MARTINUS NIJHOFF PUBLISHERS

Religion and Human Rights 6 (2011) 109–126

Religion & Human Rights
brill.nl/rhrs

Four Views of the Citadel: The Consequential Distinction between Secularity and Secularism

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Abstract
In this article I want to suggest that there is an important, perhaps critical, distinction between *secularity* and *secularism*—in particular, that one concept is a fundamental component of liberal pluralism and a bastion against religious extremism, and that the other is a misguided, even dangerous, ideology that may degenerate into its own dystopian fundamentalism. As a means of advancing this suggestion, I propose to view the distinction between secularity and secularism from four vantage points, each of which I will call a view of the citadel.

Keywords
religion; secularism; secularity; fundamentalism; religious freedom; *laïcité*; pluralism

* B.S.B.A., M.A., Georgetown University; B.Phil Oxford University; J.D. Yale Law School. Thanks to Suzanne Disparte of the International Center for Law and Religion Studies for research assistance. Thanks also to Professor Tibor Tajti and the students in his doctoral seminar at Central European University School of Law in Budapest for their helpful criticisms and comments, and to the participants at the law and religion conference at Oxford University, for their critique of an earlier draft. Thanks especially to my colleague, W. Cole Durham, Jr., at the International Center for Law and Religion Studies at Brigham Young University, with whom I have been thinking and writing about the issues raised in this article for many years. This article is an elaboration of the distinction between secularism and secularity discussed in W. Cole Durham, Jr. and Brett G. Scharffs, *Law and Religion: National, International, and Comparative Perspectives* (New York: Aspen Publishers/Wolters Kluwer, 2010), pp. 121–122. As is probably apparent, my title is a play on the classic law and economics article, 'One View of the Cathedral', by Guido Calabresi and A. Douglas Melamed, 85 *Harv. L. Rev.* 1089 (1972), which introduced four possible rules that could be adopted in a dispute between a property owner and a neighbour who is creating pollution. My invocation of this title is more than homage to a loved (by me and countless others) professor, Guido Calabresi; I also hope to suggest four familiar perspectives that may be useful in addressing a pressing social issue—how to respond to religious fundamentalism or extremism that seems to pose disruptive threats to liberal, democratic, constitutional systems. The suggestion of taking "four views" is also meant to make clear that I am suggesting four ways of looking at an important issue, rather than providing a systematic, analytical argument about it.

 DOI: 10.1163/187103211X576062

Introduction

Both secularity and secularism are linked to the general historical process of secularization, but as I use the terms, they have significantly different meanings and practical implications.[1] By "secularity" I mean an approach to religion-state relations that avoids identification of the state with any particular religion or ideology (including secularism itself) and that endeavours to provide a neutral framework capable of accommodating a broad range of religions and beliefs. By "secularism", in contrast, I mean an ideological position that is committed to promoting a

[1] The distinction, of course, is not original to me. For other discussions of the difference between secularity and secularism *see, e.g.*, Fr. Evaldo Xavier Gomes, 'Church-State Relations from a Catholic Perspective: General Consideration on Nicolas Sarkozy's new Concept of Laïcité Positive', 48 J. *Cath. Legal Stud.* (2009), p. 201 (setting forth a Catholic perspective on the distinction between secularity and secularism, in which secularity is "one of the attributes of the state in the eyes of the Church" and secularism is "characterized by a negative conception of separation between Church and state, in which the Church is persecuted or denied basic rights.") Gomez goes on to say, "[a]ccording to the Catholic conception, secularity is understood as a healthy cooperation between Church and state. In this sense, the Church and state are not opposed to each other; both are in the service of human beings, so between them there must be dialogue, cooperation, and solidarity." *Ibid.*, p. 211. Le-ann Thio, 'Constitutional Accommodation of the Rights of Ethnic and Religious Minorities in Plural Democracies: Lessons and Cautionary Tales From South-East Asia', 22 *Pace int'l L. Rev.* 43 (addressing accommodation of racial and religious minorities in society and asserting that "attention needs to be paid both to constitutional and non-constitutional solutions, to ensure the protection of the identity and culture of minorities," and warning that "[f]orcible assimilation and repressive measures against minority groups, utilizing the 'tools of coercion' . . . will only exacerbate conflict and thwart the forging of a durable peace."). Thio, in discussing the challenges of fostering a national identity among minority groups and tribes offers secularity as a helpful solution but rejects secularism as problematic, using Islamic revivalism and demands for legal systems based on Sharia as an example. "Secularism itself as a constitutional principle is a useful ordering device for state-religion relations insofar as it does not adopt the form of a substantive, anti-theistic ideology which is hostile towards religious belief. Rather than descend into a form of secular fundamentalism, the principle of secularity operates as a framework under which disparate religious groups may peacefully co-exist. This requires that religious (and non-religious) groups are treated equally under the law, that is, the state is to adopt a neutral posture towards religious groups." *Ibid.*, pp. 73–74. *See also* András Sajó, 'Preliminaries to a concept of Constitutional Secularism', 6 *Int'l J. Const. L.* (2008), p. 605 (advocating a "robust notion of secularism" characterized by a "duty of public reason giving in law" that "denies the acceptability of divine reasons" and "precludes any source of law but the secular" to combat what he calls "strong religion," which aspires "to control or reclaim the public square"). Sajó's definition of the term "secularism" as "legal arrangements that [do] not follow considerations based on the transcendental or the sacred" may be closer to what I mean by 'secularity' than 'secularism'. As Sajó uses the term, 'secularism' takes no specific position regarding religion, but rather focuses on the concept of public reason, the idea that in politics and law reasons should be translated, or at least translatable into public reason, reasons that are accessible to all citizens. As is often the case, the devil is in the definitions. *Ibid.*, pp. 607–608. He acknowledges that "secularism is a somewhat unfortunate term for use in constitutional theory" because as a term it is "overloaded," referring to different although related concepts in different languages and in different academic disciplines. *Ibid.*, p. 608. *See also* András Sajó, 'Constitutionalism and Secularism: The Need for Public Reason', 30 *Cardozo L. Rev.* (2009); Lorenzo Zucca, 'The Crisis of the Secular State—A Reply to Professor Sajó', 7 *Int'l J. Const. L.* (2009); András Sajó, 'The Crisis That Was Not There: Notes on a Reply', 7 *Int'l J. Const. L.* (2009). An early formulation of this distinction is found in David Martin, *Notes Towards a General Theory of Secularization* (1969), revised as *On Secularization: Towards a Revised General Theory* (Ashgate, 2005), at p. 85 et seq. (distinguishing "secularity" from "principled secularism").

