These models also shift analysis from the technical questions that often define law and religion jurisprudence towards more fundamental considerations concerning how modernity has structured the relationship between religion and the secular.

This development complicates the idea that the basic legal contest of the day is between secularism and religion. Some of the most significant and creative work in law and religion is being pursued by Muslim and Christian thinkers who reject this oppositional framing.227 The secular is not a univocal concept, but rather subject to intense debate and negotiation.228 Indeed, a central theme advanced by the considered thinkers is that secular politics finds its proper meaning through an engagement with religion.229 The ancient resources of theology are offered for recovering a more authentic secular modernity.230 Theological jurisprudence is not a mere ancillary interdisciplinary endeavor but a pattern of thought necessary for conceptualizing and ordering secular law. The future of secular law, as imagined and practiced, rests on a theological determination.

The turn to a theological engagement with secular law offers particular opportunities for rethinking the challenge of pluralism, particularly religious pluralism. These four authors share a common concern with identifying the cultural and jurisprudential conditions necessary for establishing an authentic plural order.231 Two important themes emerge in their writings. First, pluralism is threatened whenever the state assumes a predominant role as the arbiter of moral order.232 By extension, all of the writers see theology

224. See SACHEDINA, supra note 23, at 11; AN-NA’IM, supra note 18, at 3-4; Williams, supra note 24, at 263-64; see Address to Italian Catholic Jurists, supra note 25.
225. See Address to Italian Catholic Jurists, supra note 25.
226. See SACHEDINA, supra note 23, at 11; AN-NA’IM, supra note 18, at 3-4; Williams, supra note 24, at 263-64; see Address to Italian Catholic Jurists, supra note 25.
227. AN-NA’IM, supra note 18, at 3-4; Williams, supra note 24, at 262-63.
228. Esposito, supra note 45, at 4.
229. AN-NA’IM, supra note 18, at 1; Williams, supra note 24, at 262, 265.
230. Williams, supra note 24, at 272-73.
231. See SACHEDINA, supra note 23, at 40-41; AN-NA’IM, supra note 18, at 3; Williams, supra note 24, at 272-73; see Address to Italian Catholic Jurists, supra note 25.
232. See generally AN-NA’IM, supra note 18, at 3-4.
as necessary for constructing a form of secular order that mitigates the monistic impulses of the modern state. It is the particularistic resources of religion that can sustain a form of legal universalism also open to deep difference. The balance between the universal and particular is prone to instability, but it is a balance needed to dealing with religious difference within the boundaries of the modern secular state.

For An-Na’im and Sachedina, the governing task is to reformulate the relationship between Islam and the state so as to overcome the distinctively modern impulse to capture Shari’a within the secular law. A failure to dissociate the legal and theological, and thus to give proper jurisdictional autonomy to these two spheres of meeting, suffocates the public space needed to sustain religious pluralism. It also, in An-Na’im’s assessment, undermines the ability of Islamic thought to change and develop in a manner appropriate to its nature. A defense of the secular is thus needed to limit the reach of law into spheres of society beyond its proper scope. Theology must counter the Islamic state, which by arrogating to law the role of enforcing a monistic moral order, undermines religious difference.

A similar challenge confronts Christian thought in the West. If the problem with the Islamic state is the subsumption of the theological into the legal, the problem identified by Williams and Benedict is the marginalization of religion by the secularist state. It is, of course, a different situation than that which concerns Sachedina and An-Na’im, but the underlying problematic is the same. The state has arrogated to itself an overweening role in structuring the moral life of the polity. The universalizing logic of modernity, expressed in law, claims ever greater meaning-making authority. Not only religious pluralism, but religion itself, is stifled. Religion comes to represent a threat, a counter tradition, to the moral authority of the state. Religion is to the secularist state what

