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Dialectics of the Right to Freedom of Religion or Belief

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> We inhabit a *nomos* – a normative universe …. [in which] law and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse – to be supplied with history and destiny, beginning and end, explanation and purpose. And every narrative is insistent in its demand for its prescriptive point, its moral.[1]

I. INTRODUCTION

In his Foreword to the 1982 Supreme Court Term, Robert Cover memorably explored the reasoning of the U.S. Supreme Court in *Bob Jones University v. United States*.[2] At issue in the case was the right under the Constitution's Religion Clauses of a private university, established "to conduct an institution of learning … giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures," to deny admission to applicants engaged in an interracial marriage or known to advocate interracial marriage or dating. Prior to 1970, the Internal Revenue Service had granted tax-exempt status to private schools without regard to their racial admissions policies. But on the basis of a "national policy to discourage racial discrimination in education," the IRS decided in 1970 that it could no longer justify allowing tax-exempt status to private schools that practiced racial discrimination and revoked Bob Jones University's tax-exempt status.

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1. Robert Cover, "The Supreme Court, 1982 Term—Foreword: *Nomos* and Narrative," 97 *Harvard Law Review* 4, 4-5 (1983).

2. 461 U.S. 574 (1983).

Delivering the opinion of the Court, Chief Justice Burger held that a compelling government interest "in eradicating racial discrimination in education" substantially outweighed whatever burden the denial of tax benefits placed on the university's exercise of its religious beliefs. The political authority exercised by the IRS in interpreting the tax code to reflect this policy was not therefore unconstitutional.

In reaching this conclusion, the Chief Justice relied on two interrelated doctrinal propositions to reject the claim to religious liberty made by the university under the Religion Clauses of the First Amendment. The first proposition concerned the nature and scope of the right to religious liberty:

> This Court has long held the Free Exercise Clause of the First Amendment to be an absolute prohibition against governmental regulation of religious beliefs. As interpreted by this Court, moreover, the Free Exercise Clause provides substantial protection for lawful conduct grounded in religious belief.[3]

The second proposition concerned permissible grounds for limiting this right for reasons of compelling "public policy":

> However, '[n]ot all burdens on religion are unconstitutional …. The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.' On occasion this Court has found certain governmental interests so compelling as to allow even regulations prohibiting religiously based conduct …. Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets.[4]

The ambiguities internal to this dualistic structure are instantly familiar to any student of religious freedom jurisprudence, whether in national or international law. The first dilemma for the Court was how to address the constitutional relationship between the state and a *paideic* religious community (the central concern in Cover's Foreword,[5]) in this

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3. *Bob Jones University*, 461 U.S. 574, 603 (1983) (internal citations omitted).

4. *Ibid*.

5. In the "paideic" world of the *nomos*, law is a resource in the larger effort of a community to endow life with meaning. As an ideal-type, it suggests: "(1) a common body of precept and narrative, (2) a common and personal way of being educated into this corpus, and (3) a sense of direction or growth that is constituted as the individual and his community work out the implications of their law." This is a vision of a "strong community of common obligations" characteristic, for example, of Talmudic law and Christian conceptions of the Church where reciprocal

case a conservative Evangelical university. This raised a host of contested questions which ultimately implicated the normative foundations of the American constitutional order itself.

In this constitutional *nomos*, the Establishment Clause stipulates the prescriptive relation between the state and "religion." The key concept in the political imaginary is "religious disestablishment." Unlike in Spain or Italy, there can be no concordat between the state and federations of religious institutions, and unlike in many Muslim majority countries there can be no recognized State or dominant religion or set of recognized minority religions. Most pertinently, and in direct contradiction to the English constitution, there can be no official or established Church.[6] Rather, religion in America must be "free": a matter of essentially private life and personal conviction and belief. As James Madison in 1785 memorably expressed the idea:

> [W]e hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.[7]

On this account, a particular conception of the true nature or "essence" of religion is understood as *prior* to and ineluctably entangled with the right to "free exercise" under the Constitution. This essence encompasses a notion of "religious belief" whose location is internal to the being of a distinct religious subject: the individual for whom religion is understood on two levels simultaneously: first, theologically as "interiorized" in terms of individual "belief or conscience;" and second, constitutionally as "freely chosen" in terms of the fundamental right to subjective authority.

This is a recognizably Protestant conception of religion: the idea that "conscience was directly bound to obey and follow God and not men: a theory of the free and at the same time unfree conscience (as the

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obligations flow from commitment, not coercion, because people recognize the needs of others and respond to them. Cover, *supra* n. 1, at __.

6. American religious pluralism had its origins within the British Empire which made any notion of a common Church in the North American colonies an historical impossibility: *see* Evan Haefeli, "Toleration and Empire: The Origins of American Religious Pluralism," *in British North America in the Seventeenth and Eighteenth Centuries* (Stephen Foster ed., 2013).

7. James Madison, Memorial and Remonstrance Against Religious Assessments (June 20, 1785).

'work of God,' as Luther had said)."[8] Viewing religion as *belief* or *conscience* is recognizably modern and Christian because "it emphasizes the priority of belief as a state of mind rather than as constituting activity in the world."[9] In this respect, the *object* of the right to religious freedom is, at its core, a conception of religion understood primarily as "a set of beliefs in a set of propositions (about transcendence, causality, cosmology) to which an individual gives assent."[10] In modern religious freedom jurisprudence, this is the *forum internum*: the right of the individual subject to "have or adopt" a religion or belief that is considered to be absolutely protected from interference by the law, i.e., is nonderogable and not subject to limitation by the state.[11]

Recall again Chief Justice Burger's statement in *Bob Jones University*: "This Court has long held that the Free Exercise Clause of the First Amendment to be an *absolute prohibition* against governmental regulation of *religious beliefs*."[12] Some version of this proposition is present in all cases arising under the Religion Clauses.[13]

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8. Rainer Forst, *Justification and Critique: Towards a Critical Theory of Politics* 189 (2014).

9. Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* 47 (1993).

10. Saba Mahmood, "Can Secularism Be Other–wise?," *in Varieties of Secularism in a Secular Age* 283 (Michael Warner, Jonathan VanAntwerpen and Craig J. Calhoun eds., 2010). *See also* Saba Mahmood, *Religious Difference in a Secular Age: A Minority Report* 15 (2016) ("the concept of religion as belief is itself part of a normative secular framework in which religion is disinvested of its materiality.")

11. The conceptual division between a *forum internum* and *externum* is present in all the modern international human rights instruments: *see, e.g.*, International Covenant on Civil and Political Rights art. 18(1), Dec. 16, 1966, 999 U.N.T.S. 171 ("Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice"); European Convention for the Protection of Human Rights and Fundamental Freedoms art. 9(1), Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 222 ("Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief"); American Convention on Human Rights art. 12(1), July 18, 1978, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 ("Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs").

12. *Bob Jones University*, 461 U.S. 574, 603 (1983) (my emphasis).

13. *See, e.g., Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) (internal citations omitted) ("The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all 'governmental regulation of religious beliefs as such.' The government may not compel affirmation of religious belief, punish the

Strikingly similar versions appear also in the jurisprudence of the European Court of Human Rights interpreting Article 9(1) of the ECHR.[14]

In the American political imaginary, this understanding of religion famously induced Tocqueville to observe that "[t]he Americans combine the notions of Christianity and of liberty so intimately in their minds, that it is impossible to make them conceive the one without the other." The result was that "there are things which religion prevents them from imagining and forbids them to become …. Religion, which never intervenes directly in the government of American society, should therefore be considered as the first of their political institutions."[15]

For present purposes, the critical point is that the Establishment and Free Exercise Clauses, and two centuries of associated constitutional rights doctrine,[16] are inextricably tied to and shaped

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expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma."); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons"); *Board of Education v. Barnette*, 319 U. S. 624, 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in … religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.")

14. *See, e.g., Kokkinakis v. Greece*, App. No. 14307/88, 260 Eur. Ct. H.R. (ser. A) ¶ 14 (1993) (Martens J) ("The basic principle in human rights is respect for human dignity and human freedom. Essential for that dignity and that freedom are the freedoms of thought, conscience and religion enshrined in Article 9 para. 1. Accordingly, they are absolute. The Convention leaves no room whatsoever for interference by the State. These absolute freedoms explicitly include freedom to change one's religion and beliefs. Whether or not somebody intends to change religion is no concern of the State's …"); *Leyla Şahin v. Turkey*, App. No. 44774/98, Eur. Ct. H.R., June 29, 2004, at ¶ 104 ("The Court reiterates that, as enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned …. That freedom entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion.")

15. Alexis de Tocqueville, *Democracy in America* 292 (J. P. Mayer ed., George Lawrence trans., 1969) (1851). For this reason, "politics is free to dance lightly on the surface of life only because everything fundamental is fixed below it. The American imaginary is determined outside of politics." William E. Connolly, "Tocqueville, Religiosity, and Pluralization," *in The Ethos of Pluralization* 163, 169 (1995).

16. *See, e.g. Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947) ("the 'establishment of religion' clause … means at least this: Neither a state nor the

within a background Protestant discursive tradition.[17] This tradition is metaphysical in its structure and combines a complex series of not only ontological but also theological claims within a rationalist discourse built upon the two core notions of subjective right and secular reason. It is to these two complex and elusive concepts we can now turn.

II. THE MODERN SUBJECT

The first core claim of religious freedom discourse is ontological in nature. Strictly speaking, the claim is not directly about religion *per se*. Rather, it concerns the *subject* whose religion it is, i.e. the individual for whom religion is an object of "belief" or "conscience" on the one hand, and "free choice" on the other. The notion today that the right to religious freedom is neutral towards "religion," or protects "all religions equally," is criticized in the literature across a wide array of disciplines. Rather, it is more accurate to say that the right to religious freedom purports to treat all *rights-holders* equally.

In this move, however, a seismic shift occurs in the relationship between conceptions of subjectivity, normativity (and its sources) and authority. The modern picture is ontologically grounded not in any divine conception of heteronomous religious authority, but in a knowing moral or rational subject viewed as the self-grounding *source* of normativity itself.[18] It is now the individual who, as a matter of right,

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Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.")

17. The notion of an historically evolving set of discourses embodied in the practices and institutions of a society and thus deeply embedded in the material life of its people is central to the conception of a discursive tradition:

> These discourses relate conceptually to *a past* (when the practice was instituted, and from which the knowledge of its point and proper performance has been transmitted) and *a future* (how the point of that practice can best be secured in the short or long term, or why it should be modified or abandoned), through *a present* (how it is linked to other practices, institutions, and social conditions).

Talal Asad, "The idea of an anthropology of Islam," *Occasional Paper Series*, Center for Contemporary Arab Studies (1986) at 14.