secular order. Secularity is a more modest concept, committed to creating what might be called a broad realm of "constitutional space"[2] in which competing conceptions of the good (some religious, some not) may be worked out in theory and lived in practice by their proponents, adherents, and critics. Secularism, in contrast, is itself a positive ideology that the state may be committed to promoting, an ideology that may manifest itself as opposition to religiously-based or religiously-motivated reasons by political actors, hostility to religion in public life and an insistence that religious manifestations, reasons, or even beliefs be relegated to an ever-shrinking sphere of private life, or even an aggressive proselytizing atheism, or what has been called "secular fundamentalism."[3]

In most modern liberal democratic legal systems, there are proponents of both secularity and secularism. Constitutional and other legal texts addressing religion-state issues can often be interpreted as supporting one or the other of these views and, in fact, some of the key debates involving freedom of religion and belief turn on the difference between these two approaches. Historically, French *laïcité* is closer to secularism, while American separationism is closer to secularity. But there are debates in both societies about how strictly secular the state (and more broadly, the public realm) should be. This tension between two conceptions of the secular runs through much of religion-state theory in contemporary settings.

This article proposes four ways of looking at the distinction between secularity and secularism and the implications of this distinction for the citadel of democratic secular constitutional liberalism. In Part I, I will discuss a first view of the citadel, focusing on Isaiah Berlin's distinction between negative and positive freedom. Secularity, I argue, will be drawn toward a political philosophy based upon what Berlin described as negative liberty (*freedom from* interference by other people, including the state), whereas secularism will be inclined towards positive liberty (which implies having the power, resources or *freedom to* fulfil one's potential, perhaps a potential properly understood by others, who are willing to use coercive means to help us achieve what is good for us). This distinction is closely related to a second view of the citadel of secular liberalism, which I discuss in Part II, where I focus on what philosophers describe as the problem of the incommensurability of values. Here I draw upon the work of Joseph Raz and John Finnis, in addition to Isaiah Berlin. Secularity will view moral and political values as multiple, plural, and ultimately incommensurable, whereas secularism will view

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[2] I would like to thank Carolyn Evans of Melbourne University School of Law for drawing my attention to the concept of 'constitutional space'.

[3] *See* Paul F. Campos, 'Secular Fundamentalism', 94 *Colum. L. Rev.* 1814 (1994) (arguing that Rawls's central concept in Political Liberalism of 'public reason' is empty, "and that Rawls's analysis of political issues amounts to little more than the shamanistic incantation of the word 'reasonable.' "). According to Campos, Rawls employs the concept of "reasonableness" in the same way that "God" is invoked in dogmatic religious argument. *Ibid.*, p. 1817.

values as reducible and commensurable. Third, secularity may be viewed as providing primarily a framework, rather than a substantive positive ideology. The third view of the citadel, described in Part III, adopts terminology used by John Rawls in a different context, to suggest that secularity is committed to a "thin" rather than a "thick" political theory of the good (one that makes room for diverse and conflicting philosophies of life, rather than a conception of the good spelled out in comprehensive detail). Here I draw upon complimentary concepts advocated by Rawls, Michael Walzer, and Cass Sunstein. Finally, in a fourth view of the citadel, developed in Part IV, I draw upon Robert Cover's distinction between the jurisgenerative and jurispathic tendencies of the law. Secularity, unlike secularism, will be sensitive to the proclivity of law, movingly described by Cover, to be both jurisgenerative as well as jurispathic, and will seek to mitigate the jurispathic tendencies. In the Conclusion, Part V, I respond to the predictable objection that preferring secularity over secularism leaves one vulnerable to the charge of moral relativism or even nihilism. To the contrary, I conclude that secularism engages in epistemological, or at least political, overreaching.

I. A First View: Negative Liberty and Positive Liberty

One way of looking at the distinction between secularity and secularism is through the lens of the distinction Isaiah Berlin drew between negative and positive conceptions of liberty. Secularity is a concept consonant with negative liberty, while secularism is an ideal that reflects a vision of positive liberty. As Berlin explains, while positive liberty, a particularized vision of what is right or true for human beings, may be an attractive moral ideal for individuals, or perhaps even communities, it is extremely dangerous as a political ideology.

In his initial formulation of the two ideas, Berlin describes negative freedom as "the area within which the subject—a person or group of persons—is or should be left to do or be what he is able to do or be, without interference with others."[4] Positive liberty, in contrast, involves determining "[w]hat, or who, is the source of control or interference that can determine someone to do, or be, this rather than that?"[5]

Negative freedom is often described as freedom *from*—from being prevented from doing what one might otherwise do, from being interfered with, from being coerced, or in the extreme from being enslaved.[6] Berlin clearly acknowledges that

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[4] This, at least, is initial formulation in his essay, 'Two Concepts of Liberty'. See Isaiah Berlin, 'Two Concepts of Liberty', 121–122, in *Four Essays on Liberty* (Oxford: Oxford University Press, 1969).

[5] *Ibid*., p. 122.

