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Law and the Sacred

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The Profanity of Law

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Open thou my heart, Oh Lord, unto thy sacred law,
That thy statutes I may know and all thy truths pursue.

—Jewish Prayer Book[1]

Does not every moment of your practical life give the lie to your religious
theory? Do you think it unjust to appeal to the courts if somebody cheats
you? But the apostle says it is wrong. Do you offer your right cheek if some-
body slaps your left cheek, or would you rather start a lawsuit? But the gos-
pels forbid it. Do you not ask for a rational law in this world, grumble about
the slightest increase of taxes and become excited at the smallest violation of
personal liberty? But it is said unto you that the sufferings of this *saeculum*
do not matter in comparison with the future glory and that long-suffering
and hopeful expectation are cardinal virtues. Does the greatest part of your
lawsuits and civil laws not deal with property? But it is said unto you that
your treasures are not of this world.

—Marx and Engels[2]

It is therefore false to reduce . . . theology to anthropology, thus deifying
humanity; for what has to be demonstrated is that humanity is essentially
not divine and that God, if he exists, is man's enemy. It is the privilege of
man to be capable of finite and providential reason and to practice "the
prophecy of his future," while perfect saintliness is contradictory to pro-
gressive perfection.

—Proudhon, as paraphrased by Karl Löwith[3]

Critics of religion have always pounced on the apparent conflicts and deviations
between human and sacred law. For thinkers such as Marx and Proudhon, and
others bent on leveling religious faith and the power of religious institutions, gaps
between actual legal practices and sacred ideals have supplied endless grist for the
mill. But the idea that the law and the sacred conflict did not originate with the
critics of religion. On the contrary, conflicts between law and the sacred were a
constant preoccupation of religious thinkers and believers in the premodern, pre-
secular world. For them, it was not merely that law *differed* from sacred ideals, or

simply failed to live up to them; the concern, rather, was that human legal institutions actually *violated*, and *profaned*, the sacred—and necessarily so. The perception of a link between law and profanity, to be seized upon later by modern critics who would make a mockery of religion, was, in fact, originally a *religious* idea.

Attempting to come to terms with the link between law and profanity was an important theological project that profoundly influenced our legal practices and our basic understanding of law. Yet, despite its importance for the development of modern law, this theological project is long forgotten, lost in the mists of the premodern, presecular past. The idea of an essential link between law and profanity has two facets, both of which are alien to modern, secular thought. On the one hand, we have a notion of law that posits a necessary divergence between law and the sacred and attributes a profane character to law. On the other hand, we have a notion of the profane as the realm of human activity that necessarily includes (we might even say *features*) the business of law. Today, these notions mostly fall on deaf ears, depending as they do on the basic concepts of the profane and the sacred, concepts that have largely lost their meaning in the modern, secular world. In a secular world, the idea that the law is profane is scarcely comprehensible, let alone one we would consider adopting, resting as it does on a framework of concepts, beliefs, and standards of judgment that is altogether foreign to the secular worldview. To characterize a legal system as "profane" (or for that matter, as "holy" or "sacred") presupposes a particular epistemological framework, a basic mindset or framework of meaning, "which defines what sorts of things are accessible to the human mind and human experience,"[4] namely, things pertaining to the divine. It is well understood that different cultures have different epistemological frameworks and that nothing can be humanly known outside one epistemological framework or another. When we draw our commonplace distinctions between "the secular" and "the religious," we generally have in mind not just different domains or practices but different mindsets, or frameworks of meaning, as well. Terms like *profane* and *sacred* derive from a religious framework of meaning, and that meaning is largely lost in the modern, secular world.

But it was not always so. In fact, the very concept of the secular (which bears a close relationship to the concept of the profane) is inherited from conceptual systems that developed in the premodern, presecular world. "The secular" was, in fact, originally a *religious* concept, a product of traditional religious epistemological frameworks. The concept of the secular always served the function of distinguishing religious from nonreligious domains. But nonreligious domains did

not, in the premodern view, exist outside the religious epistemological framework. On the contrary, that framework of meaning was all-encompassing, overarching, comprehending within it *every* domain of human (and nonhuman) action and cognition, both the spiritual and the temporal, the holy and the unholy, the ecclesiastical and the secular, the sacred and the profane. In their original usage, oppositions such as the spiritual and the secular, the sacred and the profane, did not denote two different mindsets or conceptual systems or frameworks of meaning (as they do today). Rather, they referred to different institutions, different jurisdictions, different functions, and different domains, all of which were located within a single conceptual universe. That conceptual universe, it bears repeating, was a pervasively religious one. This is not to deny the occurrence in the premodern world of such phenomena as religious skepticism, indifference and cynicism, and all the various forms of transgressive behavior and thought that have been unceremoniously lumped together and dubbed "irreligion."[5] It is, rather, to emphasize the unavailability in premodern times of what we think of today as a secular worldview—that is, one without any God in it—which is to say that the concept of the secular was not originally a secular concept.

To put it otherwise, the concept of the secular has itself, ironically, been secularized and modernized, which makes it hard to grasp the original meaning of the secular and its relationship to profanity and law. The secularization of the concept of the secular has produced the familiar modern conception of the secular as a distinctive, and distinctively nonreligious, *mindset*. By the same token, it has eclipsed the original conception of the secular as a specialized area of God's domain. The resulting gap between the traditional and the modern conceptions of the secular accounts for much of the difficulty we now have in comprehending, or even registering, the claim that the law is profane. Modern secularism simply lacks the epistemological framework to make sense of this claim. And until very recently, it has lacked the incentive even to try to make sense of this claim. But as recent events have perhaps made clear, the question of the character of the law in relation to the sacred is neglected at our peril.

Contrary to the expectations of the likes of Marx and Proudhon, modern life has not been characterized by the "withering away" of religion.[6] Instead, we have witnessed the increasing polarization of religious and secular points of view. This polarization feeds on itself. It is all too easy to dismiss religious critiques of the law and the secular state as the products of fanaticism, religious fundamentalism, and political extremism, with which there is no possibility of constructive engagement.

Conversely, it is all too easy for defenders of religious tradition to demonize the secular world. Both sides demonize the other; both sides talk past each other, without realizing that they share a common root. In fact, religious fundamentalism and modern secularism derive from—and yet are cut off from—a common political and religious heritage, an intellectual tradition borne of the struggle to reconcile the idea of divinity with the practical needs and limitations of the mortal world.

That intellectual tradition exhibited a constant interplay between the ideas of the secular, the profane, and the law. It was a religious tradition, containing the basic conceptual vocabulary that religious fundamentalists invoke today against the modern, secular state, including the concepts of the sacred and the profane. Yet at the same time, it was a political tradition, a tradition of political thought that generated the basic conceptual building blocks of modern—secular—political philosophy. These building blocks include the idea of *secular law* and the concept of *the secular*, more generally, as well as many of the ideas that we now associate with the political philosophy of *liberalism*, such as pragmatism, pluralism, and the need for tolerance.[7] It may come as a surprise to both fundamentalists and secularists to learn that these legal and political ideals originated in traditional religious thought. But in fact, the liberal ideals that fundamentalists spurn and that secularists claim as their own derive from this religious tradition.

Admittedly, there is a certain artificiality to this "tradition" that I am identifying. At no point were its defining elements self-consciously articulated, nor were they ever assembled and singled out as a distinct school of thought or characterized as an intellectual tradition by the historical actors who developed them. There is no name for the tradition I have in mind—although we might refer to it as theological secularism, or secularist theology, for lack of a better term[8]—and it was never the unique property of a single culture or discrete group of people in direct communication with one another. Rather, it is more historically accurate to say that the tradition I am identifying consisted of a loose set of ideas that continually circulated in various theological and political discourses of the past. Theological secularism did not exist as a tradition in the same way that, say, Trinitarianism and millenarianism have formed traditions of Christian thought, or messianism and Hasidism are traditions of Jewish thought, or civic republicanism and liberalism constitute traditions in Western political philosophy. But we have found it useful in other contexts to identify traditions such as "pietism," "mysticism," and "rationalism," even though these terms refer to intellectual trends or bodies of ideas that surface

in more than one culture (sometimes as the result of a direct exchange of ideas but sometimes as the result of separate parallel developments) and even though these classifications are the constructs of scholars, external observers, and not terms that adherents of these "isms" would necessarily use to describe themselves. "Isms" and "traditions" are almost always constructed retrospectively—sometimes by followers and sometimes by outsider observers—after a burst of originality has yielded to the ongoing, evolving elaboration and interpretation of the original ideas. Neither the originators nor the elaborators (and of course, there is no clear-cut distinction between the two) need to be aware of the tradition they are in the process of forging (although sometimes they are). It is not their job to construct a tradition or even, directly, to generate ideas. Their job is to solve problems—the elaboration of ideas that constitute an intellectual tradition is a by-product of problem solving that may or may not be recognized and named as such by its participants. The tradition of thought that I am identifying (constructing) here is a tradition in this sense.

Characterizing a particular set of ideas as a theological–secularist "tradition" is, I readily admit, an act of retrodiction on my part, an interpretive act of ordering and giving coherence to a "body of thought" that never really existed as a recognizable body but was in fact amorphous, heterogeneous, and discontinuous (traditions are like that). Furthermore, I "find" this body of ideas circulating in not just one but in numerous legal traditions; in fact, I venture to hypothesize that *every* legal system will reflect similar ideas. Any argument that posits a basic similarity among all legal systems is subject to the charge of resting on false universalizations of local characteristics and overgeneralizations about law. In defense of this unfashionably essentialist style of argument, my position is that the case for finding a common root for liberal and fundamentalist, secular and religious, Western and non-Western conceptions of law in a secularist theology is worth making, or at least stating, if only to provoke the refutations that might help us to see the relationship between these warring conceptions of law more clearly.