18. For Kant, enlightenment was the discovery of an exit, a "way out," a "process that releases us from the status of 'immaturity'" where religious authority takes the place of our conscience by a "modification of the preexisting relation linking will, authority, and the use of reason." Michel Foucault, "What is Enlightenment?," *in The Foucault Reader* 35 (Paul Rabinow ed., 1984).

decides for herself (as a matter of authority) questions of religion, conscience or belief (now viewed as an *object* of choice or assent).

In this series of reconfigurations, religion becomes *rationalized* in accordance with a distinctive normative model of religiosity as privatized belief in a set of creedal propositions to which an autonomous individual gives assent. This simultaneous rationalization and privatization of religion generates the distinctive and unstable co-imbrication of autonomy and belief as the "buffered" self chooses autonomously as a matter of moral right and believes freely as a matter of theological conviction.[19]

Virtually all contemporary accounts of the right to freedom of religion or belief trace the genealogies of this modern picture to the legacies of nominalism, the collapse of medieval scholasticism, and the ensuing intellectual influence of the Protestant Reformation, humanism, and the civil and philosophical Enlightenments.[20] As Michael Allen Gillespie has powerfully argued, the origins of the modern concept of right lie most centrally in the ontological individualism proclaimed against scholasticism by the nominalist revolution at the end of the medieval period.[21] For Gillespie, the nominalist revolution on the "problem of universals" provided a *schema* for an entirely new understanding of time and being.

Drawing drew upon Neoplatonic interpretations of Aristotle, what most centrally characterized the *via antiqua* of scholasticism was ontological realism: i.e. the "belief in the extra-mental existence of universals … [such that] species and *genera* were the ultimately real things and individual human beings were merely particular instances of these universals."[22] Such universals were "nothing other than divine reason made known to man either by illumination, as Augustine had

19. For discussion of the co-imbrication of autonomy and belief in religious freedom discourse, *see* Peter G. Danchin, "Islam in the Secular *Nomos* of the European Court of Human Rights", 32 *Mich. J. Int'l L.* 663 (2011).

20. The most prominent recent example is Charles Taylor, *A Secular Age* (2007). *See also* Ian Hunter, *Rival Enlightenments: Civil and Metaphysical Philosophy in Early Modern Germany* (2001).

21. It is for this reason that the tendency of much modern liberal rights theory to locate its origins and justification in eighteenth century (usually Kantian) Enlightenment thought is incomplete and misleading, especially as regards its theological origins and continuing dialectic entanglements.

22. Michael Allen Gillespie, *The Theological Origins of Modernity* 20 (2008).

suggested, or through the investigation of nature, as Aquinas and others had argued."[23]

This ontological realism had three main consequences: First, "nature and reason reflected one another" in a rational structure. Second, while God transcended his creation, he "was reflected in it and by analogy could be understood through it" with the result that "logic and natural theology could supplement or, in the minds of some, even replace revelation" (with obvious implications for modern natural law theory). And third, man was a "natural being with a natural end and was governed by the laws of nature" such that he "did not need Scripture to inform him of his earthly moral and political duties," although Scripture was "necessary to understand everything that transcended nature, including man's supernatural destiny."[24]

On the scholastic view, the ultimate source of normative order was divine and all rights, duties and obligations of man were defined internally to this order.[25] As Alasdair MacIntyre has argued, this conception of normativity, whether placed within a classical or theistic framework, had two dominant characteristics: first, some account of the essence of man as a rational animal; and second, some account of the human *telos*. The purpose of practical reason was therefore to "instruct us both as to what our true end is and as how to reach it."[26]

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23. *Ibid.*

24. *Ibid*.

25. Koskenniemi describes the main features of international law in medieval thought as follows:

> '[O]rder' was a natural state of affairs, existing by the force of creation and discoverable in the natural arrangement of things and men through faith or *recta ratio*. If doubt arose, it could always be dismissed by appeal to the Church's or the Emperor's authority. Behind this authority stood the Christian idea of a *civitas maxima* which both legitimized and constitutionalized it. Different institutions exercised powers in a system of mutual control, each submitted to legitimation proceeding 'downwards' from the highest commands of divine law.

Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* 56-7 (1989).

26. Alistair MacIntrye, "Why the Enlightenment Project Had to Fail," in *After Virtue: A Study in Moral Theory* __ (1981). In the case of ethics placed within a theistic framework of divinely ordained law, whether that be Aquinas in the Christian tradition, Maimonides in the Jewish tradition or Ibn Roschd in the Islamic tradition, the "threefold structure of untutored human nature, human nature as it could be if it realized its *telos*, and the precepts of rational ethics as the means of transition from

In the history of Western legal thought, this understanding of the normative grounds for law is illustrated as much by St. Thomas Aquinas's hierarchy of eternal, natural, human and divine positive law,[27] as by modern accounts of the emergence in the mid-seventeenth century of public international law and a new system of secular sovereign states.[28]

As Gillespie suggests, the realist ontology of scholastic thought was shattered by the *via moderna* of nominalism which viewed only individual things as *real* and universals as mere fictions: "words did not point to real universal entities but were merely signs useful for human understanding."[29] Reacting against the growth of Aristotelianism, including importantly the commentaries of the Islamic philosophers Avicenna and Averroes, nominalists such as Duns Scotus and William of Ockham emphasized the divine omnipotence of God giving birth to the conception of a voluntaristic as opposed to rational God. For Ockham, faith alone confirmed that God is omnipotent with the result that "every being exists only as a result of his willing it," while creation is radically particular and non-teleological — "an act of sheer grace."[30] Accordingly, there is "no immutable order of nature or reason that man can understand and no knowledge of God except through revelation."[31]

On Gillespie's reading, the nominalist revolution had three main ontotheological effects: First, God remained a *necessary* being (all other beings being contingent creations of His will), but the nature of God was fundamentally altered. The nominalist God was "frighteningly omnipotent, utterly beyond human ken, and a continual threat to human well-being," thus epitomizing "divine power and unpredictability rather

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one to the other, remains central to the theistic standing of evaluative thought and judgment." *Id.* __.