[6] Berlin contrasts interference with 'incapacity', in inability to attain a goal. Coercion in contrast implies the "deliberate interference of other human beings within the area in which I could otherwise act." *Idem.*

freedom so understood is not the *summum bonum* of life;[7] there "are situations, as a nineteenth century Russian Radical writer declared, in which boots are superior to the works of Shakespeare; individual freedom is not everyone's primary need."[8] Someone who is ill-fed, ill-educated, or simply ill, will not be in a position to enjoy the benefits of negative freedom.

Positive freedom is often described as freedom *to*—to be one's own master, to be free of external forces, "to be the instrument of my own, not of other men's acts of will," to be a subject rather than an object, to have the capacity to conceive goals and realize them.[9] Positive freedom involves rational self-direction.

Positive freedom may be an attractive moral ideal, for individuals or communities, but the idea of freedom as self-mastery can easily devolve in a view of man being "divided against himself,"[10] unable to understand what is best for himself or, if he understands it, unable to exert sufficient self-discipline and mastery to achieve it. If freedom means rational self-direction, then "I cannot deny that what is right for me must, for the same reasons, be right for others who are rational like me."[11] When this happens, liberty and authority are not seen as being at odds with each other; rather, "liberty, so far from being incompatible with authority, becomes virtually identical with it."[12] Laws may limit liberty, but such limits are necessary to ultimately increase liberty. When rulers are sufficiently wise, "liberty coincides with law: autonomy with authority. A law which forbids me to do what I could not, as a sane being, conceivably wish to do is not a restraint of my freedom."[13]

Berlin describes the French Revolution, at least in its Jacobin form, as "an eruption of the desire for 'positive' freedom of collective self-direction on the part of a large body of Frenchmen who felt liberated as a nation, even though the result was, for a good many of them, a severe restriction of individual freedoms."[14] A robust *laïcité*, as a fully-developed positive vision, may be the most enduring fruit of the French revolution.

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[7] "It is true that to offer political rights, or safeguards against intervention by the state, to men who are half-naked, illiterate, underfed, and diseased is to mock their condition; they need medical help or education before they can understand, or make use of, an increase in their freedom." *Idem.*

[8] *Idem.*

[9] *Ibid.*, p. 131.

[10] *Ibid.*, p. 134.

[11] *Ibid.*, p. 145.

[12] *Ibid.*

[13] *Ibid.*, pp. 148–149. Berlin summarizes the conditions that will facilitate a virtuous despotism, a despotism of "the best or the wisest," but still despotism, "which turns out to be identical with freedom:"—"first, that all men have one true purpose, and one only, that of rational self-direction second, that the ends of all rational beings must of necessity fit into a single universal, harmonious pattern, which some men may be able to discern more clearly than others; third, that all conflict, and consequently all tragedy, is due solely to the clash of reason with the irrational or the insufficiently rational . . .; finally, that when all men have been made rational, they will obey the rational laws of their own natures, which are one and the same in them all, and so be at once wholly law-abiding and wholly free." *Ibid.*, p. 154.

[14] *Ibid.*, p. 162.

Berlin ends his essay, *Two Concepts of Liberty*, with a crushing indictment of positive liberty as a political ideal. Part VIII, the final section of the essay, entitled "The One and the Many", opens with Berlin thundering:

> One belief, more than any other, is responsible for the slaughter of individuals on the altars of the great historical ideals—justice or progress or the happiness of future generations, or the sacred mission or emancipation of a nation or race or class, or even liberty itself, which demands the sacrifice of individuals for the freedom of society. This is the belief that somewhere, in the past or in the future, in divine revelation or in the mind of an individual thinker, in the pronouncements of history or science, or in the simple heart of an uncorrupted good man, there is a final solution. This ancient faith rests on the conviction that all the positive values in which men have believed must, in the end, be compatible, and perhaps even entail one another…[15]

Secularism, in contrast, with secularity is a positive freedom ideal. It posits a set of attitudes and beliefs that are best and true, and is willing to marshal the coercive means of the state to help citizens along to becoming genuinely rational and virtuous, as the ideal defines and envisions those terms.[16]

Berlin gives an even more searing condemnation of any such hoped for "final solution" in his essay, *The Pursuit of the Ideal*:

> I conclude that the very notion of a final solution is not only impracticable but, if I am right, and some values cannot but clash, incoherent also. The possibility of a final solution—even if we forget the terrible sense that these words acquired in Hitler's day—turns out to be an illusion; and a very dangerous one. For if one really believes that such a solution is possible, then surely no cost would be too high to obtain it; to make mankind just and happy and creative and harmonious for ever—what could be too high a price to pay for that. To make such an omelette, there is surely no limit to the number of eggs that should be broken—that was the faith of Lenin, of Trotsky, of Mao, for all I know of Pol Pot. Since I know the only true path to the ultimate solution of the problems of society, I know which way to drive the human caravan; and since you are ignorant of what I know, you cannot be allowed to have liberty of choice even within the narrowest limits, if the goal is to be reached. You declare that a given policy will make you happier, or freer, or give you room to breathe; but I know that you are mistaken, I know what you need, what all men need; and if there is resistance based on ignorance or malevolence, then it must be broken and hundreds of thousands may have to perish to make millions happy for all time.[17]

The project of omelette making is not an appropriate undertaking for nation-states. The state is unlikely to have the "best" recipe, and, in any event, the notion that there is a single 'best' recipe for omelettes is mistaken; it is, in Berlin's phrase, "an illusion; and a very dangerous one." This is not because there are no valid, appropriate, or helpful metrics for evaluating omelettes; rather it is because there is no single metric that is universally applicable in every situation.

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[15] *Ibid.*, p. 167.

[16] The same critique would apply to other positive visions, including religious ones, that seek to impose themselves on a state's constitutional order. Thus, a similar basis exists for condemning what András Sajó's describes as "strong religion." *See* András Sajó, *supra* note 1, pp. 605–607.