But my purpose in this chapter is not to prove the contention that every legal system is rooted in secularist theology. Nor is my aim to demonstrate the presence of theological secularist ideas in every religious tradition. As interesting as it would be, it would also be virtually impossible to examine every legal tradition for evidence of the imprint of theological–secularist ideas, even if one possessed the skills of the best comparativist scholar (which I emphatically do not). My purpose here is twofold: first, to describe the content of the intellectual tradition that I

characterize as secularist theology; second, to show that the warring worldviews of modern secularism and religious fundamentalism have a common source in secularist theology and that they both represent developments, and to some extent distortions, of traditional theological—secularist ideas.

In the main body this chapter, I flesh out the content of the ideas that (I) define (as) secularist theology by following their historical development within *our* legal tradition, that is, the so-called Western tradition of legal ideas, beliefs, practices, and institutions upon which modern, secular legal systems are largely based.[9] In particular, I focus on Christian and Jewish conceptions of the relationship between law and the sacred and their respective connections with classical philosophy as well as biblical thought. This part of the chapter reveals that, contrary to the received wisdom (based on centuries of anti-Jewish polemics) that Christianity was based on a rejection of the harsh justice and excessive "legalism" of Mosaic law, Judaism and Christianity each harbor conceptions of law that constitute virtual mirror images of each other, both in their vision of divine justice and sacred law and in their acceptance of the fact that divine law and sacred ideals of justice have to be violated in the temporal world. Most important, for the fateful history of Jewish—Christian relations, Christian and Jewish conceptions of law mirror each other in their respective projections of this profane conception of law onto the legal system of the other, even as they each incorporate the profane system of law that supposedly belongs to the other within their own legal system. The upshot, in both cases, is the elaboration of a particular set of legal arrangements and a particular set of religious and political justifications for those arrangements, which together constitute what I call secularist theology—that is, theological arguments for secular law, enforced by secular political authorities.

Without undertaking the impossible task of establishing the presence of the same set of ideas in all other legal systems, I end by identifying three general intellectual principles or tendencies—pragmatism, pluralism, and probabilism—that are found in Jewish and Christian secularist theologies alike and that, at least at first glance, appear strikingly similar to intellectual tendencies and ideas found in other religious legal cultures. Although passing references to legal cultures as diverse and seemingly remote from Western culture as classical Islamic jurisprudence and the "legal cosmology" of Buddhist Tibet[10] hardly establish the universality of secularist theology, they are at least suggestive of the possibility that secularist theology is expressive of a widely shared human condition and that legal cultures which appear to be deeply alien and hostile to one another in fact share a common stock of ideas.

Central to what I call "secularist theology" are the intertwined concepts of the secular, the profane, and the law. Secularist theology is a legal philosophy, a philosophy about the nature and necessity of law in human society, as well as a religious philosophy about the nature and necessity of a boundary between the sacred and the profane. At the crux of secularist theology is a line of reasoning leading to the conclusion that legal systems fall on the profane side of the boundary line and that the intellectual postures of pragmatism, pluralism, and probabilism are therefore required of law. Although the main body of this chapter is devoted to retrieving this tradition and line of reasoning, the conclusion looks at its evolution (or one might say, devolution) into modern secularist and fundamentalist thought. The opposition that we see today between secularist and fundamentalist thought reflects important points of tension contained in theological—secularist thought. These tensions were always difficult to maintain, but maintaining and containing these tensions is precisely what theological secularism *did* and, in a deep sense, what theological secularism *was*. The collapse of these tensions spelled the demise of secularist theology, leaving in its wake the radically estranged viewpoints of antisecular fundamentalism and antireligious secularism and a broad range of more or less tolerant religious and secular beliefs in between. Even at the extreme poles of modern religious and secularist beliefs, though, secularist—theological ideas never completely disappeared. On the contrary, secularist and fundamentalist legal philosophies each build on different aspects of traditional theological—secularist thought, amplifying one or the other side of the tensions that historically animated secularist theology.

Reconstructing the point of view of secularist theology involves putting the two sides back together, a task that might be likened to trying to repair a pair of chromosomes that, having mutated, no longer fit together, or to tracing the etiology of a modern cultural deformity that finds expression in the frightening levels of mutual incomprehension and antipathy between "the religious" and "the secular" that we see today. It would be hopelessly naive to think that reconstructing the point of view of secularist theology could bring about a solution to the conflicts between religion and secularism that we now face, when the causes of these conflicts are exceedingly complex and hardly reducible to nonmaterial, intellectual causes of the sort explored here. But perhaps it can shed light on the predicament we now are in by helping us to achieve a better understanding of who *we* are and where *we* are coming from, if not also a better understanding of the (religious or secular) other.

Secularist Theology

Classical Origins

The beginning of any account of "Western culture" lies in pagan antiquity. In the beginning, the holy was separated from the profane. Far from being a godless world, as some critics of paganism would have it, the premonotheistic world of pagan antiquity was awash with divinity. By definition, the polytheistic world abounded with gods. "To each community its own local god" was the fundamental precept of the polytheistic order. This meant in practice that every community possessed its own god or gods, practiced its own rites, and worshipped at its own temple. (These facts have led some scholars to propose that the ideas concerning religion embraced by the more radical Enlightenment figures, ideas such as religious tolerance and freedom of belief, constituted a kind of "modern paganism"—a provocative thesis that, while not universally accepted, at least not without qualification, captures the contemporary resonance between pluralism and polytheism, on the one hand, and exclusivity and monotheism, on the other.[11]) In the ancient world, the profane referred literally, and without any value judgment, to the area of space directly before ("pro-") the temple ("fanum"): *profanum*.[12] Only in its second definition did the Latin *profanum* acquire the pejorative connotations of impiousness, wickedness, and ignorance.[13] In its original sense, profanity was strictly a place designation based on a differentiation between two sorts of physical and metaphysical space: the sacred—precisely, that which was consecrated, set apart,[14] as in a *sanctum* (a holy place),[15] or a *sanctuarium* (a shrine or a private cabinet, a place for keeping sacred things)[16]—and the space outside the sacred (i.e., the profane), which referred in the narrowest sense to the space directly in front of the sacred cabinet, temple, or shrine and in a wider sense to any space (physical or metaphorical) that had not been consecrated. The concept of the secular in early Christianity came to have much the same meaning: "worldly, temporal, profane, lay, and secular" became so many synonyms[17] for the comings and goings and doings of mundane life.[18]

The split between the two different senses of profane, one pejorative and one not, can be seen clearly in the opposite meanings attached to the verbal form early on: "to profane" was both to bring an offering to the temple (literally to be before the temple, *pro fanus*) and to make unholy.[19] Both usages presuppose the existence of a boundary line dividing the sacred from the profane, but they conceive of very

different relationships between the two sides of the line. In the first instance, the boundary line is respected, and the profane simply occupies the space outside the line that separates the profane from the sacred. In the second instance, the profane oversteps the boundary and crosses over into sacred space (as only the wicked, the impious, the unlearned, or the ignorant would do). In the first, root sense, the profane is not merely compatible with religious piety; it is definitive of it, involving precisely the hallowing of sacred space,[20] the performance of religious obligations,[21] and the reverencing of God (or in the pagan context, of gods or a god).[22] The derivative sense of the profane implies just the opposite—the desecration of sacred space, the violation of religious obligations, and the failure to obey one's god—in a word, sacrilege.[23] But if the latter is an *irreligious* posture, implying impious disrespect and disobedience of divine commands, it is by that same token *not* an *areligious* posture, implying a disbelief in the god (or gods) whose commands are disrespected. On the contrary, it presupposes a religious conception of the world, including a belief in the sacred (otherwise, what is being violated?),[24] no less than the former conception of profanity does.

The tension and the slippage between the two meanings of "profane" are facts to be reckoned with in reconstructing the history of theological secularism. Some viewpoints collapse the difference between the two meanings. For example, as we shall see in the concluding section of this chapter, many forms of religious fundamentalism view anything that is *outside* the jurisdiction of the sacred as, ipso facto, a *violation* of the sacred. From this point of view, there is no distinction to be made between the pejorative and nonpejorative senses of the profane, and there is no distinction to be made between sacred and nonsacred realms. Everything *ought* to be within the sacred jurisdiction according to these reductive views, and whatever escapes it is an affront to religion. Modern secularism can be equally reductive. Instead of equating the two meanings of profanity, modern secularism eliminates the tension between them by simply preserving one and discarding the other. Thus, it adopts the original notion of the profane as a separate sphere of nonreligious activity—the "secular sphere" as it has been known since early Christian times—while relegating the normative notion of the profane to the sphere of private judgment, where, ostensibly, people are free to believe what they like. Religious fundamentalism collapses the distinction between the two meanings of profanity by equating the two, whereas modern secularism empties out the religious meaning of profanity altogether. Neither position recognizes the original conception of a secular realm that is profane in the first sense but not in the second and that, furthermore,

provides a defense of the secular realm's profanity, in the first sense, and a refutation of its profanity, in the second sense, *on religious grounds*. Neither position, that is, recognizes the *theology* of secularism.

Unlike fundamentalism and modern secularism, theological secularism preserves the duality of profanity's meaning and, on the basis of that duality, constructs a religious defense of secularism and secular law. It is the essence of theological secularism to recognize *both* senses of the profane and to maintain their separation, thereby creating space for a form of profanity that is neither areligious, nor irreligious but, rather, paradoxically, reflective of religious commitments and beliefs. Contra the various forms of religious fundamentalism that admit no legitimate secular jurisdiction, theological secularism reflects a belief in the necessity of a "nonreligious" sphere of activity that is separated from the sacred realm. Contra modern secularism, theological secularism conceives of that necessity as a *religious* necessity, driven by religious concerns and expressive of religious humility and a sincere belief in god; it likewise conceives of the secular sphere as subject to the will of god and divine law, while being nonetheless "nonreligious" and outside the jurisdiction of religious law in another sense.