27. St. Thomas Aquinas, *On Law, Morality and Politics* (2nd ed., trans. Richard J. Regan, ed. William B. Baumgarth and Richard J. Regan, 2002) (On Different Kinds of Law).

28. This historical juncture at the time of the Peace of Westphalia in 1648 is said to mark the "great epistemological break" when religious medieval "unity" gave way to a secular system of "plural" territorially-limited sovereign states. Between the 16th and 18th centuries, this led to the emergence of what Koskenniemi has termed the "liberal doctrine of politics," the driving force of which was the attempt to "escape the anarchical conclusions to which loss of faith in an overriding theologico-moral world order otherwise seemed to lead." Koskenniemi, *supra* note 25, at 52.

29. Gillespie, *supra* note 22, at 14.

30. *Ibid.* 22.

31. *Ibid*. Human beings "thus had no natural or supernatural end or *telos.*" The result was that "the nominalist revolution against scholasticism shattered every aspect of the medieval world." *Id.* 14.

than divine love and reason."[32] The period of modernity arises as a complex series of attempts to find a way out of this metaphysical/theological crisis. In particular, the eighteenth century Enlightenment philosophy of Immanuel Kant would later figure centrally in modernity's search for just such a "way out."[33]

Second, the two great intellectual movements that arose in response – humanism and the Reformation – agreed on the premise but differed on which of the two realms of being, man and God, was ontically primary. Humanism "put man first and interpreted God and nature on this basis," while the Reformation "began with God and viewed man and nature only from this perspective."[34]

And third, the radical freedom of divine will gave new importance to human will. Luther accepted the premises of ontological individualism, but rejected the problem of the impenetrability of the nominalist God. Reconfiguring the relationship of human and divine will by viewing faith alone, as opposed to philosophy, as the will to union with God, i.e. right willing dependent on God, he was able to "transform the terrifying God of nominalism into a power *within individual human beings*," such that "God becomes the *interior* and guiding principle of [man's] life, or what Luther calls *conscience*."[35]

These profound effects of nominalism both underlie and ground the ontological claims of modern religious freedom discourse in making the individual the subject of the right and belief or conscience its object. For Martin Heidegger, the most decisive transformation from medieval thought to modernity is from Aristotle's *hupokeimenon* (the "underlying thing" or substance in a thing, i.e. that which is constant and real) to the Cartesian notion of the *subjectum* as *ego*:

> According to the metaphysical tradition from Aristotle onwards, every true being is a *hupokeimenon*. This *hupokeimenon* is determined afterwards as *subjectum*. Descartes' thinking distinguishes the *subjectum* which man is to the effect that the *actualis* of this *subjectum* has its essence in the *actus* of *cogitare* (*percipere*).[36]

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32. *Ibid.* 15.
33. *See supra* note 17 and accompanying text.
34. Gillespie, *supra* note 22, at 17.
35. *Ibid.* 33-34. (My emphasis.)
36. Martin Heidegger, "Metaphysics as History of Being," *in Nietzsche II, 1939-46* (vol. II) at 31.

The result is that since Descartes, the human "I"—with its new dimension of perceptive activity—has come to be the "subject" in metaphysics. This conceptual architecture generates the familiar ontological metaphysics of rights discourse in seeking to define the *essence* of religion as such, understood as what is common to all religious subjectivity.[37] On the basis of the brief genealogy sketched out here, this essence is broadly understood today under the category of "inner faith" or "belief."

III. SECULAR REASON

What is striking and maddeningly elusive is how this rights-based metaphysics simultaneously enfolds within it a second, theological claim regarding not the essence, but *existence* of all beings, understood as that which is the highest or supreme, all-founding being.[38] Following Kant's use of the term,[39] Heidegger argued that the entire history of Western metaphysics is "ontotheological" in structure in the sense that it makes two ambiguous and historically intertwined foundational claims: first, in ontologically grounding an understanding of beings "as such"; and second, in theologically legitimating our

37. The ontological claim involves a search for the most general ground of beings, i.e. what all beings share in common. This "exemplary being" is understood in terms of "that being beneath or beyond which no more basic being can be 'discovered' or 'fathomed.'" Iain Thomson, "Ontotheology? Understanding Heidegger's *Destruktion* of Metaphysics," 8 *International Journal of Philosophical Studies* 297, 301-2 (2000).