[17] Isaiah Berlin, 'The Pursuit of the Ideal', in Henry Hardy (ed.), *The Crooked Timber of Humanity: Chapters in the History of Ideas* (New York: Alfred A. Knopf, 1991), p. 15.

II. A Second View: The Plurality and Incommensurability of Values

A second closely connected way of looking at the distinction between secularity and secularism focuses on the incommensurability of values, which is the underlying reason why Berlin objects to politics focused on the realization of positive liberty.[18] Following his denunciation of political "final solutions" Berlin says this:

> The world that we encounter in ordinary experience is one in which we are faced with choices between ends equally ultimate, and claims equally absolute, the realization of some of which must inevitably involve the sacrifice of others. Indeed, it is because this is their situation that men place such immense value upon the freedom to choose; for if they had assurance that in some perfect state, realizable by men on earth, no ends pursued by them would ever be in conflict, the necessity and agony of choice would disappear, and with it the central importance of the freedom to choose.[19]

Value incommensurability is the view that some important values (those that are incommensurable) may not be fully reduced to or expressed in terms of some other value. It is not that values that are incommensurable have nothing in common (if so, they are incomparable), but rather that what makes each of them attractive, or choice-worthy, cannot be fully captured by a single common value metric.

The philosopher John Finnis describes the central problem of incommensurability as follows:

> There are many basic forms of human good, all equally or incommensurably basic and none reducible to any or all of the others; none of them is attainable by any one choice or finite set of choices; to commit oneself to one course of action, project, commitment, even life-plan, is to turn one's back on perhaps countless other opportunities of worthwhile action, project, commitment, life…[20]

Later, Finnis utilizes the concept of incommensurability in critiquing what he calls 'proportionalism'—the ethical view that tells us to weigh benefits and harms and choose the option that gives a better proportion than any other option, i.e. that option which maximizes the good over bad. Proportionalism's directive is clear: make a computation. Finnis points out that sometimes this is not just impracticable, but senseless:

> It is senseless in the way that it is senseless to try to sum up the quantity of the size of this page, the quantity of the weight of this book, and the quantity of the number six. At first glance, the computation seems possible; after all, each of those quantities is a quantity, and thus has in common with the others the feature that, of it, one can sensibly ask: How much? Yet, on reflection, it is clear that

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[18] The discussion in this section builds upon my argument in Brett G. Scharffs, 'Adjudication and the Problems of Incommensurability', 42 *William and Mary L. Rev.* (2001), pp. 1367–1435.

[19] Berlin, *supra* note 4, p. 168.

[20] John Finnis, *Fundamentals of Ethics* (Washington, D.C.: Georgetown University Press, 1983), pp. 66–67.

> the different kinds of quantity—volume, weight, and cardinal numbers—are objectively incommensurable.[21]

In these passages, Finnis succinctly states the problems of incommensurability. First, values are plural and irreducible. We recognize different sorts of value (e.g. weight, volume, cardinal numbers); these values are quantifiable through appropriate systems of measurement (pounds, cubic inches, Arabic numerals); systems of measurement for a single sort of value are commensurable (inches and centimetres are commensurable, as are pounds and kilograms); the system of measurement appropriate for one sort of value is not appropriate for another sort of value (inches are not an appropriate measure of weight); and many values are not only different, they are *irreducible* (the value of weight cannot be expressed in terms of length, the value of length cannot be expressed in terms of weight, and the value of both cannot be expressed in terms of some other value).[22] The problem of incommensurability could be recast in the language of the heterogeneity of value and the difficulty of making comprehensive judgments that attempt to collectively quantify numerous heterogeneous values.

Second, if values are incommensurable, considerable doubt is cast on reason's ability to adjudicate between the competing claims made by plural and conflicting values. Reasoned deliberation about incommensurables cannot at root be a matter of calculation, no matter how subtle or complex. If all values can be reduced to one ultimate value, then the demands of rationality seem clear: Maximize! This is not to say that reasoning will be simple or straightforward, for conducting the necessary calculations may be extremely complicated. But if values

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[21] *Ibid.*, p. 87.

[22] Some authors acknowledge the irreducibility of values, but discount the problem of incommensurability. For example, James Griffin notes that "[w]e tend to think that incommensurable values are not at all rare because a certain sort of conflict between them is quite common. Happiness can conflict with knowledge, mercy with justice, liberty with fraternity, and so on. And they can conflict in a way that allows no resolution without often wrenching loss of value. It is a fact of life that some values, by their nature, exclude others. We can choose between them because the demands of living often mean that we must, but the choice is not a matter of deciding which, if either, has compensatingly more of some deep value than the other. Our choices can leave us with uncompensated loss." James Griffin, 'Incommensurability: What's the Problem?', in Chang (ed.), *Incommensurability, Incomparability, and Practical Reason* (Massachusetts: Harvard University Press, 1997), p. 36. But while Griffin sees such conflict and absence of a "deep value" that adequately represents all that is important about a value as "undeniable," he argues that it is "not a matter of strict incommensurability." *Idem.* What Griffin has in mind here seems to be quite similar to what I have elsewhere called "incomparability," which refers to situations where values or choices have nothing in common, which renders any comparison between them impossible. *See* Brett G. Scharffs, *Adjudication and the Problems of Incommensurability*, 42 William and Mary L. Rev. 1367–1435, at 1393–94, where I argue that situations of genuine incomparability are extremely rare and do not pose a significant obstacle to practical rationality. According to Griffin, incommensurability refers to situations where there is no scale available to compare values as 'greater', 'less' or 'equal'. According to Griffin, incommensurability arises when cardinal rankings are not possible. *Ibid.*, p. 37.

are multiple and irreducible, then as a conceptual matter a strategy of maximization is not only futile, but senseless.[23]