Perhaps the best way of understanding secularist theology—both its underlying religious consciousness and the practical arrangements that it prescribes—is to look at it not as an abstraction but, rather, as a practical response to a concrete problem. The basic problem to which secularist theology responds is, not to put too fine a point on it, human imperfection. The imperfection of human knowledge, in particular, is the problem that historically triggered the development of theological–secularist ideas. To put it otherwise, secularist theology reflects an acute awareness of the failures and limits of human cognition, growing out of the perception of a fundamental gap between the human capacity for knowledge and the omniscience of the divine. Of course, it is possible to cultivate an awareness of the frailty of the human conceptual and perceptual apparatus without holding specifically religious metaphysical views. Conversely, it is painfully obvious that holding religious metaphysical views does not ensure being mindful of the limits of human cognition. But historically, the distinctively religious consciousness of an unbridgeable gap between the human and the divine has not infrequently served to sharpen perceptions of the faultiness of human perception and to heighten awareness of the limits of human awareness.

Examples of this distinctively religious consciousness abound. In the Western tradition, the *locus classicus* is, depending on the school of thought, either Plato or

Aristotle. One school derives a religious intellectual tradition that "is both anti-sensible and antirational"[25] from Plato's skeptical philosophy of mind, expressed in passages such as the following:

> Every human soul by reason of its nature has had a view of Reality, otherwise it could not have entered this human form of ours. But to derive a clear memory of those real truths from these earthly perceptions is not easy for every soul—not for such as have only a brief view in their former existence, or for such as suffered the misfortune, when they fell into this world, to form evil connections . . . forgetting the holy vision they once had.[26]

As described by Stanley Fish in his reconstruction of this intellectual tradition, the "cornerstone" of Plato's philosophy of mind "is a profound distrust of the systems of value and modes of perception indigenous to human life."[27] True knowledge, according to this view, can only be obtained through *holy vision*,[28] which is precisely *not* "the [partial and distorting] version of reality yielded by the senses and by a merely rational wisdom."[29]

In this view, the instruments of proof available in the human world—legal proofs are paradigmatic—do not lead to knowledge of the truth but, rather, to its very antithesis: the *illusion* of truth.[30] For this reason, legal proofs and rhetoric, the art of legal persuasion, were roundly condemned by Plato and his followers hand in hand with the condemnation of poetry.[31] Despite its association with poetry, rhetoric is *not* distinguished, in this intellectual tradition, from rational, scientific forms of discourse. To the contrary, rhetoric and science are equated—as ways of producing and communicating knowledge based on merely probabilistic evidence and ordinary sense perceptions—and pronounced to be merely illusory forms of proof (in contrast to dialectic, which alone leads to truth).

The classical tradition of rhetoric is therefore the last place one would expect to find an expression of the religious consciousness of human cognitive limits similar to Plato's. In fact, however, the classical conception of rhetoric, bequeathed by Aristotle in his classic defense of rhetoric against Plato's attack, exhibits more or less the same understanding of the limits and deficiencies of rhetoric as Plato's vision does. Proponents of classical rhetoric were anything but unmindful of the lack of certainty afforded by rhetorical proofs; they understood full well that proofs based on rhetoric rest on inventive interpretations rather than on perfectly objective reconstructions and produce merely probable rather than certain truths.[32] The difference between the followers of Aristotle and Plato on the subject of rhetoric did not lie in a disagreement about what rhetorical knowledge is like (they were rather in

agreement about its made-up and less than certain nature), nor did it lie in a difference of opinion about whether other superior forms of knowledge are available in the mortal world (again, they were more or less in agreement that *all* human knowledge practices, including science, medicine, political judgments, and law, have to be based on the imperfect art of rhetoric, save for the philosophical occupation of pure speculation, which is necessarily the province of a few and, by definition, disconnected from the practical world). The difference lay, rather, in their respective evaluations of the practical utility and moral acceptability of rhetoric as a form of knowledge (and in their respective views of the relationship between those two characteristics). Whereas Plato, for the most part, saw little value in rhetoric,[33] Aristotle and his followers accepted the imperfections of human cognition reflected in rhetorical modes of knowledge. The project of classical rhetoric was not to deny the susceptibility of these modes of knowledge to bias and error nor to deny their merely probabilistic and less than certain—hence, illusory—nature. But it was not to deny their practical or ethical value either. Indeed, classical rhetoric made utility the measure of value and recognized the utility of even imperfect, probabilistic modes of knowledge. Rhetoric was thus conceived as a quintessentially pragmatic project of making the best of a bad lot, the lot of living as a mortal in the mortal world, "where we cannot have certain knowledge," so "our knowledge must be probable at best."[34]

Seeking to make human practices of interpretation and judgment as useful and as equitable as possible, classical rhetoric was organized around an awareness of the limits and the pitfalls of the human cognitive capacity. Whether this mindfulness of human cognitive limitations embedded in the classical tradition expressed a distinctively *religious* consciousness of a gap between the human and the divine is a complicated question, the answer to which need not be resolved here.[35] More important, for our purposes, is the emergence of Judaism, Christianity, and Islam as the chief continuators of Aristotle's philosophical ideas.[36] We may never know if religion was at all central to the Aristotelian tradition of rhetoric in the original context—the pagan societies of ancient Greece and Rome—in which it was first developed, institutionalized, and practiced, chiefly by lawyers, a slowly professionalizing class, occupied mainly with practical, human affairs, which placed them outside the sacred realm of rites and oracles, presided over by the priests.[37] What is undisputed is that during the period of time between the twelfth and fifteenth centuries, the proverbial "golden age" of medieval Spain, Aristotelian thought, including the classical tradition of rhetoric, was absorbed into the three major

monotheistic religions. Thus, whether or not classical rhetoric contained a religious sensibility at the outset, there is little doubt that the religious sensibilities of Judaism, Christianity, and Islam were grafted onto it (and it onto them) during the Middle Ages (if not, in some instances, before).

The encounters that occurred between the monotheistic faiths and Aristotelian thought (each had its own "Aristotelian moment") did not *create* the religious sense of a gap between the human and divine. That basic notion was a core feature of Judaism, Christianity, and Islam, rooted in biblical (and Koranic) texts, well before any encounter between Greek philosophy and the monotheistic religions occurred. But if the idea that human knowledge falls short of divine omniscience preexisted the encounter between philosophy and monotheism, that encounter could only have sharpened the already present awareness of human cognitive imperfection. In fact, both Platonism and Aristotelianism would have reinforced the sense of human cognitive inadequacy promoted by the monotheistic faiths, and vice versa.

Christian Developments

This is readily seen in the case of Christianity, which early on became fused with both Platonic and Aristotelian ideas and developed a legal tradition directly based on Roman law and its classical *ars rhetorica*. The development of Christian canon law is an inseparable part of the history of the various civil law and common law systems that eventually emerged in Europe. It is therefore of great moment, for purposes of establishing the existence of a tradition of theological secularism and its formative influence on the modern legal culture of the West, to demonstrate the centrality of classical ideas to Christian canon law and traditional Christian legal thought.

The most striking feature of Christian canon law, for our purposes, is its coexistence at all times with other legal systems. From the fourth and fifth centuries, when the first Church Councils were organized and produced the original Church rules, or "canons,"[38] through the establishment of the papacy in Rome, to the present day, the Church never exercised—and never claimed—unrivaled political power. The powers that the Church accrued were undeniably vast. But even at its height, the political authority of the Church did not *displace* other forms of political rule either in theory or in practice. This was not just a matter of Realpolitik (though of course it was also that). It reflected the Church's own understanding of how political power ought to be ordered and distributed.

Church theology, canon law, and the Bible itself always recognized a division between the "spiritual" jurisdiction of the Church and its courts and the "secular" jurisdiction of the State. Indeed, the term *secular* finds its origins in this early Christian usage, meaning, roughly speaking, the worldly, the temporal, the nonreligious, in other words—in its root, nonpejorative, sense—the profane. Building on Mark 12 ("Render unto Caesar what is Caesar's") and Romans 13 ("Obey the government, for God is the one who put it there"),[39] Christian theologians consistently accepted the proposition that secular government is divinely ordained by God. Although this implied a degree of interpenetration between religious and State authority at odds with modern notions of the separation of Church and State, it also implied a theory of a division between Church and State not so dissimilar from modern notions as we might imagine. Augustine's pairing of the "city of God" and "city of the world" and Aquinas's theory of a divinely ordained hierarchy of spiritual and temporal political jurisdictions were perhaps the most influential statements of the fundamental Christian belief in the rightful coexistence of secular and religious realms, but they merely gave expression to a commonplace view.[40]

This theory of dual jurisdictions presupposed the existence of a boundary line separating the sacred from the nonsacred realm, which raises two basic questions: (1) What differentiated the two realms? In other words, what did each realm contain? (2) Why was such a division thought to be necessary? Why couldn't everything be contained in one—sacred—realm? Why couldn't everything be sacred?

The answers to these questions are interrelated. They both turn, in important part, on the basic idea that humans lack the cognitive perfection of the divine. The sacred realm, in the Christian understanding, was occupied by God, of course—by the Father, the Son, and the Holy Spirit; it was also occupied by divine justice and sacred law. But divine justice and sacred law could bear at best only a hortatory relationship to conventional law and human legal institutions for the simple reason that human beings, and human reason, in the Christian conception are flawed. The problem—the practical problem to which Christian theology had to respond—is not just that there are "bad guys" (intentional lawbreakers who violate the sacred order with evil hearts), an inevitability given humanity's penchant for evil in its fallen state. The more intractable problem is that the "good guys," the law *enforcers*, lack the tools to make the correct judgments necessary to doing justice that God alone can make.