38. This second claim seeks to answer the question of "[w]hich being is the highest (or supreme) being, and in what sense is it the highest being?" The theological claim itself thus has two aspects in "striving to identify the highest or supreme being (the question of God), but [also] … to understand the being of God (that is, the sense in which God 'is', or the kind of being which God has)." The theological claim in this way "inquires into and would give an account (*logos*) of the existence of the *theion*, 'the supreme cause and the highest ground of beings'." *Ibid*. 302

39. Before Heidegger, Kant was the first to use the term "ontotheology". He distinguished between theology derived from reason on the one hand and revelation on the other. Within the category of the former ("reasoned theology,") he further distinguished between natural theology and transcendental theology. Natural theology was divided as between physico-theology and ethical/moral theology, while transcendental theology was divided between cosmotheology and ontotheology. For Kant, ontotheology was "the type of transcendental theology characteristic of Anselm of Canterbury's ontological argument which believes it can know the existence of an original being [*Urwesen*], through mere concepts, without the help of any experience whatsoever". Iain Thomson, *Heidegger on Ontotheology: Technology and the Politics of Education* 7 (2005).

changing historical understanding of the source or "totality" of these foundational claims.[40]

Heidegger's guiding idea is that in answering the question of reality's ultimate foundation, the metaphysical tradition establishes "both the fundamental and the ultimate conceptual parameters of intelligibility".[41] The result is that

> [a] series of metaphysical ontologies anchor our successive constellations of historical intelligibility, temporarily securing the intelligible order by grasping it from both ends of the conceptual scale simultaneously (as it were), both ontologically (from the inside out) and theologically (from the outside in).[42]

This second, theological strand of metaphysics seeks to explain and legitimate the ultimate source or foundation of rights discourse itself and its theological structure does not disappear in modernity's self-understanding of the transition from divine to secular conceptions of reason. Despite the ontological consensus on the individual as the modern subject of the right, the ontic differences discussed above between humanist and Reformation thinkers as well as between rival religious communities and confessions played a significant role in the devastating wars of religion that completely shattered Europe in the sixteenth and seventeenth centuries.

This set of theological debates was the precursor to the "civil Enlightenment" of the early modern period in Europe which predated the philosophical *Aufklärung* of Kant by more than a century. In response to the devastating wars of religion, the civil philosophers sought to desacralize the state and this led over time to both the churches losing their civil and political authority and the gradual spiritualization of religion in the form of individual "conscience and belief."[43]

Importantly, however, this conception did not rest on any form of subjective right of individuals against the State. Rather, for civil philosophers such as Christian Thomasius it comprised a right of the

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40. Martin Heidegger, *Being and Time* (trans. Macquarrie and Robinson, 1962).

41. Iain Thomson, "Ontotheology,' *in Interpreting Heidegger: Critical Essays* 109 (Daniel O. Dahlstrom ed., 2011).

42. *Ibid.*

43. Ian Hunter, *Rival Enlightenments: Civil and Metaphysical Philosophy in Early Modern Germany* 376 (2001) (arguing that in the civil tradition "it is religion and morality that define the private domain, their inward and unenforceable character defining the kingdom of truth," while the public sovereign domain is defined by the use of coercion to preserve social peace).

state against intolerant religious communities.[44] The juridical construction of religious freedom in the early modern period thus sought to establish political neutrality toward ultimate theological principles as the condition of establishing parity of legal treatment for rival religions as equally valid legal associations.[45] This marked a shift in the understanding of religious authority as Erastian control of churches by the State was effected to deny the coercive authority of religious institutions in enforcing the demands of conscience.[46] This was the condition of freedom in the newly emerging private sphere – a sphere defined, protected, delimited and increasingly regulated by the State itself.

In this sequence of moves it is important to see how, at the ontological level, normativity is now conceived in terms of radically individual beings while, at the ontic level, a radically free God retains authority in relation to such beings. Faith on this account is subjective, a matter of voluntary belief, not knowledge. This is what the "privatization" of religion refers to, although not yet its rationalization and loss of authority to the master modern principle of autonomy.

The crucial point for present purposes is that the nominalist ontology of radical individuality lies at the origin of the modern division between knowledge and belief. It was now possible to have *true belief* about God, and God's action, on the basis of God's own self-revelation as received by faith, but it is not possible to have *knowledge* of such matters. While man and God exist independently of our thinking about them, we can only have knowledge of the former. Well before

44. Negotiated and contingent relations between the state and different religious communities, groups and traditions is quite distinct from the notion of "a right" which implies a legal/moral relation between the state and an individual subject as rights-holder, as well as a background justification not only of the right itself but its distinctive function of holding others to correlative duties.

45. *See* Ian Hunter, "Religious Freedom in Early Modern Germany: Theology, Philosophy, and Legal Casuistry," 113 *South. Atl. Q.* 37 (2014);

46. Central to this strategy was the category of *adiaphora*: the old Stoic idea of actions that morality neither mandates nor forbids, which within Christianity was understood to refer to matters regarded as inessential to faith but nevertheless permissible for Christians or allowed in the Church. On this basis Thomasius declared "virtually the entirety of the visible church — all of its liturgies, sacraments and theological doctrines — to be morally indifferent with regards to salvation" while at the same time holding that "forms of worship were a matter of 'Christian freedom' to be left to the disposition of individuals or groups to the extent they posed no threat to social peace." Ian Hunter, "Religious Offences and Liberal Politics: From the Religious Settlements to Multi-cultural Society," 9 (2005).

liberalism then, the category of "conscience or belief" is contingent on the ontological individualism proclaimed by nominalism.

