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Some notes on *The Impossibility of Religious Freedom and Toleration in A Secular Age*

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As my contribution to this conference on “Religion and the Constitution,” I would like to share the perspective of a political theorist working to understand the historical and theoretical configuration of modern secularism. In this line of research, I find myself in closer dialogue with scholarship in the fields of the history of political thought, religious studies and cultural anthropology, but my hope is that by formulating some familiar problems in perhaps slightly different terms, I might be able to stimulate discussion. My observations come under three headings, which I place upfront here in stark, tendentious, and hopefully provocative form:

Point 1. “Religion” is not only *difficult* to define, but rather for historical, political and conceptual reasons, it *cannot* satisfactorily serve as a common marker for the traditions generally subsumed by it.

Point 2. “Secularism” is not adequately understood as the mere absence of religion, but must itself be understood as a set of discourses and practices to be subjected to theoretical, theological, and anthropological analyses as any “religious” tradition.

Point 3. Despite intentions to separate church and state, “the religious” and “the secular” regions of life are locked in a constant relation and share a porous boundary. While courts must, indeed, take part in negotiating this boundary, that activity will necessarily be more pragmatic and political in nature than principled and intellectual. The very idea of separation may be worth reconsideration.

I will orient my discussion around two relatively recent texts, and one quite old one--Winnifred Sullivan’s improbably influential *The Impossibility of Religious Freedom* (2005), and Charles

Taylor's currently unavoidable *A Secular Age* (2007), and John Locke's "Letter Concerning Toleration" (1689)--to develop these points a bit further for discussion.¹

Point 1. The concept of "religion."

Scholars working in the field of religious studies have developed a substantial body of literature developed over the last four decades that problematizes the category of religion: this literature stretches roughly from Wilfred Cantwell Smith's *The Meaning and End of Religion* (1962) to Tomoko Masuzawa's *The Invention of World Religions* (2005), and is doubtless growing as we speak. To reduce it to a few short phrases, the problem is this: the concept of "religion" developed by modern scholarship fits modern protestant traditions and sensibilities, but it does not fit practices and sensibilities formed outside that particular historical conjunction, i.e. most of the world's "religious" traditions. One conclusion is that subsuming the multiplicity of traditions and sensibilities dispersed across the globe under the concept of religion leads to mistaken judgments.

Rather than pursuing that literature in depth, let me try to draw out some of its implications for thinking about "religion and the constitution" by turning to Sullivan's text. *The Impossibility of Religious Freedom's* immediate task is to document the proceedings of *Warner v. Boca Raton* in the US District Court of Southern Florida in 1999. The *Warner* trial lasted only five days and concerned a small number of memorials erected by individual grave owners within a cemetery managed by the Boca Raton's City Park Department. The cemetery's regulations limited memorials to flat plaques, but as Sullivan describes the matter, "a practice grew up in the Boca Raton Cemetery over the course of a number of years from the mid-1980s to the mid-1990s in which individual owners decorated graves above the ground with various objects that did not conform to [these] regulations. . . The *Warner* case was a class action brought on behalf

¹ While it's not clear what influence Sullivan's text has had on the trajectory of American constitutional jurisprudence, or on the study of constitutional law, I should mention that it has become a common point of reference in many discussions of the legal face of modern secularism for many scholars working in the humanities and social sciences.

of the owners of these graves (17),” which sought to bar the city from removing the non-conforming memorials. Sullivan frames the legal problem as one of discriminating between merely personal choices subject to strict regulation, in this case what would be construed as “a personal preference” (69) enacted by erecting memorials at grave sites, and the dictates of religious traditions worthy of protection.² As Sullivan condenses the point: the Constitution’s establishment clause implicitly charges the court with defining protected religious practices, but “to define is to exclude, and to exclude is to discriminate” (101). What strikes me as the most important part of this text, however, is not its characterization of constitutional law, but its problematization of the concept of religion within that context.

As Sullivan puts the point, quite directly, her “book is intended, at the simplest level, to show that ‘religion’ can no longer be coherently defined for the purposes of American law” (150). It makes this case by putting forward two kinds of argument: First, the concept of religion bears a distinctively protestant Christian inflection in both the context of modern scholarship to which I have alluded, but also in legal contexts; this means in short that despite the aim of disestablishment, protestant Christian religiosity is privileged over other traditions and sensibilities. In the *Warner* trial, this meant in practice that the presiding judge discounted expert testimony about practices in the eastern orthodox church for not tallying with his own understanding of Christianity.³ Such a procedure is but one concrete instance of the pervasive

² “What the plaintiffs chose to do at these gravesites, the City argued, was personal, rather than religious, because the particular actions were not compulsory – that is, they were not specifically demanded of them by their religions and they were not central to the integrity of their religious traditions” (35).