The religious consciousness of an unbridgeable gap between divine and human perception is thus intimately connected to the Christian conception of a legiti-

mate secular sphere separated from the sacred realm. Simply put, according to traditional Christian thought, secular law is necessitated by the inadequacy of our grasp on divine justice and sacred law. Which is to say that the secular realm is largely occupied with law—conventional human law, state law, and its attendant institutions, which are designed to apply and enforce the law and serve the needs of society.

This, in a nutshell, is the basic logic of the religious argument for the secular state and secular law, or what I call "secularist theology." The force of this logic is perhaps best appreciated in the context of particular historical episodes in which the allocation of law-enforcement powers to secular political regimes was explicitly discussed. One particularly telling example is the discussion that surrounded the "new criminal law," which emerged in Europe in the late twelfth century. As described by Richard Fraher, who made the topic the subject of a series of articles,[41] the creation of a new criminal law in the high middle ages was propelled by the fact that "procedural guarantees for the defendant were so strongly entrenched in the traditional accusatorial procedure" prescribed by canon law "that prosecution *per accusationem* emerged as a positively inefficient means of curbing criminal behavior."[42] The "conceptual base" for these procedural guarantees, Fraher points out, was "inherited from antiquity."[43] Specifically, "[t]he rabbinic tradition had required two witnesses in order to establish proof and thus supplied a standard for sufficiency of proof in criminal cases. Both the Old Testament and the Roman law required due process before a defendant could be condemned."[44] And "[a] crucial third element appeared in the Roman law's *dictum* that the burden of proof lay upon the accuser and not the accused."[45] The practical result was that convictions were almost impossible to secure under traditional canon law. In other words, sacred law was, literally, too good for this world.

The religious conception of sacred law that made it practically unenforceable reflects the religious consciousness of the limits of human cognition discussed earlier.[46] As Fraher explains, "the fathers of the Latin church had decidedly rejected the preoccupation of fifth-century Roman law with maintaining social control through harsh penal sanctions"; more broadly, they rejected "the conceptual framework from which the [Roman law] vocabulary was drawn" (even as they adapted that legal vocabulary to other ends).[47] Their repudiation of law as an instrument of coercion and social control had many sources. "If the voice of Christian experience in the age of martyrs did not sufficiently discredit the brutal Roman approach to criminal law, the authority of Scripture, cautioning the Christian not to accuse his

brother, certainly suggested toleration."[48] It was also consistent with the general spirit of Jesus' rejection of the law and "legalism" of the Pharisees.[49] It is critical to note, however, that this negative attitude toward law and legalism was only aimed at law *in the temporal realm*; it did not extend to the world beyond. As Fraher explains, describing the Church fathers' views, "[i]t was not that any sin would fail to meet its just desert but that [Christian theologians, such as] Augustine and Gregory *were not confident of society's ability to enforce the divine law in this world* and therefore felt safer in leaving vengeance to God and restricting the aims of the church in *this* world to corrective, medicinal ends through penance."[50]

The separation originally made by Christian thinkers between the divine and the temporal thus cut two ways. On the one hand, the Church fathers could afford to dispense with law enforcement in the earthly realm, confident that punishments and rewards would be meted out in the afterlife. On the other hand, their reason for dispensing with temporal law enforcement in the first place was that human beings, charged with enforcing the law, would inevitably fail to make the correct decisions because, as humans, they necessarily lack the perfect omniscience and understanding (the judgment and the mercy) of the divine. The only hedges against these limitations conceived of by the Church fathers were to attach stringent procedural safeguards to the conduct of prosecutions to prevent convictions from being based on inadequate proof or to forego law enforcement altogether. For all practical purposes, these seemed to amount to the same thing.

Not surprisingly, such a purist approach to law enforcement was quickly "supplemented" by a variety of mechanisms aimed at securing what the purist approach could never achieve, namely, convictions.[51] A law that is too good for this world really is too good for this world, a fact that Christians were readier to accept once "the age of martyrs" ended, and they ceased to be the objects of legal persecution and found themselves (after the Roman emperors' conversion to Christianity) in the position of power instead. A system of law that refuses to permit convictions based on less than perfect knowledge is a system in which crimes can be committed with impunity; neither punishment nor deterrence of criminal behavior will be served. By the twelfth century, the perception of soaring crime rates strongly suggested to Christians that the promise of punishment in the afterlife was an ineffective deterrent. Combined with the sense that unrestrained criminality could hardly have been part of the divine plan, the belief emerged in this period that effective mechanisms of law enforcement were a necessary part of the divine plan, even if they conflicted with the requirements of established religious law.

How the need for effective law enforcement was to be reconciled with established Christian law and fundamental Christian tenets, such as "turn the other cheek,"[52] is a long and twisted tale, which can only be glanced at here.[53] Immediately prior to the emergence of the new criminal law, in the twelfth century, the favored technique for avoiding the impediments to effective law enforcement had been the trial by ordeal, conceived as a means to produce the signs or confessions that would satisfy the stringent requirements of biblical and canon law.[54] The abolition of trial by ordeal in 1215 created a practical void that the new criminal law was designed to fill.[55] As Fraher says, "the motivation behind the development of the new criminal procedures . . . was the perceived need for efficient enforcement of the canon law, for the purpose of deterring deviant behavior" (in particular, the deviant behavior of clergy members, which, then as now, had become an embarrassment to the Church).[56] The legal innovations included "the replacement of accusatory by inquisitorial procedures, the virtually automatic use of torture as an investigative and perhaps punitive tool in criminal cases, the employment of lesser standards of proof when witnesses were lacking, and the creation of summary procedures to deal with 'enormous crimes.'"[57]

It may seem a great irony that such brutal procedures were adopted as a result of the Church's moral squeamishness about basing criminal convictions on human judgments and imperfect proofs. But in fact, it was this very reluctance that generated the need for *alternatives* to the legal procedures understood to be prescribed by sacred law. Theologians and canon lawyers were perfectly aware that the new criminal procedures, like the old procedure of trial by ordeal, deviated from the requirements of sacred law, and they understood full well that in so doing, the new legal procedures raised the specter of catastrophic mistakes.[58] It was for just this reason that at least some of these legal procedures were removed from the "spiritual domain" of the canon law courts and entrusted to the secular government instead.

Indeed, one of the most important and long-lasting of the theological innovations of this period was a principle of deference to secular government to enforce criminal law. In essence, the Church authorized the secular governments of the then-prevailing city-states to create and implement an effective system of criminal law. This was justified on the basis of the newly articulated doctrine, first uttered by Pope Innocent III in 1203: *publicae utilatis intersit, ne crimina remaneant impunita* ("in the interest of public utility, crimes ought not remain unpunished").[59] According to Fraher, this doctrine "helped to justify the nontraditional punitive measures which communal governments enacted to ensure stability and curb

violence in the new city-states."[60] By relegating law enforcement procedures that compromised sacred law's "impossible" standards of proof[61] to the secular realm, upholders of Church principles could simultaneously maintain the purity of religious law (in theory), while in practice overcoming the insuperable obstacles which that law imposed to actually punishing or deterring crime.

It is not insignificant that Fraher links this use of the public utility doctrine to the "enormous popularity of Aristotle" at the time.[62] In fact, the justifications articulated for the new criminal law are a quintessential example of the fusion between religious scruples and Aristotelian pragmatism that characterizes theological–secularist thought. Splitting off secular law and government from the Church's spiritual jurisdiction was not just a concession to power; from the internal standpoint of Church theology, it was a way of "hiving off"[63] functions that, because they had to rely on faulty human judgments, profaned the law. It was a dirty job, but someone had to do it, and to maintain clean hands, that someone had to be a nonreligious (secular) authority. This was the pragmatic solution that secularist theology offered in response to the practical problem of reconciling the standards of the divine (which would not countenance erroneous convictions) with the need for effective crime control and law enforcement (which require that some erroneous convictions be made).

There was, of course, a serious problem with this "solution," reflected and partially concealed in the double meaning of "profane." The legal procedures that deviated from sacred law were not just separated from the realm of sacred law, but they were in direct violation of its impossible standards—standards which were, as a practical matter, impossible to meet. They allowed judgments to be rendered on the basis of merely probable, imperfect knowledge; they allowed erroneous judgments; they permitted innocent people to be tortured, imprisoned, convicted, and put to death. They were thus, in every sense of the word, profane. Yet, they were necessary, and not just on pragmatic but on religious grounds. This was the paradox of secularist theology: Secular law was both *religiously necessary* (or crime would go unpunished and aggression would be unbridled) and *necessarily profane* (for mistakes would have to be made, and innocent heads would roll). Secular law, as conceived by the Christian architects of the new criminal law, was thus both transgressive and normative, both violative of and justified by religious law; indeed, it was religiously mandated. It was authorized by Church doctrines, such as the newly canonized doctrine that no crime should go unpunished. Yet it had to be differentiated and cabined off from the spiritual law. Somehow secular law was

both religious and nonreligious; both consistent and inconsistent with religious law. If one thought too hard about it, contracting out the dirty work might not have seemed like an adequate solution to the problem of reconciling the standards of divine justice with the human need for effective law enforcement and human cognitive failings. After all, the dirty work was still being done and still being countenanced by the Church and church law. But for the most part, one didn't have to think too hard about it.[64] It was possible to deny that secular law was profane, in the normative sense, while acknowledging its profanity in the nonpejorative sense in light of its seeming necessity and religious justification—a form of denial made easier by the fact that the favored linguistic convention for referring to the nonsacred domain from early Christian times was to call it "secular," which never carried quite the same sting as calling it "profane." ("To secularize" is not "to profane.")