233. See SACHEDINA, supra note 23, at 40-41; AN-NA’IM, supra note 18, at 3; Williams, supra note 24, at 272-73; see Address to Italian Catholic Jurists, supra note 25.
234. RATZINGER, supra note 184, at 125-26.
235. See SACHEDINA, supra note 23, at 40-41.
236. See id.; AN-NA’IM, supra note 18, at 3.
237. See SACHEDINA, supra note 23, at 41; see AN-NA’IM, supra note 18, at 3.
238. See AN-NA’IM, supra note 18, at 3.
239. Id.
240. Id.
241. Compare Williams, supra note 24, at 271-72; see RATZINGER, supra note 184, at 116.
242. Compare Williams, supra note 24, at 271-72 and RATZINGER, supra note 184, at 116 with SACHEDINA, supra note 23, at 40-41 and AN-NA’IM, supra note 18, at 3.
243. TAYLOR, supra note 4, at 2.
244. See generally Address to Italian Catholic Jurists, supra note 25.
245. See generally id.
246. See generally id.
the secular is to the theocratic state. 247 Theocracy and secularism, in this respect, are both forms of modern fundamentalism that use law to suffocate religious difference. 248 For the Christian thinkers surveyed, space must be created for religion within the secular by means of critique (Williams) 249 and recovery (Benedict). 250 Pluralism and the secular are intertwined, though not in the manner envisioned by the standard liberal narrative. Rather, they are linked by the theological project of devising an alternative account of secular law and secular politics.

While all these thinkers aim to disrupt the modern state’s tendency to become the predominant arbiter of meaning, they also offer complex accounts of the relationship between religion and modern order. Not only must modernity open itself to the resources of religion, but so too must religion open itself to an encounter with the modern. In other words, the encounter needs to be dialogical. Above all, the projects advanced by Sachedina, An-Na’im, Williams, and Benedict demand a certain attentiveness to the way in which religious traditions balance the true and permanent with the contingent and historical. 251 Charles Taylor captures this dialogical encounter well in describing how the dethroning of Christianity in the West, through the advent of modern liberal politics, made possible “what we now recognize as a great advance in the practical penetration of the gospel in human life.” 252 It took the external challenge from modern moral order for Christianity—and now, perhaps, we might also say Islam—to redefine its own ethical center. 253 In its encounter with law can be seen the fact that that theology stands both within and beyond history. 254 It is a dynamic Williams captures in arguing that an upholding of that which is universal about law “requires both a certain valuation of the human as such and a conviction that the human subject is always endowed with some degree of freedom over against any and every actual system of human social life.” 255 Theological jurisprudence can animate this project, while also learning from it.

A rethinking of the secular will take different forms. What unites An-Na’im, Sachedina, Williams, and Benedict, however, is a common

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247. See generally id.
248. See generally id.
249. See generally Williams, supra note 24, at 272.
250. See generally Address to Italian Catholic Jurists, supra note 25.
251. See SACHEDINA, supra note 23, at 11; AN-NA’IM, supra note 18, at 3-4; Williams, supra note 24, at 263-64; see Address to Italian Catholic Jurists, supra note 25.
253. Id. at 18-19.
254. Id.
255. Williams, supra note 24, at 272.
recognition that religion needs the secular and the secular needs religion.\textsuperscript{256} The place for religion must be found neither above nor below the secular. Rather, creative possibilities for imagining the role of law are to be found in religion moving through modernity—critically engaging and finding a voice within the world modernity has wrought. The problem, in other words, is not with the secular state as such. All of these authors accept the basic legitimacy of the liberal secular model, with its commitments to rule of law, human rights, pluralism, and religious freedom.\textsuperscript{257} The problem is with regnant understandings of the secular state, particularly its relationship to religion and religious meaning.\textsuperscript{258} In various ways, these authors complicate the secular through the critical and constructive resources of theology. The application of these projects to law and lawyering will depend on the legal system, the cultural context, and the religious tradition. This is a matter of prudential judgment. Regardless, the way forward will require constructing systems and norms that avoid both the negation of religion by secular law and the negation of secular law by the religious. Capturing this tension marks the beginning of a just and well-ordered secular order.\textsuperscript{259}

\textsuperscript{256} See SACHEDINA, supra note 23, at 11; AN-NA`IM, supra note 18, at 3-4; Williams, supra note 24, at 263-64; see Address to Italian Catholic Jurists, supra note 25.

\textsuperscript{257} See SACHEDINA, supra note 23, at 4; AN-NA`IM, supra note 18, at 4; Williams, supra note 24, at 262; see Address to Italian Catholic Jurists, supra note 25.

\textsuperscript{258} See Address to Italian Catholic Jurists, supra note 25.

\textsuperscript{259} Id.