In contemporary theology, this thesis has been carefully expressed and elaborated in the work of John Milbank who identifies John Duns Scotus (1265-1308), and his notion of "univocity of being," as being the first major thinker to influence medieval thought away from Thomas Aquinas's "analogy of being." As Milbank argues:

> Now this [late medieval nominalist] philosophy was itself the legatee of the greatest of all disruptions carried out in the history of European thought, namely that of Duns Scotus who for the first time established a radical separation of philosophy from theology by declaring that it was possible to consider being in abstraction from the question of whether one is considering created or creating being. Eventually this generated the notion of ontology and an epistemology unconstrained by, and transcendentally prior to, theology itself.[47]

MacIntyre in *After Virtue* similarly observes that the Jansenist Pascal recognized that the Protestant conception of reason was at one with the conception of reason in seventeenth century philosophy and science. Reason no longer comprehended essences or transitions from potentiality to act, such concepts belonging to the despised conceptual scheme of scholasticism. Rather, reason was calculative and could assess truths of fact and mathematical relations, but nothing more.[48]

In anticipation of Hume, Pascal thus recognized that "a central achievement of reason is to recognize that our beliefs are ultimately founded on nature, custom and habit." But as regards ends, "it must be silent."[49] In retaining the negative aspects of this conception, "reason for Kant, as much as for Hume, discerns no essential natures and no teleological features in the objective universe available for study by physics."[50]

These shifts in the conceptualization of reason have significant implications for our understanding of the contemporary nature and limits of religious freedom jurisprudence. In any legal dispute involving

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47. *Radical Orthodoxy: A New Theology* 23 (John Milbank, Catherine Pickstock and Graham Ward eds., 1999).

48. MacIntyre, *supra* note 26, at __.

49. *Ibid.*

50. *Ibid.* Similarly, "Diderot, Smith and Kierkegaard reject any teleological view of human nature, any view of man as having an essence which defines his true end." *Id.*

claims not to religious belief *per se*, but to religious *traditions* such as *halakhah* or *sharia*—discursive traditions of religious knowledge, hermeneutics and practice—what is most at stake in such cases is ineluctably shaped by background assumptions concerning the ontology of the right itself. Does, for example, the meaning of the term "conscience" differ if considered internally to *halakha* or *sharia*-based traditions of thought and deliberation?[51] Further, if "religion" is the proper object of the right, how can we speak meaningfully today of entire discursive traditions encompassing their own sources, justifications and hermeneutics and thus conceptions of religious identity, membership and practice as being the object of such a right?

If for the scholastics God was the source of normative order and man's rights were conceived internal to that order, following the nominalist revolution either man or nature became the ontological source of secular right and God, now understood as radically free, stood in an entirely new relation to this normative order. This conceptual shift is well illustrated in Locke's empiricist epistemology which led to a conception of civil power as directed to the regulation of things that can be "objectively known," whereas religious belief was relegated to the status of "subjective conviction."[52]

By the eighteenth century, however, this early modern civil philosophy was gradually superseded by the Kantian philosophy of the Enlightenment. Locke's idea of religion as a subjective belief which is unable to be coerced because located in a private mental space marks the beginning of a new religious psychology and corresponding shift from the privatization of heteronomous religious authority to its normative interiorization and subordination to the rationalist principle of autonomy.

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51. Regarding *halakha*, see *R (on the application of E) v. The Governing Body of JFS*, [2009] UKSC 15, [2010] 2 A.C. 728 (S.C.), discussed in Peter G. Danchin and Louis Blond, "Unlawful Religion? Modern Secular Power and the Legal Reasoning in the *JFS* Case," 29 *Maryland Journal of International Law* 414 (2014); regarding *sharia*, *see Refah Partisi v. Turkey*, App. No. 41340/98, 37 Eur. H.R. Rep. 1 (2003), discussed in see Danchin, *supra* note 19.

52. For Locke, the neutrality of civil law with respect to religion and the truth of particular religious practices was guaranteed epistemologically by relegating religious belief to the "realm of speculation." It was the "discursive separation from other-worldly concerns" that therefore underpinned the capacity of civil discourse to convert incommensurable expressions of religious "difference" into a politically indifferent "diversity" of religious practices. Kirstie McClure, "Difference, Diversity, and the Limits of Toleration," 18 *Political Theory* 361, 385 (1990).

As Talal Asad suggests, it is the idea that the *mind* is the impregnable bastion of true religious experience that provides the modern view with its plausibility, i.e. that coercion of religious belief is irrational because impossible. Given that force can only secure an insincere profession of faith and outward conformity, true authenticity rests on the modern subject's ability to *choose* her beliefs and act on them.[53] This conception of belief as singular and inaccessible to other locations reinforces the idea of an autonomous "buffered" subject able to separate itself from objects by contemplation, reasoning and interpretation and choose from available beliefs.[54]

This intellectual disposition and sensibility prefigures the modern liberal tradition whereby the public sphere is reconceived in terms of a moral theory of justice and religious liberty grounded in a complex and unstable notion of a subjective right to freedom of thought, conscience and belief. This conception derives most centrally from Kant's transcendental idealism which simultaneously *rationalized* religion and *sacralized* reason in a morally grounded State.[55] Consistent with the ontotheological structure of metaphysics, the former grounds the core ontological claim of modern religious freedom discourse, while the latter justifies the ultimate conceptual parameters of intelligibility in a radically new conception of secular reason.[56]

If in the early modern period God was understood as radically free, now freedom itself was reconceived as the source of normative order (autonomy in the form of the self-legislating moral law) and God became understood as an *idea* or *concept* internal to practical reason

53. Talal Asad, "Free Speech, Blasphemy, and Secular Criticism," *in Is Critique Secular? Blasphemy, Injury, and Free Speech* 44-5 (Talal Asad, Wendy Brown, Judith Butler and Saba Mahmood eds., 2009).