Third, incommensurability is not just a problem of uncertainty or vagueness. If your ambition is to determine the best course of action under certain circumstances, and you are finding it difficult to determine that one alternative is rationally superior to all other alternatives, you might conclude that the source of the problem is that the values reflected in the competing alternatives are incommensurable. A critic of the view that values are plural and irreducible might respond that the problem is really not one of incommensurability but uncertainty. This critic would maintain that the problem is not that there is no best alternative, but rather that as of yet you are uncertain what it is. This critic might also maintain that when we declare that values are incommensurable, we are mistaken or confused. What we are really doing is expressing frustration at our inability or unwillingness to do the hard rational work necessary to achieve certainty. On this view, our powers of reason may be insufficient to determine what the best alternative is, but this is due to our own (personal or collective) shortcomings rather than anything inherent in the situation. This critic might make the further claim that all instances of apparent incommensurability are in fact situations of uncertainty.

The critic would be mistaken. Not all problems of incommensurability are really problems of uncertainty.[24] As Finnis points out, if you are unable to conclude which is heavier, the number six or the colour red, your problem is not one of uncertainty, but rather that the underlying values that are the object of your reasoned consideration are incommensurable.[25] In some situations, making a calculation is not just impracticable it is senseless. This is not to say that it is impossible or senseless to make judgments that claim to be correct or best. But it will be necessary to develop a conception of reason that accounts for incommensurability, and strategies of maximization and calculation are not up to the task.

Rather than pursuing through politics an ideal truth of positive freedom, Berlin advocates the ideal of pluralism, a concept that lies at the heart of secularity:

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[23] I make a number of suggestions about how reason can be rehabilitated in the face of plural and conflicting values in Scharffs, *supra* note 18, pp. 1410–1434.

[24] Even without the complication of incommensurability, uncertainty can create seemingly intractable ethical conundrums. For example, if I am clear that my goal is to select the option that will bring me the most happiness, I may find it exceedingly difficult to choose between available alternatives. This is in part because happiness is itself a complex value that reflects a plurality of constituent values (pleasure, accomplishment, peace of mind, meaningful interpersonal relationships, etc.) Even if happiness is understood as a simple, unitary value, uncertainty may be inescapable. The list of considerations that will make it difficult to compute the respective implications for one's happiness of alternatives is long and open-ended, and will include difficulties of computation, uncertainty in predicting future contingencies, the need to estimate statistical probabilities, and the need to account for the decisions and actions of others. Uncertainty presents real difficulties, but those difficulties are not conceptually reducible or identical to the problems of incommensurability.

[25] *See* Finnis, *supra* note 20, pp. 87–89.

> Pluralism, with the measure of "negative" liberty that it entails, seems to be a truer and more humane ideal than the goals of those who seek in the great, disciplined, authoritarian structures, the ideal of "positive" self-mastery by classes, or people, or the whole of mankind. It is truer, because it does, at least, recognize the fact that human goals are many, not all of them commensurable, and in perpetual rivalry with one another. To assume that all values can be graded on one scale, so that it is a mere matter of inspection to determine the highest, seems to me to falsify our knowledge that men are free agents, to represent moral decision as an operation which a slide-rule could, in principle, perform. To say that in some ultimate, all-reconciling, realizable synthesis, duty *is* interest, or individual freedom *is* pure democracy or an authoritarian state, is to throw a metaphysical blanket over either self-deceit or deliberate hypocrisy.[26]

Secularism makes the same mistake made by other varieties of value monism (including what András Sajó describes as "strong religion"[27] that seeks to co-opt the legislative process and impose religious rules on everyone)—concluding that the same complex recipe of values is best for everyone, and that it is the state's job to impose them on everyone.

III. A Third View: Thin and Thick Theories of the Good

A third way of looking at the distinction between secularity and secularism is through the lens of what John Rawls described as thin and thick conceptions of the good.

In his book, *A Theory of Justice*, Rawls makes a distinction between what he calls "thin" and "thick" theories of the good.[28] His argument is part of his discussion of what rational actors in the original position would choose for principles of justice to govern their lives, before they know anything about the particularities of their circumstances as human beings. The thought experiment of the original position is designed to show that there are certain basic or primary goods that we are all likely to value, and that we know we are likely to value, even before we know the specific contours of our particular lives. These things include basic liberties, such as freedom of thought and liberty of conscience, access to some minimal quantum of social resources, and opportunities that are relatively equal.

Although we may or may not agree whether the original position is a useful, or sufficient, mechanism for reasoning our way to an acceptable theory of justice, let alone broader principles of morality, or truth, the idea of a 'thin' theory of the good has proved remarkably attractive and resilient. As I take it, a thin theory of the good will be a modest theory, one that is likely to appeal to a wide range of people, even those with remarkable different "thick" or complete ideas (what Rawls calls "comprehensive doctrines") about morality and justice.

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[26] *Ibid.*, p. 171.

[27] *See supra*, note 1.

[28] John Rawls, *A Theory of Justice* (Massachusetts: Harvard University Press, 1971), p. 395.

Michael Walzer centres his book, *Thick and Thin: Moral Argument at Home and Abroad*, upon a similar insight. He begins by recalling an experience, a picture in his mind, of watching the television news in 1989.

> It is a picture of people marching in the streets of Prague; they carry signs, some of which say, simply, "Truth" and others "Justice." When I saw the picture, I knew immediately what the signs meant—and so did everyone else who saw the same picture.[29]

Walzer asks, "[h]ow could I penetrate so quickly and join so unreservedly in the language game or the power play of a distant demonstration?" He notes that the marchers came from a different culture, and had a set of life experiences that were dramatically different than his own.