For all its inadequacies, the theological argument for secular legal authority was eagerly embraced by a Christian public desperate for a solution to the problem of ineffective law enforcement. In a classic Aristotelian moment, both the laity and the clergy welcomed the use of the public utility doctrine to justify secular legal authority on ostensibly religious terms. Indeed, the doctrine was extended to justify changes in the legal procedures of courts in the ecclesiastical realm as well.

For centuries—going back to the original formation of the ecclesiastical realm as a body of religious clerics, formally organized and separated from the Christian laity—the Church had maintained its own "spiritual courts," which followed the legal procedures and substantive rules prescribed by canon law. Indeed, canon law got its start as a collection of rules and bylaws adopted by the Church to "define and determine the organization of the Church and the conduct and duties of its members"—that is, of the clergy.[65] This original focus on the administration of the Church is reflected in the titles and subtitles of the first Church lawbooks, compiled in the fourth and fifth centuries, which announce the subject matters covered by canon law, such as:

1. Ordination, Orders, the life of the Clergy.
2. Monks, nuns, widows, public penitents.
3. Church courts, trials, accusations, etc., councils, church property.
4. Liturgy, Baptism.
5. Marriage, sins of the flesh, murder.
6. Duties and moral conduct of clergy and of laity.

7. The Crown.
8. Theological questions.
9. Heresy.
10. Idolatry.[66]

As these headings reveal, the original collections of Church canons were essentially rulebooks for the clergy, containing the operating instructions for how to qualify, behave, and perform one's duties as a cleric and how to run the day-to-day affairs of the Church. Writing of the character that canon law assumed more than 1,000 years later, during "the long period from the Reformation to the Second Vatican Council," Charles Donahue has described it as "basically an administrative law, parceling out powers and functions, largely among clerics, with papal power increasingly exercised by the Vatican bureaucracy."[67] Minus the Vatican bureaucracy, this is a fairly accurate description of what canon law was like from the beginning: an ecclesiastical law, in the strictest sense, or as Donahue put it, the "administrative law" of the Church, comprising the rules that govern its internal affairs and the conduct of its officers.

Necessarily, this administrative law encompassed matters of both great and little theological import (from heresy to housekeepers)[68] and concerned the conduct of the laity as well as the clergy (since the clergy's regular duties include guiding and ministering to the laity, for example, in the officiation of marriages). As a result, the division of labor between ecclesiastical law and secular law would never be perfectly neat. There would always be overlaps between spiritual and secular law, and the management of conflicts of law and contests over jurisdiction would become a major leitmotif of canon law and Church history.[69]

Given the overlap between ecclesiastical and temporal jurisdictions, it is perhaps not surprising that, at the same time that the Church developed justifications for secular legal procedures to prosecute crime more effectively than traditional canon law allowed, it also enhanced its own prosecutorial powers. The authorization of less stringent standards of proof and procedural protections in the secular courts was only one of the procedural innovations of the new criminal law; most of the others consisted of modifications of the substantive and procedural rules employed by the Church's own legal tribunals. Fraher's work traces how the very same doctrine of *ne crimina remaneant impunita* that justified the circumvention of traditional canon law by the secular city-states also served to justify the circumvention of canon law procedural requirements by the ecclesiastical courts and the

Church hierarchy itself.[70] In the first case, canon law authorized another body of law (the *ius commune*, or common law, of the city-states) to deviate from it; in the second case, canon law in effect authorized itself to deviate from itself. The inquisition, after all (one of the chief elements of the new criminal law) was a religious, not a secular, institution. Like the public utility doctrine that was used to justify it, the inquisition procedure was initially used to deal with "wayward" or "criminous" clerics[71] (as much to avoid outside proceedings against them as to restore discipline to the clerical order).[72]

Just as the use of secular law was rationalized by the Church, the employment of new procedures by the Church's own legal institutions was justified as an "extraordinary measure" required to meet exigent circumstances.[73] And just as the use of the term *secular* helped to finesse the profane character of state law (profane because it violated the requirements of the traditional spiritual law, permitting the conviction of innocent people), the public utility doctrine and similar doctrinal innovations within canon law[74] helped to finesse the profane character of law in the ecclesiastical realm. Although the changes made in canon law and secular law were recognized to deviate from sacred law, they were not explicitly deemed by mainstream Christians to be "profane" (particularly when the stakes were relatively low but even when the stakes were high—as Helmholz observed of a later period, "[f]ew men argued that a judge risked eternal damnation merely by allowing temporal courts to hear disputes between two parsons over which one was entitled to tithes"[75]).

The development of the new criminal law was just one episode in a long history of movements back and forth in Christian thought between a strict adherence to a sacred law that highlights the inadequacy of human judgments and a laxer approach, which stresses the adequacy of human judgments as measured by the pragmatic standards of social utility and necessity. The tension between these two approaches, the purist and the pragmatic, was reflected historically not only in the split between the temporal and spiritual realms but within each realm as well. On the spiritual side, ecclesiastical courts deviated from sacred law every bit as much as the secular courts did, even as these deviations were enshrined in canon law. On the secular side, the recognized temporal power was always viewed (from the point of view of Christian theology) as part of a larger spiritual whole. Throughout centuries of changes in the form and the seat of temporal power, and notwithstanding the multitude of secular political regimes that coexisted with the Church at any one time, the theory that held until well into the modern period was that

kingships were divinely ordained and as much a part of Christendom as the pa-pacy.[76] A divinely ordained kingship is by no means a theocracy (neither is the papacy). Yet it is divinely ordained. As the secular branch of government, it repre-sents not the antithesis but rather the counterpart to the spiritual jurisdiction of the Church, both being part of a single integrated political (and religious) system. That being the case, the legal systems of the temporal powers could never be conceived of as wholly lacking in spiritual content or wholly removed from the Church and its ecclesiastical jurisdiction. The law of the king was, in theory, no less beholden to God than the law of the Church; no less expressive of God's will than the law of the Church; and no less a function of God's design than the law of the Church. Secular law was differentiated from religious law not on the grounds of not being part of the divine order but, rather, on the grounds that secular and religious law served different practical (religious *and* political) functions and had different (religious *and* political) jurisdictions presided over by different (religious *and* political) institutions and rulers.

This is not to deny the existence of overlaps in the functions, jurisdictions, and personnel of the two suborders. In fact, the overlaps were significant. As enumer-ated by Richard Helmholz in his discussion of Church law and secular law in Eng-land, there were three different ways in which spiritual and secular law overlapped: (1) "[T]he persons subject to the jurisdiction of the ecclesiastical and the common-law courts were, roughly speaking, the same"—to wit, subjects of the king, virtu-ally all of whom were Christian after the expulsion of the Jews from England in 1290.[77] (2) "[T]here were several areas of human life where the law of the Church and the common law of the realm both claimed exclusive jurisdiction."[78] Finally, (3) "[M]any clerics served as judges in the early common-law courts [and] were in fact mainstays of the system."[79] Scholars have tended to focus on the *conflicts* between Church and State produced by their overlapping jurisdictions (e.g., "If a man punches a parson in the nose, is that a case of assault and battery, or is it the religious offense of impugning the Church's authority?"[80]). But underlying these conflicts is a basic unity between the temporal and spiritual realms. Even when genuine conflicts of law and contests over jurisdiction arose between the two legal systems, the two remained part of a single unified system, specialized parts of a single unitary (religious and political) whole.[81]

This is equally true of the two different secular law systems that evolved in the emerging states of continental Europe and England, civil law and common law (and equally true of the periods both before and after the Reformation.).[82] Civil

law and common law, each a species of secular law, were alike not only in their secular but also in their indelibly religious (Christian) character and their rela-tionship to Christian religious law. At once apart from, and a part of, the Church's spiritual law, unquestionably subject to God's law (which at once was and wasn't the same thing as the spiritual law), civil law and common law both expressed the paradoxical quality of secular law in secularist theology. Like the new criminal law enacted by the medieval city-states, civil law and common law each embodied the characteristically secular commitment to effective law enforcement, which, be-cause it required the exercise of human judgment, had to deviate from (and liter-ally "profane") the purity of sacred law. Yet each of these secular legal systems also incorporated norms (e.g., the values of due process)[83] that cut against the need for effective law enforcement and expressed concerns about the fallibility of human judgments that were clearly derived from Christian theology and canon law.

Taken together, as the indivisible though differentiated whole that they were, the various legal regimes of Europe and England gave institutional form to the pre-vailing secularist theology that recognized, yet sought to justify, the profane char-acter of law *on religious grounds*. Underlying the diversity of temporal and spiritual jurisdictions produced in Western Christendom was a unifying theology, a set of religious arguments supporting the institution of secular political authority and secular forms of law alongside the Church's own courts (which themselves would be licensed to exercise temporal forms of power).

Similar theological arguments have served to justify similar legal arrangements in other religious cultures. One notable example is Jewish law, which produced a version of a secularist theology that replicates (or anticipates) Christian secularist theology in every critical respect. Notwithstanding the different purposes served by secularist theology in Jewish and Christian thought, and notwithstanding the differences between the situation and content of Jewish and Christian systems of law, the similarity in their respective orientations toward secular legal authority is striking. It strongly suggests that secularist theology is not unique to Christian-ity and the complex system of European canon, common, and civil law but that it rather reflects more widely shared beliefs and concerns.