³ Sullivan’s account of the proceedings details how the biases of “a reformed evangelical piety,” which shapes and limits the American understandings of religion, and which is inscribed within popular and legal discourses, emerged within the *Warner* trial. Sullivan recounts as follows, for example, the presiding judge’s rebuttal of expert testimony by a priest of the Romanian Orthodox priest and professor of early church history, John McGuckin: “What had impressed the rest of us – McGuckin’s skillful invoking of the practices of the early church and evident concern with representing the religious sensibility of the Catholic and Orthodox traditions – apparently left the judge unimpressed. Ryskamp, in his oral opinion, continued to exhibit a highly protestant religious sensibility: ‘I don’t know how much I would recognize Dr. McGuckin’s expert opinion. . . I don’t need any authority to say that I’m the expert and I will give you the opinion. . . [Referring to McGuckin’s testimony,] that’s an unusual attitude. I don’t know where he gets that from Catholicism.’ . . . Ryskamp relied on his own, largely mistaken, ‘knowledge’ of Catholic teaching, rather than McGuckin’s” (93). What comes into focus here

biases scholars now argue are encoded within all currently operative concepts of “religion.” Second, while the free exercise of a wide range of protestant Christian denominations might be accomplished with relative ease, precisely because these modes of religiosity focus on the private claims of conscience, claims of other forms of “religion” cannot be guaranteed insofar as they are often public, and often mutually conflicting.⁴

To follow out these arguments in the context of the *Warner* case seems to do something more than to re-discover a generic tension between the establishment and exercise clauses. In this connection, it may be more important to note that the case turns on rites of burial and mourning. Such rites surely have claim in some sense to the status of “religious” practices; a concept of religion, it seems, should cover such prevalent and significant rites. While it would seem that burial and mourning must certainly fall within the category of religion, however, they are not readily reducible to matters of “conscience” or “expression.” What comes to the fore, here, are some of the consequences of the inadequacy of any concept of religion: while it includes certain traditions and practices, it will of seeming necessity exclude others that seem nonetheless worthy of inclusion.

Point 2. The concept of “secularism.”

The core argument of Charles Taylor’s *A Secular Age* runs as follows: what we understand as a modern western secular sensibility does not emerge from the rejection, or “subtraction,” of an earlier religious sensibility; it emerges instead as a reconfiguration of western Christianity in which belief becomes aware of itself, and therefore reflective about itself. While there are a number of points in Taylor’s argument that I do not accept, I find it quite useful for pushing a general argument: “secularity” is a concrete ethical and epistemological stance, comparable in that sense to any other mode of “religiosity.” It seems

are not only the limitations of modern legal discourses, or the conflicts of authority performed in the courtroom between academic, religious and legal discourses, but the heightened ethical dimensions and political dimensions involved in judgments about the content of religion.

⁴ As Sullivan puts this condition, “We live increasingly in a world of diaspora religious communities in which all religions are everywhere, in which all religions everywhere are governed by secular legal regimes, and in which all religions everywhere are being reinvented by their adherents to suit new circumstances” (3).

saying a few more words about the difficulty of articulating the substance of secularity, as well as about the desirability of being able to do so.

Most of the time, the word “secular” is used to indicate that something is *not* “religious.” The *Oxford English Dictionary*, for example, notes that the secular is “Chiefly used as a negative term, with the meaning *non-ecclesiastical, non-religious, or non-sacred.*” And that usage is serviceable enough in ordinary circumstances – one is in such cases much like Justice [Potter] Stewart was when called upon to define pornography. Stewart rather famously demurred in that instance. He said that he would not attempt a definition. But, he said, “I know it when I see it,” and he said that what was before him in the case at hand, “is not that.” Now the courts have a much more ample, if not yet adequate, vocabulary for speaking about religion; but if you’ll forgive the somewhat unlovely analogy, for the most part, in everyday circumstances, for the purposes of identification, we tend to approach religion much as Justice Stewart approached pornography: we know it when we see it, and we know that secularity “is not that.” It’s good enough for many everyday situations, but for the purposes of analyzing complicated issues, addressing hard cases, or working through contentious political problems, this kind of definition is unfortunately not very useful at all.

It turns out to be quite difficult to give a consistently satisfying account of what “secularity” – or the condition of being secular – is. When theorists try to give a more ambitious answer than the kind attempted by Justice Stewart, they are often inclined to say that the capacities to *distance oneself from, reflect upon* and *criticize* something – a text, a work of art, an argument, or a passion, for example – that the capacities for disinterested criticism *are the same capacities* that allow us to be secular. In other words, it is often suggested that secularity entails mature, self-directed, independent critical thought. In the more specific context of political theory, “secular” often describes a particular kind of role we are called to play in certain circumstances; for example, when we are called upon to deliberate publicly we must be secular, or when we are called upon to discharge the duties of public office we must likewise be secular. Secularity in this sense characterizes a more universal or more neutral footing that we must attain to in certain situations, but it is a stance that need not be adopted at all times.