It was not, Walzer realized, that his sympathy or understanding rested upon knowing that he and the marchers shared the same epistemological views about what constitutes truth (that they were "marching in defense of the coherence theory, or the consensus theory, or the correspondence theory of truth"). Nor did his sympathetic understanding rest upon a shared theory of justice ("these citizens of Prague were not marching in defense of utilitarian equality or John Rawls's difference principle" or any other theory of justice). Rather, Walzer says, he was able to understand and sympathize with their yearnings because of the elementary character of the epistemological commitments of the marchers. He didn't need a "thick" theory of "truth" or "justice" to understand them; there was something simpler and more basic that they were communicating. He understood that the marchers wanted to hear their leaders speak the truth; they wanted to be able to believe what they read in the newspapers, they "didn't want to be lied to anymore."[30] Similarly, he understood them to be marching for "garden variety justice"—an end to arbitrary arrests, for equal and fair enforcement of the law, for an abolition of privileges for the party elite.[31]

Walzer notes that he did not need a "thick" moral argument to achieve a significant level of human understanding. "Moral terms," Walzer suggests, "have minimal and maximal meanings; we can standardly give thin and thick accounts of them, and the two accounts are appropriate to different contexts, serve different purposes." When we are arguing "at home", a more detailed, thicker, type of moral argument will be needed. When we are "abroad" we can engage in a type of less detailed and more generic account. Walzer notes that when the marching stopped (which may have been aimed partly at generating foreign support for the protesters' cause) and debates about specific policy problems began (for example,

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[29] Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (Indiana: University of Notre Dame Press, 1994), pp. 1–3.

[30] *Ibid.*, p. 2.

[31] *Idem*.

taxation or health care policy), then it would be time for an appeal to "home truths and local values."[32]

A similar sensibility is evident in Walzer's discussion of "spheres of justice," overlapping areas of life, where the types of arguments and reasons that are appropriate, or that we find persuasive, may vary.[33] John Rawls develops a similar theme in his later book, *Political Liberalism*, where he argues that an "overlapping consensus" about political values can help create a stable political framework, within which individuals and communities can develop and live their own "comprehensive doctrines."[34] Cass Sunstein makes a complementary argument with his concept of "incompletely theorized agreements"—agreements between people of different views that leave for a substantial amount of disagreement while still providing some common basis for government and society.

Incompletely theorized agreements take several forms. In one type, we may agree about general principles, but disagree about the implications of those principles. Sunstein notes:

> Incompletely theorized agreements play a pervasive role in law and society. It is rare for a person, and especially for a group, to theorize any subject completely—that is, to accept both a highly abstract theory and a series of steps that relates the theory to a concrete conclusion. In fact, people often reach incompletely agreements on a general principle. Such agreements are incompletely theorized in the sense that people who accept the principle need not agree on what it entails in particular cases. People know that murder is wrong, but they disagree about abortion. They favor racial equality, but they are divided on affirmative action. Hence there is a familiar phenomenon of a comfortable and even emphatic agreement on a general principle, accompanied by sharp disagreement about specific ends.[35]

In other situations, we may agree about "mid-level principles" but disagree about the deeper general theory that accounts for those principles. With this second type of situation, we may agree that something is right (for example, that everyone is entitled to due process of law) or that something is wrong (the government should not discriminate on the basis of race) even if we do not agree on a general theory that grounds our respective beliefs. "So too, people may think that government may not regulate speech unless it can show a clear and present danger, but fail to settle whether this principle is grounded in utilitarian or Kantian considerations, and disagree about whether the principle allows government to regulate a particular speech by members of the Ku Klux Klan."[36]

A third situation involves incompletely theorized agreements on particular outcomes, accompanied by agreements on the low-level principles that account for them:

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[32] *Idem*.
[33] Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1984).
[34] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), p. 134.
[35] Cass Sunstein, 'Incompletely Theorized Agreements', 108 *Harv. L. Rev.* (1993), pp. 1739–1740.
[36] *Ibid.*, 1739–1740 (footnotes omitted).

> We might think of low-level principles as including most of the ordinary materials of legal doctrine—the general class of principles and justifications that are not said to derive from any particular large theories of the right or the good, that have ambiguous relations to large theories, and that are compatible with more than one such theory.[37]

In reality, incompletely theorized agreements are ubiquitous. We often agree about general principles while disagreeing on specific applications of those principles. We often agree about general policies while disagreeing about the best philosophical bases for those policies. And we often agree about specific rules and procedures without having deep agreement about their underlying justification.

Concepts such as these—thin versus thick moral arguments, overlapping consensus, incompletely theorized agreements—provide the basis for more than a mere *modus vivendi*—a wary standoff where peace is maintained by three criminals each having a gun aimed at the head of one of the others. Rather, a reasonably stable, just, and sustainable political order can be maintained by finding common moral ground—through thin theories and moral arguments, by developing overlapping consensus, and on the basis of incompletely theorized agreements. In reality, most of our agreements and our disagreements (at home and abroad) are not as deep or as entrenched as we imagine them to be. When we seem to agree, we can begin to dig and explore, and will soon enough find that we are not entirely in agreement after all. And when we seem to disagree, we can often find that beneath what appear to be vast disagreements there is significant common ground.

Secularism tries to do too much—it insists that it is uniquely true when reasonable people may disagree, it insists that everyone accept a "thick" theory that is infused with questionable content, it posits a comprehensive doctrine and insists that anyone who resists it is irrational or in the grip of self-deception, it seeks to impose rather than develop consensus.

Secularity, less ambitious, more modest, creates space for individuals and communities to define and live out what Rawls calls their "comprehensive doctrines," without undue fear and within a political space where they can feel safe. Some limits will be warranted and justified, but they will be narrowly construed and grounded on compelling public needs.