54. Taylor, *supra* note 20, at 35-95 (discussing the shift from the "porous" self, vulnerable to external forces, spirits and demons, to the new Reformed "buffered" self, a "disciplined and free agent living in a progressively disenchanted world.")

55. *See* Danchin, *supra* note 19, at 710-15.

56. The modern drive to secure the authority of secular reason in the public sphere has both a visceral and political sense: visceral in reiterating the "Christian and Kantian demands to occupy the authoritative place of public discourse," and political in response to the fear that a "non-Kantian, religiously pluralized world would fall into either disorder or religious tyranny if its participants did not endorse a single standard of rational authority, regardless of the extent to which such a standard can in fact be secured transcendentally." William Connolly, *Why I Am Not a Secularist* 38-9 (1999).

itself (pure rational faith).[57] Religion was thus now *subject* to the panoptic demands of morality and the *forum internum* was reconceived from a sphere of non-interference in freely chosen conscience to a sphere of autonomous choice of any belief at all (religious or not).

As William Connolly notes, the idea of a "self-sufficient public realm fostering freedom and governance without recourse to a specific religious faith" encountered from the start three major dilemmas. First, the equation of religion with belief or conscience clearly derives form a Western Christian genealogy that is at odds with the core tenets of non-Western religious traditions such as Islam in which Muslims regard themselves more as claimed by a religious community they have not chosen and which foreground strongly the role of embodied practices within religious life.[58]

Second, the tendency to elide freedom of conscience with autonomy fatally undermines the normative basis for according freedom of conscience in the first place.[59] And third, the Kantian question of how to secure secular authority in the public sphere remains haunted by the twin charges of abstraction (how any conception of reason can have standing to judge the limits and competence of reason itself) and hypocrisy (the apodictic recognition of morality in virtue of a shared universal rationality being seen instead as merely a "secondary formation reflecting the predominant Christian culture in which it is set.")[60]

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57. "The commanding subject is God [where] … this commanding being is not outside man as a substance different from man." Kant, *Opus Postum*. For Insole, this is a quasi-theological proposition: "our giving to ourselves the moral law has the mark of divinity, such that, in a sense, we are God-like in this function. We have a sort of *theoisis*, where human beings become transformed in the image of God; but where God disappears into the human being as this happens." This *theoisis* in fact "eclipses God, rather than being an increasing participation in God." Christopher J. Insole, *Kant and the Creation of Freedom: A Theological Problem* 170 (2013).

58. As scholars such as Saba Mahmood argue, the result is that "secular epistemologies cannot grasp the way that Islam articulates religious values, misconstruing both the Islamic subject and the public meanings of its religious practices."

59. *See* Michael J. Sandel, "Religious Liberty: Freedom of Choice or Freedom of Conscience," *in Secularism and Its Critics* 84-5 (Rajeev Bhargava ed., 1998) (observing that "[t]he respect this neutrality commands is not, strictly speaking, respect for religion, but respect for the self whose religion it is, or respect for the dignity that consists in the capacity to choose one's religion freely," with the result that "[n]ot all religious beliefs can be redescribed without loss as 'the product of free and voluntary choice by the faithful'").

60. In claiming that freedom consists in the acceptance of what reason dictates as duty, Kant made three critical philosophical moves: first, he elevated a generic

IV. CONCLUSION: DIALECTICS OF THE RIGHT

The genius of modern religious freedom discourse is to combine these two metaphysical strands of ontology of the modern subject and theology of secular reason within a single concept of "right." Accordingly, the two guiding ideas of modern doctrine are, on the one hand, religious freedom conceived as a universal human right and, on the other, the neutrality of the public sphere towards religion, with each thesis axiomatically defined in terms of the other.

The secular neutrality of the political order is thus said to be secured by the guarantee to protect the universal right to religious liberty. In this move, the disciplinary structure and secular practices of the public sphere combine to *produce* the believing subject and concomitant post-Protestant conceptions of religion (especially in relation to scripture and rituals) and religious subjectivity (especially as regards moral and ethical sensibilities). Conversely, the universality of the right is said to be secured by the neutrality of the public sphere towards religion. This requires the state ceaselessly to recognize or limit claims regarding the manifestation of religious belief and practice which in turn generates the distinctive entanglement of religion and law in different domains of the public and private spheres.

This double-structure necessarily generates two interrelated paradoxes. For the reasons discussed above, by defining the secular neutrality of the public sphere in terms of the right to religious freedom, the authority of religion is privatized relative to state authority and its normativity interiorized relative to individual subjectivity. Second, and as a result, religious freedom is secured through subordination of religion to the secular power and public reason of the sovereign state. By defining the meaning and scope of freedom protected by the right in terms of secular neutrality, the claims of individuals and communities

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Christianity ("rational religion") above sectarian faith, anchoring it in a "metaphysic of the supersensible" that binds moral agents simply in virtue of their rationality; second, in order to secure the authority of moral philosophy over theology, he reduced moral judgment to practical reason alone; and third, while he retained the "command model of morality of Augustinian Christianity," Kant shifted the "proximate point of command from the Christian God to the moral subject itself." Connolly, *supra* note 56, at 31-3. *See further* Danchin, *supra* note 19, at 683-5.

to religious liberty are in fact limited through a continuing praxis of legal recognition and regulation.[61]