Jewish Law

Undeniably, there are crucial differences between the legal systems of Western Christendom and Jewish law. One obvious difference stems from the fact that Jews lacked political and legal sovereignty for most of their history, which meant that

the power of their legal institutions was greatly circumscribed. Most of the development of Jewish law (which consists of the law of the Torah and the *halakha*, rabbinic interpretations of the law of the Torah, compiled in the Talmud) occurred in the context of political exile, at the sufferance of host states that intermittently accorded Jewish communities a measure of autonomy to operate their own political and legal institutions.[84]

Perhaps the most oft-stated (and often overstated) difference between Christian and Jewish law stems from Christianity's antipathy to Mosaic law and the "legalism" of the Pharisees.[85] According to longstanding (Christian) tradition, the basic break with Judaic law announced by Christ in the Sermon on the Mount served to elevate the moral content and appeal of Christianity over the exclusive particularism of the Jews.[86] According to others, less critical of the Jewish tradition, the break with Jewish law resulted in a diminishment of the legal content of Christian theology as well as the impoverishment of the theological content of Christian canon law.[87] Charles Donahue speaks for this view when he observes that, although "Christianity was an offshoot of Judaism, a religion that has a great penchant for law," and although "Christianity quickly became associated with Roman culture," another culture with "a great penchant for law," Christianity itself exhibits no penchant for law.[88] According to Donahue, the fact that the fathers of Church law used the Greek word *kanon*, suggesting a technical rule, to refer to their statutes, rather than *nomos*, "a word redolent of overarching philosophical ideas,"[89] reflects the fact that canon law, unlike Jewish law, never was and never would be "redolent of overarching philosophical ideas."[90]

Donahue's view is surely exaggerated (canon law is hardly devoid of theological content), but it is certainly true that canon law has historically played a smaller role in Christian theology than religious law plays in the theology of many other religious traditions, for example, Judaism and Islam. (The Hindu religion might be another case in point.[91]) Jewish law indeed is suffused with philosophical ideas, and law is the medium in which the greater part of Judaism's theological, moral, and political ideas have been expressed,[92] which makes it quite different from Christianity in crucial respects.

This difference in the respective contents and functions of canon law and Jewish law reflects another basic difference: Judaism never produced a specialized clerical order comparable to the Christian clergy. Canon law, as we have seen, was in the first instance the law of the clerical order, the administrative law of the Church, ecclesiastical law in the strictest sense. In Judaism, because there is no comparable

division between clerical and lay orders, religious law in the Jewish conception could not possibly serve the same functions or have the same character as canon law. Lacking an organized Church, there could be no truly *ecclesiastical* law in Judaism. In the Christian conception, the fundamental division is that between the laity and the clergy, and out of that initial distinction, the differentiation of temporal and spiritual legal jurisdictions emerges. In Judaism, by contrast, the distinction between spiritual and temporal law is not based on a distinction between a law for the clergy and the law for the laity, for there is no comparable social distinction drawn between the two. The crucial distinction in Judaism is not that between a law for the clergy and the law for the laity but, rather, that between a law for Jews and a law for everyone else.

Based on biblical scripture, rabbis developed complex doctrines concerning a law for non-Jews, even though, lacking political sovereignty and power, they had neither the means nor the intention of enforcing that law. The so-called Noahide law, derived from the "Seven Commandments of the Sons of Noah," applies to all humankind (and is sometimes equated with "natural law").[93] Extensive discussions of the legal obligations of non-Jews took place under the rubric of this Jewish law doctrine. And in the same fashion, extensive discussions of the obligations of Jews to follow non-Jewish law took place under the rubric of the Talmudic doctrine of *dina de-malkhuta dina* (literally "the law of the kingdom is the law," often translated as "the law of the state is the law").[94]

Although the interrelationship of these two doctrines is disputed by rabbinic authorities, together they reflect the core ideas of what I have called secularist theology. These include (1) a mindfulness of the unreliability of human judgments, stirred by a religious awareness of the gap between the human and the divine; (2) a sense of the consequent profanity of human justice (and profanation of divine justice) that results from the unreliability of human judgments; (3) a sense of the inefficacy of divine justice in the temporal realm due to the procedural barriers erected by sacred law to prevent miscarriages of justice; (4) an appreciation of the great human need for effective means of law enforcement and the practical value and utility of legal mechanisms for circumventing the stringent sacred law; and (5) a corresponding sanction for the development of distinctively secular forms of justice, designed to circumvent the procedural barriers to effective law enforcement imposed by sacred law. As in Christian theological secularism, these ideas gave rise to a complex, variegated system of multiple legal jurisdictions and types of law, some of which are deemed "secular" or "temporal" and others of which are

deemed "sacred," "Jewish," or "religious," although all of them are recognized and authorized by Jewish law.

The first cut in Jewish law is the distinction drawn between a law for the Jews and a law for the gentiles. According to the traditional rabbinic understanding, God prescribed law for all of humanity, but Jews alone were bound by the additional commandments of Sinaitic, or Mosaic, law (the law of the Torah) because only Jews had entered into the special covenant with God to be so bound.[95] Everyone else was subject to the less demanding Noahide Code. The Noahide Code, in the traditional Jewish understanding, contains six basic commandments against idolatry, blasphemy, sexual offenses, bloodshed, theft, and eating the flesh of a living animal. The final, seventh, commandment of the Noahide Code is *dinin*, variously defined as the "obligation to enforce the other provisions of the Noahide Code by appointing judges and other law enforcement officials"[96] or, alternatively, as the obligation to "establish[ ] an ordered system of jurisprudence for the governance of financial, commercial, and interpersonal relationships."[97]

The *halakhah* contains extensive discussions exploring the meaning of Noahide law and the respective obligations of Jews and gentiles to obey one another's law. As Suzanne Stone has remarked, "[t]his large corpus of Jewish legal material defining the obligations of non-Jews who, by and large, are unaware of the existence of the doctrine and who are, in any event, not accountable to Jewish legal authority is to contemporary eyes no doubt strange."[98] That this is so is no doubt a reflection of the modern tendency to equate "real" law with law that is enforceable—a tendency that reveals our own secularist bias. Real law, we tend to think, is law that is enforced by real authorities with real power—that is, states or political institutions like the Vatican, which command the power of a sovereign state, not institutions like the rabbinic courts of the stateless Jews, which clearly lacked the power to subject non-Jews to their law.

But this way of thinking seems clearly to miss the point of the doctrine of Noahide law, in particular, the commandment of *dinin*, which is precisely a call for non-Jews to establish their own system of law, their own rules of contracts, property, and torts, and their own tribunals to apply and enforce these rules of law. According to the rabbis' own understanding, Noahide law is not supposed to be enforced by the Jewish courts. Indeed, the question raised by the interpreters of the *halakha* was not how or whether they could apply the law of the Noahides to the Noahides (i.e., non-Jews) but, rather, how or whether they should, in some circumstances, apply the Noahide law to Jews. Similarly, the doctrine of *dina de-*

malkhuta dina (the law of the kingdom is the law) was elaborated to settle questions concerning whether and when Jews had an obligation to follow the law of the land. Rather like the Christian principle of "rendering unto Caesar what is Caesar's," the doctrine of *dina de-malkhuta dina* served in part to justify Jewish submission to the authority of non-Jewish law—on the grounds of Jewish law—even when that submission entailed the abrogation of certain principles of Jewish law.[99] In this respect, the doctrine was clearly functioning to rationalize pragmatic concessions to superior political power. But this was not the only, or even the primary, function of the doctrine of the law of the king.[100] As scholars like Chaim Povarsky have shown, by marking a boundary line between the jurisdictions of Jewish and non-Jewish law, the doctrine also served to *define* and *protect* a sphere of Jewish legal and political autonomy, safeguarded from incursions by outside law.[101] Most of the applications of the doctrine had the effect of supporting the authority of the rabbinic courts (and other Jewish political institutions) and Jewish law. And even when conflicts of law led rabbinic authorities to apply the doctrine to support the law of the "king," the authority of the rabbinic courts was enhanced inasmuch as they were able to present themselves as the ones granting deference to the secular authorities on the basis of Jewish law.[102]

Clearly, what is going on in the elaboration of these doctrines is the articulation of a complex division of legal authority and jurisdictions, defined and authorized by Talmudic law, much like the theory of multiple legal jurisdictions found in Christian theology and canon law. As in the Christian case, the religious authorities (the rabbis) are conceived of, by Jewish law, as the fundamental legal authorities; and as in the Christian case, these fundamental legal authorities are understood to be the ones to have carved out space where other forms of law are allowed, indeed required, to operate. In theory, then, the deference accorded by Jewish law to other legal systems does not reflect its ineffectiveness; rather, paradoxically, it reflects its fundamental authority.

As in the Christian case, the structure of the system of different legal jurisdictions and bodies of law recognized by *halakha* is complex. A seemingly simple dichotomy between religious and nonreligious law gives way in each case to the elaboration of not just two, but multiple, jurisdictions and systems of law. In the Christian case, as we have seen, the basic bifurcation of temporal and spiritual realms was complicated by the Church's assumption of secular powers for itself. On the grounds of public utility, necessity, and the need for extraordinary measures to be taken to enforce the law, the ecclesiastical courts enacted a new "spiritual" law in the twelfth

century alongside their authorization of a new secular law. The new spiritual law, which closely resembled secular law in its relatively lax procedural requirements and standards of proof, was explicitly conceived as a form of emergency law. It was only on the grounds of its emergency powers that the ecclesiastical authorities were thus permitted to deviate from (i.e., violate) the traditional sacred law. The result was that Christian theology sanctioned not just two but three kinds of law: (1) the temporal law of the state (be it civil or common law, a kingdom or a republic); (2) the original spiritual law of the Church, a supposedly pure embodiment of the sacred law combined with a purely administrative law to govern the affairs of the Church; and (3) the emergency "spiritual" law, which was in essence a form of temporal law, designed to serve temporal needs, administered by the Church and the ecclesiastical courts.