IV. A Fourth View: The Jurisgenerative and Jurispathic Faces of the Law

A fourth way of looking at the distinction between secularity and secularism focuses on the distinction Robert Cover draws between the ways in which the law is both jurisgenerative and jurispathic.[38] In his masterwork, *Nomos and Narrative*,

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[37] *Idem*.

[38] My discussion of Cover's distinction between the jurisgenerative and jurispathic faces of the law draws upon an earlier discussion in Brett G. Scharffs, Creation and Preservation in the Constitution of

Cover begins by observing that we live in a *nomos*—"a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void."[39] Cover calls this process of creating legal meaning "jurisgenesis" and notes that it is decentralized and rooted in communal precepts and narratives.

As described by Cover, there are two patterns at work in forming a *nomos*. The first pattern he calls *paideic* or "world creating," and the second pattern he calls "imperial," or "world maintaining." The *paideic* or world creating mode is creative in character, while the imperial pattern focuses on preservation. Cover maintains that normative worlds are never created or maintained exclusively in either a *paideic* or an imperial mode.[40]

It is the very creation of multiple normative meanings from single texts, events, or symbols that leads to the need for the imperial virtues of world maintenance. For example, even a single constitutive text, such as the 13th Amendment to the U.S. Constitution (which freed the slaves) or the 14th Amendment (which guaranteed equal protection and due process of law) will not have a single normative meaning. As Cover puts it:

> Some of us would claim Frederick Douglass [a former slave and staunch abolitionist] as a father, some Abraham Lincoln [the sixteenth president], and some Jefferson Davis [the President of the Confederacy]. Choosing ancestry is a serious business with major implications. Thus, the narrative strand integrating who we are and what we stand for with the patterns of precept would differ even were we to possess a canonical narrative text.[41]

Thus, one of the functions of the law, and of courts in particular, is to decide among the multiplicity of meanings that are generated by interpretive communities. As Cover explains:

> It is the problem of the multiplicity of meaning—the fact that never only one but always many worlds are created by the too fertile forces of jurisgenesis—that leads at once to the imperial virtues and the imperial mode of world maintenance. Maintaining the world is no small matter and requires no less energy than creating it.[42]

Civil Religion, part of a symposium, "'Civil Religion' in the United States and Europe: Four Comparative Perspectives," to be published in volume 41 of the *George Washington International Law Review* (forthcoming).

[39] Robert M. Cover, 'Nomos and Narrative, The Supreme Court 1982 Term Forward', 97 *Harv. L. Rev.* (1983), p. 4.

[40] Cover explains, "Any *nomos* must be paideic to the extent that it contains within it the commonalities of meaning that make continued normative activity possible. Law must be meaningful in the sense that it permits those who live together to express themselves with it and with respect to it. It must both ground predictable behavior and provide meaning for behavior that departs from the ordinary." *Ibid.*, p. 14.

[41] *Ibid.*, p. 18.

[42] *Ibid.*, p. 16.

Thus, legal institutions—legislatures, executives, and courts—respond to jurisgenesis, the "too fertile" proliferation of multiple meanings of a single text or symbol, with an authoritative voice that chooses which meaning will be given official sanction and which will enjoy the coercive imprimatur of the state. This does not depend upon judges or other public officials having a superior hermeneutical methodology, but rather, as Justice Jackson succinctly stated of the Supreme Court, it rests upon power: "We are not final because we are infallible, but we are infallible only because we are final."[43]

Cover's account is instructive on a number of levels. Here I will focus on just one—the distinctive role of judges in this normative dialectic between the forces of creation and the forces of preservation. While Cover was concerned specifically with judges in the U.S. system of justice, which is characterized by the powerful institution of judicial review, the specific seductions of jurispathic power apply to whomever the power is given to declare authoritatively what the law is.

Since judges have the power to decide among multiple meanings, Cover describes the judges' power as "jurispathic." The judge's job is not so much to create legal meaning but, rather, to kill it. As Cover explains, "[i]nterpretation always takes place in the shadow of coercion;"[44] or as he put it in the opening sentences of *Violence and the Word*, "[l]egal interpretation takes place in a field of pain and death."[45]

Cover makes his point in *Nomos and Narrative* with characteristic drama:

> Judges are people of violence. Because of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispathic office. Confronting the luxuriant growth of a hundred legal traditions, they assert that *this* one is law and destroy or try to destroy the rest.[46]

Judges, confronted with too much creativity in the elucidation of normative meanings by various communities within the polis, decide for one, put the coercive power of the state behind it, and in so doing destroy or attempt to destroy all other competing meanings. Thus, for example, when a French legislature or court determines that the headscarf is a symbol of oppression, its decision carries with it the coercive power of the state, and its determination of what the headscarf "means" is jurispathic—it kills (or at least tries to), in a decisive and conclusive way, alternative meanings, at least as far as French law is concerned. Muslim girls or women may have a different understanding of what the headscarf means, but when the state declares in an authoritative, official voice, those alternative meanings are not just undermined, they are delegitimized.[47]

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[43] *Ibid.*, p. 42, citing *Brown* v. *Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

[44] *Ibid.*, p. 40.

[45] Robert Cover, 'Violence and the Word', 95 *Yale L. J.* (1986), p. 1601.

[46] Cover, *supra* note 39, p. 53.

[47] See, e.g., Judge Tulkens dissenting opinion in Leyla Sahin v. Turkey, European Court of Human Rights, App. No. 44774/98, Eur. Ct. H.R., Grand Chamber (2005) particularly para. 11 of her opinion:

The jurispathic role of the law and of courts is to some extent inescapable and necessary. After all, the law as a normative institution is not just about creation, but preservation as well. A community that is exclusively creative, one that is in the grip of competing jurisgenerative visions, will splinter and fall apart. The centre will not hold. One job of the judge is to decide among competing conceptions, even if it means eliminating others. Cover recognizes this and explains this reality as follows:

> But judges are also people of peace. Among warring sects, each of which wraps itself in the mantle of a law of its own, they assert a regulative function that permits a life of law rather than violence.[48]

Thus, the jurispathic work of judges is closely related to their "world maintaining" function of preserving a community and maintaining the peace.