Both of these definitions are important and appealing, but neither is without limitations and problems. For example, if critical thought is secular, how can one claim that the elaborate – and critical, to say the least – Biblical commentaries of Talmudic scholars are not secular? For

that matter, are the highly methodical, textually based, and intellectually rigorous procedures employed in Islamic law secular? It seems that they are both reasonable and critical, but certainly not secular in any recognizable sense. Likewise, if one sketches secularity as a kind of public stance or role, is it sufficiently satisfying to say that a civil servant can and will play this role without any reference to the religious commitments that inform the rest of his or her life? Is it satisfying to say that one must adopt a restrictive and limiting type of role or persona whenever we speak or act politically? These questions have easy answers, and, indeed, it's well that they open hard-fought debates.

The harder you press such problems, however, the more complicated they become. Rather than asking about the essence of the secular, it might seem sensible to think of the secular as the outcome of an historical process. According to the general theory of secularization developed by sociologists, after a fractious period of reformation and religious war, secular modernity as we now understand it emerged as the church receded from public life, as the belief in God became a matter of private significance rather than public importance, and as this belief in general declined. This approach produces a satisfying answer, and it held a great deal of sway throughout much of the twentieth century. But there is one key problem with this theory – it didn't anticipate, and cannot account for the persistence of public religions in modernity that seems so clear now; a persistence that calls for discussion under the rubric of conferences such as this on "religion and the constitution." As so many people these days seem to agree – a leading characteristic of contemporary politics is the return of religion; religion never withered away as Max Weber suggested it would; in fact, religion is back – some have said that it is back with a vengeance. Indeed, the strict Weberian avenue of thinking about modernity as the end point of a process of secularization itself seems to be coming to a close.

So much for a survey of the common ways of thinking about the secular. I would propose here some less common, but potentially useful ways of thinking about secularity: secularity is an ideal that a large part of social--and legal--theory remains deeply invested in. Secularity is an ideal that many of us hold on to in order to address the very real problem of religious pluralism and the often bloody political conflicts to which it can contribute. Secularism is in large part a set of political practices that vary according to context – these practices are different in France, the United States, India, and Egypt, for example. These practices are employed provisionally and pragmatically to negotiate a sustainable line between

what is religious and what is not religious for the purposes of establishing and maintaining certain types of social order. The secular, in other words, is produced and sustained by political institutions and public contestation, and the nature of the secular is shifting in contemporary politics. One of the most important conclusions reached in my own research is that it is useful to de-essentialize the idea of secularity: it may be useful to say that secularity is a product of politics, of power, and of discourse—legal, political, theoretical, and so forth—; and to suggest that the stances one takes toward the secular have important, concrete political and ethical significance.

Point 3. Negotiating “The Religious” and “The Secular”

Given the instability of the categories of “the religious” and “the secular,” would it be worthwhile to ask some questions again, in very fundamental ways, about how we understand secularism as the imperative to separate church and state? There has always been empirical evidence of the entanglement of government and religion, but how can this entanglement be acknowledged theoretically, and outside the paradigm of establishment? On this score, it would be worthwhile first to take stock of contemporary, or quite recent, theoretical accounts of secular politics: One might, for example, begin with Robert Audi’s “The Separation of Church and State and the Obligations of Citizenship,” proceed to John Rawls’s “The Idea of Public Reason” in *Political Liberalism* (1993), and conclude with the elaboration and emendation of this argument by Jürgen Habermas in essays such as “Religion in the Public Sphere: Cognitive Presuppositions for the ‘Public Use of Reason’ by Religious and Secular Citizens,” in *Between Naturalism and Religion* (2008). Surveying once more the historical quartet of American documents—following Madison’s hand in his “Memorial and Remonstrance,” and the bill of rights, and Jefferson’s hand in Virginia’s act for religious freedom, and his letter to the Danbury Baptists—would likewise be indispensable. In some senses, remarkably, all of these texts concur in a quite general sense in their emphasis upon the necessity of separating church and state, and they hearken in this sense to the still order lineage of seventeenth century, Anglo-Euro-American disputes about the parameters of religious toleration. In a relatively firm sense, these arguments all place stock in something quite the formulation of John Locke’s “Letter

Concerning Toleration,” by insisting that it is “above all things necessary to distinguish exactly the Business of Civil Government from that of Religion.”

There would seem to be a strong presumption against the utility of trying to re-open a conversation about the separation of church and state, were it not for three points: first, that “church” and “religion” fail to adequately map the phenomena they are intended to cover; second, that it is eminently unclear what a “secular state” might be, unless it would be a state that stands in a contested relation to “religion”; and third, that certainly Locke’s “Letter,” and arguably many of the arguments that follow it, cannot be reduced to the simple claim that it is necessary to separate religion from government. While there is no space here to work out the argument adequately here, consider that the opening sentence of Locke’s “Letter” states his claim “that toleration” is “the chief characteristic mark of the true Church,” and continues to its conclusion by developing a religiously/scripturally inflected argument for the partial and contingent separation of church and state. Emphatically, let me say that I’m not suggesting a return to established churches; I would like, however, to suggest that some of the ways in which our inherited theoretical paradigms--or, at least, as they are often received--, in particular those intended to shore up a faltering distinction between “the religious” and “the secular” may be worth dramatic retooling.