Jewish law likewise complicated the basic distinction between Jewish and non-Jewish law, ultimately producing a typology of not just three but four types of law authorized by Jewish law. The fact that Jewish law defined four types of law rather than just the three authorized in the Christian conception reflects the fact that Jewish law, unlike Christian law, subdivides law by peoples or nations in addition to subdividing it according to spiritual as opposed to temporal functions. In the Christian conception, there is no recognition that different peoples or nations might have— or should have—their own legal systems. Implicitly, the Christian theology of law assumes that everyone is Christian or at least subject to the law of Christian people. Even temporal law, in the Christian conception, is conceived of as a part of the larger Christian body politic: The divinely ordained king is, presumptively, a Christian king subject to the law of God and the Church (even if the Church exercises its authority in part by deferring in some areas to the jurisdiction of the king). By contrast, Jewish law, as we have seen, posits that Jews and non-Jews each have their own separate legal systems. The distinction between Jews and non-Jews is independent of the distinction between religious/spiritual and temporal/secular domains. Thus it is that four, rather than three, different types of law are elaborated in the *halakha*: (1) the sacred law of the Torah, or "pure Jewish law,"[103] which is the law supposedly administered by the rabbinic courts for the Jewish people in ordinary nonemergency circumstances; (2) the "law of the king" (or law of the state), sanctioned by the doctrine of *dina de-malkhuta dina*, understood to apply to both Jewish and non-Jewish kings/states; (3) the Noahide law, conceived of as the law of the gentiles, although on some accounts it is construed as a universal law to which Jews also are subject (in addition to being subject to Sinaitic,

or "pure religious," law); and finally, (4) a special form of rabbinic law, endowed with the same procedural flexibility as Noahide and state law, authorized to be exercised by the rabbinic courts in cases of emergency, where exigent circumstances demanded the exercise of exigency powers.

Save for the additional wrinkle of the distinction drawn between Jewish and Noahide law, it should be clear that this complex structure of multiple forms of law almost exactly replicates the crucial features of the legal system enshrined in Christian theology. Both systems feature a pure religious, or sacred, law, which on the one hand is supreme over all other forms of law, but on the other hand is limited by its own decree to the jurisdiction of the religious courts, which is separated (again by its own decree) from the jurisdiction of secular rulers and secular law. The systems further parallel each other in their recognition and authorization of a secular law, administered and enforced by a secular state and its secular courts. In both the Jewish and the Christian conceptions, secular legal authority, independent of the jurisdiction of the religious authorities, is not merely tolerated but regarded as necessary and divinely ordained to serve the most basic human needs. Finally, there is an almost exact parallel in the assumption of "emergency powers" by the religious legal authorities sanctioned by the Jewish and Christian traditions. In both cases, religious courts are licensed to deviate from the "pure religious law" on the grounds of exigent circumstances, utility, and necessity (a development that greatly complicates the basic distinction drawn between spiritual and temporal power). Like the ecclesiastical courts, rabbinic courts were authorized to use their "exigency powers" to devise and implement an "extralegal," efficacious system for enforcing the law—when "exigent" circumstances made such a need for effective law enforcement necessary.[104] Thus it was that the basic distinction between two types of law—secular and spiritual—gave way in the Jewish case to *three*, factoring in the two different types of rabbinic law that could now be exercised under the jurisdiction of the rabbinic courts.

All that distinguishes the Jewish structure of multiple legal systems from the Christian structure is the additional distinction that Jewish law draws between a law for the Jews and a law for the rest of the humanity, the gentile "sons of Noah," a body of law that is not just *nonreligious* in character but also (a very different thing) *non-Jewish*. In tandem with the doctrine of *dina de-malkhuta dina*, the doctrine of Noahide law reflected more than a grudging recognition of non-Jewish law. Together, the two doctrines define an essential role for secular law and (either Jewish or non-Jewish) secular rulers.

If the structure of the various legal systems sanctioned by Jewish law resembles the structure of multiple legal systems enshrined in Christian theology and canon law, as it surely does, the question remains whether the rationales provided for this structure in the Talmud resemble the core ideas of the secularist theology found in the Christian tradition. It seems clear that the development of all of these Talmudic doctrines was fueled, at least in part, by the fact that sacred law, the "pure Jewish law" of the Torah, the Sinaitic or Mosaic law, as it is variously called, frustrated the purposes of law enforcement. Not only did biblical and rabbinic law require two witnesses to prove a crime and obtain a conviction, but it also required that criminals be warned of the legal consequences of their actions prior to committing their bad acts. In the case of a murder, for example, the murderer could not be convicted unless someone—a victim or a bystander—had cautioned him against it. It was readily perceived that these biblical rules made it virtually impossible to obtain convictions; indeed, that was their evident function. The criminal law of the Jewish Bible was seen to be a "system of exceptional leniency to the accused."[105] According to traditional understanding, it would allow penalties to be imposed "only in cases of the most serious and egregious violations, when the evidence of guilt approaches certainty as close as is humanly possible."[106] In the case of capital crimes, Sinaitic law created "elaborate procedural barriers to the imposition of capital punishment" that did not exist in Noahide law (as that law was construed in the Talmud).[107] The upshot was that "the Torah's procedural and evidentiary rules make it almost impossible for the death penalty to be imposed"[108]—one of the marks of distinction between it and the morally inferior (but perhaps practically superior) Noahide law.

For pressing practical reasons, then, rabbinic law, like canon law, was compelled to grapple with this system of "exceptional leniency," which essentially precluded the enforcement of its own legal code. The rabbis' practical solution to this problem was the now familiar strategy of "supplementing" the pure religious law with alternative legal systems of law, which are authorized to follow less stringent (and less lenient) procedural rules. Indeed, what Noahide law, the secular law of the state or the king, and the emergency law of the rabbis all have in common is precisely the license to disregard the traditional evidentiary rules of the Bible, such as the two-witnesses and caution requirements. What distinguishes "the Sinaitic judicial system,"[109] or "pure Jewish law,"[110] from all of these other kinds of law is that it is the one legal system that does not permit judgments to be made absent perfect (or at least near perfect) proof. Conversely, all three of the legal systems

other than the "pure" Jewish religious law of the Torah were depicted by the rabbinic tradition as ones that were ready and able to punish crime "even when the evidence is less than perfect and when the offender is driven by motives other than rebellion against God."[111]

The questions, then, are what was the reason for instituting the procedural and evidentiary barriers in Sinaitic law, and what was the reason for allowing Jews and non-Jews to follow and enforce less stringent procedural regimes according to Jewish law? And do the rationales provided by Jewish legal authorities resemble the rationales found in Christian theological secularism? As Suzanne Stone has noted, the institution of procedural barriers in Sinaitic law "reflects certain assumptions about . . . the nature of divine justice that Jews are commanded to emulate."[112] She also notes that "the scriptural authority to dispense with Sinaitic procedure"—by instituting and following alternative legal regimes—"has proved altogether elusive."[113] According to Enker, the system of procedural stringency and "exceptional" leniency found in the Sinaitic law expressed the underlying rabbinic attitude that "[i]f these requirements yield the result that most violators of God's law will not be punished, so be it. God can and will, it is firmly believed, see to their deserved punishment."[114] This, of course, is essentially the same as the position taken by Augustine and other Church fathers.[115] In both cases, it demonstrates an awareness and an acceptance of the fact that sacred law lacks practical efficacy in the temporal realm (and a corresponding faith that justice will be meted out in the afterlife).

What, then, justified the adoption of practical alternatives to this sacred legal regime? One theory, favored by Stone, holds that the judicial powers of the king, the judicial powers of gentile rulers, and the emergency powers of the Jewish courts, sanctioned by Jewish law, all stem from the same source, namely, "the extension of the provisions of the Noahide Code to Jews."[116] According to this rabbinic theory, the principle underlying the original establishment of a Jewish monarchy was that the Jewish people were henceforth to be a "nation like all the nations." This implied an abandonment of the earlier ideal that the Jews would be holier than other nations.

If "before Sinai, the Noahide Code governed all humanity,"[117] Sinaitic law reflects the "additional obligations" that "the Jewish people took upon themselves . . . at Mount Sinai—to be a nation of priests and holy people."[118] Had the Jews lived up to their covenantal obligation to be holy, a temporally enforced law would have been unnecessary for them. It would be unnecessary because a truly holy people would obey the law without the threat of penalty; a truly holy people

would voluntarily obey the sacred law. But because the Jews had refused to be holy, coercive enforcement mechanisms in the temporal world were necessary to uphold the law. Thus, the doctrinal innovations authorizing secular, gentile, and emergency law were motivated in part by a perception of a need for law and order in the temporal realm, a need created by the unholiness of Jews and non-Jews alike.

But—and now a familiar series of practical problems begins to form—effective mechanisms of law enforcement necessarily rely on human judgments, which the rabbis were suitably wary of. The problem then (as in the Christian case) was not so much the bad guys (the lawbreakers) as it was the good guys (those who would enforce the law). The solution to the good-guy problem, such as it was, was to impose procedural obstacles to rendering convictions without adequate proof, which, for all practical purposes, came close to preventing convictions from being rendered at all. This, of course, exacerbated the bad-guy problem. The solution to the bad-guy problem clearly called for something else: effective means of law enforcement. This produced the good-guy problem. Thus, the two problems and solutions cycled endlessly throughout Jewish law.

The institution of procedural barriers, the solution proposed in Jewish law to the good-guy problem, reflects the belief that divine omniscience is indispensable to divine justice and the corresponding view that human knowledge is inherently uncertain and unacceptably prone to mistake. Stone provides strong support for the view that this is the rationale behind the exceptional leniency of Sinaitic law, noting that:

> the rabbis were aware that the hardest part of dispensing justice for a human court is the finding of facts. The two-witness rule is designed, according to the internal viewpoint of the Talmud, to assure thorough investigation of the facts so as to arrive at the truth. The procedures thus assure that judges will not find themselves guilty of judicial murder through an error in judgment or through acceptance of false testimony.[119]

This is a powerfully direct statement of what is at risk in the human enforcement of law: the violation of the sanctity of human life and sacred law—*profanity* in the fullest sense. It is, by the same token, a clear statement of the link made in rabbinic thought between the religious consciousness of the gap between divine and human cognition and the perception that human legal institutions are necessarily profane.