By favouring a political framework characterized by secularism rather than secularity, a state tips the scales of the jurisgenerative and the jurispathic tendencies of the law too far in the jurispathic direction. By giving an official imprimatur to a thick, substantive conception (secularism), the state kills other conceptions (including religious conceptions) that might flourish in a system of secularity that is less inclined to decisively favor a single thick conception of the good. When engaging in a law making or law interpreting role, state officials should be aware that they are not just one voice in the crowd; they should remain acutely aware of their jurispathic power—their capacity to kill alternative conceptions of the good and to adopt a single "official" conception.

V. Conclusion: Is Secularity a Road to Moral Relativism or Nihilism?

I would like to respond to one predictable objection to preferring secularity over secularism. A defender of French *laïcité*, for example, might object that secularity endorses a form of radical moral or cultural relativism—a spineless concession that all conceptions of the good are equally valuable or equally plausible. Such a

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"Turning to *equality*, the majority focus on the protection of women's rights and the principle of sexual equality (see paragraphs 115 and 116 of the judgment). Wearing the headscarf is considered on the contrary to be synonymous with the alienation of women. The ban on wearing the headscarf is therefore seen as promoting equality between men and women. However, what, in fact, is the connection between the ban and sexual equality? The judgment does not say. Indeed, what is the signification of wearing the headscarf? As the German Constitutional Court noted in its judgment of 24 September 2003, wearing the headscarf has no single meaning; it is a practice that is engaged in for a variety of reasons. It does not necessarily symbolise the submission of women to men and there are those who maintain that, in certain cases, it can even be a means of emancipating women. What is lacking in this debate is the opinion of women, both those who wear the headscarf and those who choose not to." The European Court of Human Rights' holding in *Sahin* may on its face be viewed as a victory for secularism, but only by characterizing Turkish secularism as very brittle and vulnerable.

[48] *Idem*.

critic may be concerned, for example, that allowing the headscarf would amount to bowing to the patriarchal subordination of girls and women by fathers and husbands. With an accusing glare he might insist, you are asking me to admit or concede that every idea about right and wrong is on equal footing, equally deserving of respect or deference.

I believe this argument lacks merit for several reasons. First, adopting a thin political conception of the good does not mean that we must become epistemological relativists or nihilists. It is quite coherent to adopt—indeed, I would argue, we should adopt—a political conception of the good that is thin, one that is subject to a broad "overlapping consensus", perhaps based upon "incompletely theorized agreements", whereas our own moral and political views may be much richer, detailed, and contestable. I can believe in the truth, without believing I am obliged to impose my understanding of the truth on you through political coercion. This is not to say the state will never coerce—of course it will, but it should limit its coercive force to situations where it is really warranted, and disagreements about rich and vibrant conceptions of the good for the most part are not situations where coercion will really be needed.

Of course, *laïcité* is itself a complex concept that is capable of many different conceptions. *Laïcité* may be interpreted in ways that come much closer to what I have been calling secularity rather than secularism. It may be said that this is what French President Nicolas Sarkozy has been attempting to do in his articulation of "*laïcité positive*", or a positive *laïcité.* In speeches in Rome in 2007 and Riyadh in 2008, he advanced this concept. In Rome he defended positive *laïcité*, which he defined as "an open secularism, an invitation to dialogue, tolerance, and respect. It is a new chance, a jump, a further dimension to public debate."[49] Sarkozy even acknowledged the possibility that morality grounded in religion may be superior to secular morality. As Father Evaldo Xavier Gomez understands it,

> [u]nder this new conception of *laïcité*, the state is not anti-religious. In his speech in Riyadh, Sarkozy asserted that religious feelings are not dangerous ("ce n'est pas le sentiment religieux qui est dangereux"). Going even further, he asserted that a civil society owes religions for the principles of universal morality, human dignity, the universal values of freedom, responsibility, honesty, and rightness. In Sarkozy's words, "there is a need for a *laïcité positive* that preserves freedom of thought and does not consider religion as dangerous, but rather as positive.[50]

Father Gomez notes that Pope Ratzinger in a 2008 speech in France called this new concept of *laïcité* a historical step in Church-state relations. Father Gomez expressed the significance of this new conception as follows: "What the French President expressed in Rome, and later in Riyadh, was a desire to progressively move toward a new concept of *laïcité*, which is not synonymous with laicism—in

[49] Fr. Evaldo Xavier Gomes, 'Church-State Relations from a Catholic Perspective: General Considerations on Nicholas Sarkozy's New Concept of Laïcité Positive', 48 *J. Cath. Legal Stud.* (2009), p. 215.

[50] *Ibid.*

other words, a *laïcité* that does not mean the expulsion of the religious from social and political circles."[51] According to Gomez, there are two key components to the concept of positive *laïcité*: "First, it ought to be a principle of respect for all religious beliefs and not an opposition towards religious feeling as such. The second point concerns the recognition of the decisive role that religion can play in the political and social context of our post-industrial and post-secular societies."[52]

At the end of the day, we may conclude that secularism engages in epistemological, or at least political, overreaching. By adopting a contentious positive conception of freedom, it may unduly engage the coercive power of the state, and crack too many eggs while trying to make a certain type of omelette; by insisting on the commensurability of values it may render itself philosophically and practically unappealing; by relying on a thick concept of the good that is contestable it may generate unnecessary opposition where common ground might be found; and by decisively favouring one comprehensive doctrine over all others it may become unnecessarily jurispathic, and eventually reap what it sows—hostility for hostility, fear for fear, creating enemies from friends.

[51] *Ibid.*, p. 216.
[52] *Ibid.*, p. 217.