We see this dialectic at work in the reasoning of Chief Justice Burger in *Bob Jones University*. Nothing permits the government to interfere with or regulate the university's "religious beliefs," which remain absolutely protected from state intervention in the private sphere. Consistent with the constitutional right to free exercise, nor will the government restrict "lawful conduct grounded in religious belief." But where an "overriding governmental interest" can be shown, the state may justify a limitation on religious liberty, including even "regulations prohibiting religiously based conduct."[62]

This oscillating dialectic between the neutrality of secular reason and universality of individual right defines how modern doctrine functions as a technology of secular governance and is integral to the power of the modern nation-state.[63] We see this in three key areas. First, in the foundational distinction between the *forum internum* on the one hand, defined as the locus of religious belief and conscience ostensibly protected absolutely by law, and the *forum externum* on the other, where the outward expression or manifestation of this belief is subject to state regulation and limitation.

Second, in debates concerning the proper subject of the right and whether this can include collective subjects and actually-existing systems of religious law adhered to by both majority and minority religions.[64] And third, in cases where conflicts of value arise between two or more claims internal to the right to religious liberty itself, i.e.

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61. For a comprehensive discussion of this legal praxis, *see* Danchin and Blond, *Unlawful Religion?*, *supra* note 51.

62. *See supra* note 4 and accompanying text.

63. Peter G. Danchin, "Religious Freedom as a Technology of Modern Secular Governance," *in Institutionalizing Rights and Religion: Competing Supremacies* (Leora F. Batnitsky and Hanoch Dagan eds., 2017).

64. Note the latent uncertainty in *Bob Jones University* whether a private religious university, as opposed to its individual members or a "Church", can assert a right in the *forum internum* to religious liberty. The Court states that "[w]e deal here only with religious schools - not with churches or other purely religious institutions; here, the governmental interest is in denying public support to racial discrimination in education." This indeterminacy regarding the proper subject of the right is a recurring dilemma in Religion Clause cases. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. 171 (recognizing a "ministerial exception" to antidiscrimination law in relation to religious institutions).

where both sides to a dispute frame their arguments as a claim to religious freedom.[65]

Not only will the nature and scope of the *forum internum* be fiercely contested in all such cases, but so too will any restrictions on the manifestation of religion in the *forum externum* under rubrics such as "public order" (reflecting the early modern "civil Enlightenment" genealogy of securing social peace between rival religious factions) and the "rights of others" (reflecting the later philosophical Enlightenment genealogy of Kantian autonomy).

What is increasingly recognized is that this double-structure of the right over time generates its opposites. While the *forum internum* is purported to be sovereign and inviolable, it actually authorizes the state's continual intervention in order to determine its meaning and scope.[66] As Hussein Agrama has observed, the separation between private inner belief and public outer act or expression is in fact

> reunited through a suspicion of motives of material interest or worldly power. In the context of the freedom of religious belief, it becomes imperative to determine whether acts or expressions of belief are genuinely religiously motivated. This presumes the power to pronounce upon, and if necessary probe into, the character of one's private convictions.[67]

For this reason, "secularism's power may lie more in the underlying question it continually provokes and obliges us to answer, than in the normativity of the categories it proposes."[68]

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65. *See* Peter G. Danchin, "Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law," 49 *Harvard International Law Journal* 249 (2008).

66. Saba Mahmood, *Religious Difference in a Secular Age: A Minority Report* 3 (2016) (arguing that "political secularism is the modern state's sovereign power to reorganize substantive features of religious life, stipulating what religion is or ought to be, assigning its proper content, and disseminating concomitant subjectivities, ethical frameworks, and quotidian practices.")

67. Hussein Ali Agrama, "Religious Freedom and the Bind of Suspicion in Contemporary Secularity," in *Politics of Religious Freedom* (Winnifred Fallers Sullivan, Elizabeth Shakman Hurd, Saba Mahmood and Peter Danchin eds., 2015). In Religion Clause cases, the courts routinely determine whether "religious acts or expressions are sincerely held to be essential to one's religion", and whether "these acts and expressions are authorized and mandated by orthodox religious texts." *Id* (*citing* Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (2005)).

68. Hussein Ali Agrama, "Secularism, Sovereignty, Indeterminacy: Is Egypt a Secular or Religious State?," 52 *Comparative Studies in Society and History* 495, 500 (2010).

Similarly, the continuing praxis in public law of recognition or limitation of religious liberty claims of individuals and communities over time privileges the values and commitments of the religious majority as the norm against which the religious practices of the minority are judged and sanctioned in the *forum externum*. The rights discourse and laws of national and international legal systems alike are thus primary sites for the construction and dissemination of particular modular conceptions of religiosity and religious subjectivity.

Importantly, this dissemination occurs not only in non-Western societies whose level of secularity is often questioned, but also those regarded as paradigmatically secular such as the United States and the states of Western Europe. For this reason, the problems of religious intolerance and discrimination cannot be understood solely as a product of cultural and social values, but must address how modern technologies of secular governance and dialectics internal to the right to religious freedom contribute to their ongoing vitality in modern societies.[69]

69. This is the argument in Saba Mahmood and Peter G. Danchin, "Immunity or Regulation? Antinomies of Religious Freedom," 113 *South Atlantic Quarterly* 129 (2014) (arguing that the right to religious liberty in practice often legitimates rather than alleviates discriminatory practices of the state against religious minorities and that this paradox haunts the jurisprudence of Egyptian and other courts in post-colonial contexts as much as the European Court of Human Rights).