The basic justification supplied for adopting the various secular legal regimes, and dispensing with the strict procedural requirements of sacred law, was the need

for law and order. Kingships, whether Jewish or non-Jewish, are understood to have been instituted for the worldly purposes of maintaining the peace and protecting the social order—not the higher purpose of achieving holiness that dignifies Sinaitic law (in fact, just the opposite) but a divinely sanctioned purpose nonetheless. The guiding principle of the kingship in both Jewish and Christian traditional conceptions is the social good, which is measured by the standards of public necessity and public utility.[120] (The receptivity of this tradition to Aristotelian ideas should now be clear.) Likewise, the basic purpose of Noahide law and the exercise of emergency power by the rabbinic powers is to preserve the peace and protect the basic social order.[121] Each of these forms of law is a form of secular law, necessitated by the fact that human behavior is *not* perfectly holy (the bad-guy problem) combined with the fact that human beings lack the cognitive perfection necessary for the proper enforcement of divine law (the good-guy problem). Thus it was that, according to Jewish tradition, the Jewish kingship first was instituted when it was conceded that the Jewish people would be "a nation like other nations"—that is, a nation of both bad guys and good guys (both of whom could end up with blood on their hands) rather than the nation of priests and holy people envisaged by the covenant.

There is thus a basic dichotomy in the rabbinic conception between a worldly realm of government and law, which includes both Jewish and gentile states, and another realm that is dedicated to the relationship between man and God. The first realm is a secular one, not in the modern sense but in the traditional sense of a realm that is separated in function, purpose, and institutional form from the "purely religious" realm. Its function is to deal with "the day-to-day concerns of law enforcement and the protection of the social order."[122] Its purpose is to achieve peace, tranquility, and the public good. Its institutional form is the political state. As in the Christian conception, the "nonreligious" or not "purely religious" realm is differentiated from the sacred realm on the basis of its concern with social needs in the temporal world, in particular, the need for social order, which requires effective mechanisms of law enforcement. And again, as in the Christian case, the need for a realm of law apart from the sacred is generated by the necessary inefficacy of sacred law in the temporal realm. As Enker summarizes the rationale underlying the creation of a secular realm in Jewish thought:

> judicial restraint is tolerable, even welcome, with regard to violations of those religious laws that primarily concern man's relation to God. But homicide, and other crimes

between man and man destructive to the social order, require a more aggressive stance. These crimes must be punished even when the evidence is less than perfect and when the offender is driven by motives other than open rebellion against God.[123]

In other words, *publicae utilitas intersit, ne crimina remaneant impunita*—in the interest of public utility, no crime should go unpunished. It is the same pragmatic argument, with the same Aristotelian flavor, offered to justify the exercise of secular legal authority by Christian theology in the twelfth century.

Such rationales reflect concessions to the failings and imperfections of humanity—failings that, Jewish law was compelled to recognize, afflicted Jews as well as non-Jews. The Jews would not, after all, answer to a higher standard, at least not consistently; they would instead be like all the other nations. If there is a principle of universalism here, it is a pessimistic universalism grounded in universal human shortcomings.

The flip side of such pessimism, however, is a sympathetic appreciation for the human condition in the merely mortal world. Such an appreciation is poignantly expressed in the following justification given by the fourteenth-century Jewish jurist, the "Rashba," for the emergency jurisdiction of the rabbinic courts:

> This [the authorization of the courts' emergency powers] is in order to preserve the world. For if you issue decisions based exclusively on the law as given in the Torah, and rule in questions of torts and such only in accordance with this law, why then society would be destroyed, for we would need witnesses and forewarning. As the Talmud says, "Jerusalem was destroyed because they established their decisions only in accordance with biblical law."[124]

This is a truly breathtaking formulation of the principle of practical necessity as a justification for temporal law. Not only is the sacred law too good for this world; its application would actually result the world's destruction! To put it the other way around, if human beings are not good enough for the sacred law, then the sacred law is not good enough *for human beings*. Far better is the law of temporal human institutions, applied by human beings, which, imperfect as it is, is better suited, and more adequate, to the human situation.

It is hard to imagine a more powerful statement of the principles of social utility and necessity that justifies the application of nonideal standards and procedures to a nonideal world. This understanding of human need as being at odds with sacred law is amplified by the rabbinic understanding of the nature of the "emergency" that justifies the rabbis' own use of "extraordinary" powers. In theory, the

rabbinic courts' use of their exigency powers in circumvention of the ideal sacred law is strictly an "emergency measure."[125] In practice, the emergency never ends. The implicit theory seems to be that life, the human condition itself, is the emergency. The startling insight here is that sacred law would be destructive of this world and destructive of human life. The corresponding conclusion is that profane law—which entails the commission of "judicial murder"—is necessary and useful because, without it, the world would be destroyed.

Common Themes

It should be clear by now that the conceptions of law in the Jewish and Christian traditions represent mirror images of each other. The two traditions share a religious consciousness of the gap between the human and divine, leading to a mindfulness of the limits of human judgment and cognition. They further share a common conception of sacred law and its unenforceability in the temporal world. To overcome the problem of unenforceability, they both generate justifications for secular law and secular political authority, religious justifications based on human needs and human limitations and on the pragmatic principles of public utility and necessity. Both are thus appropriately characterized as secularist theologies, theological arguments for the necessity and value of secular law.

Of course, neither tradition embraces secular law without ambivalence. Secular law, it must always be remembered, dispenses with the requirements of sacred law and risks "judicial murder." Secular law is at odds with the theological awareness of the inadequacies of human judgment. Secular law is profane. So it is not surprising that each tradition finds a way of defending its ideal of the sacred, while abandoning it in practice, by projecting its image of profane law onto the "other." This, of course, is a well-known psychological strategy. The specific phenomenon of Christians projecting negative images of law onto Judaism is particularly well known. What is perhaps less familiar is the corresponding Jewish tradition of projecting negative images of law onto the legal systems of the non-Jewish other. The representations of Jewish and non-Jewish law within the *halakhik* tradition represent a complete inversion of the familiar stereotypes. The Jewish understanding of the nature of Sinaitic law, reflected in the doctrines of Noahide law and the law of the king, upends the conventional representation of Jewish biblical law as harsh, punitive, and vengeful ("an eye for an eye") in contrast to the merciful dispensation of the New Testament. From the Jewish point of view, it is the Jewish law of

the Torah that is more merciful and lenient than the Noahide law of the gentiles, not the other way around.

So here we have yet another similarity between Jewish and Christian conceptions of law. Not only do both endorse a profane, secular law, but they also both engage in acts of collective psychological denial and projection, each attributing to the other the profane form of law that it itself conceived and adopted.

These similarities between Christian and Jewish conceptions of law may seem less startling when we recall that the practical problem which triggered the development of alternatives to traditional canon law was, as Fraher observed, a legacy of Christianity's biblical and rabbinic "inheritance."[126] Notwithstanding the differences between them, Christianity and Judaism share a common corpus of texts, the Hebrew Bible, and the core tenets of monotheistic faith. It is perhaps less than surprising then that these two traditions should have generated such a similar set of ideas about law and its relation to the sacred.

But students of other religious cultures may recognize the features of secularist theology in their subjects as well. Consider, for example, this description of the legal system of Buddhist Tibet, drawn from the work of legal anthropologist Rebecca French. French describes the legal system of Tibet as a single polity, which is subdivided into "religious" and "secular" jurisdictions, even though the entire system is understood to be governed by religious law. The distinction between religious and secular realms tracks a distinction made between two social groups: the "spiritual seekers" or "priests" (in other words, the clerical order) and the spiritual "supporters" or "patrons" (that is, the laity).[127] "Although the Tibetan canon applies to all Tibetan Buddhists, it includes a legal code only for the spiritual seekers."[128] "[T]he dichotomy between the religious community and the law community required a separate and profane legal system."[129] Yet "the sacred realm incorporates the profane even as it defines its included distinctiveness."[130] The "paradox . . . is that even though the legal tradition was presumed to be wholly religious, the dualistic nature of Tibetan religious culture itself actually dictated that 'secular' spiritual supporter laws were of necessity different from 'religious' spiritual seeker laws."[131] The sacred "world of monks [is] governed by the canonical rules of the Vinaya," an ecclesiastical law, while "the world of laypersons [is] governed by the laws of the ancient kings."[132] The law of the kings is classified as a form of secular law in contradistinction to the ecclesiastical law of the Vinaya. But the content of the law of the kings "come[s] directly from the Tibetan Buddhist canon."[133] The law of the kings is "a secular code based on and imbued with the spirit of Buddhism."[134]

"Even though secular actors operated from secular legal codes and viewed themselves as distinct from religious actors, Tibet was a culture perfused with a religious mentality, and the moral standards of the Buddha and the Vinaya reverberated through every part of the legal system."[135]

The line drawn in Buddhist Tibet between the law of the priests and the law of the laity is reminiscent of the distinction between clerical and nonclerical realms in Christian canon law, while the Tibetan conception of the law of the kingdom is reminiscent of the Jewish notion of the law of the kingdom embodied in the doctrine of *dina de-malkhuta dina*, discussed earlier. Traditionally, "there were no clear divisions between religion and the state" and "Tibetans saw religion, politics, administration, and law as an interpenetrated whole from which it was difficult to separate out 'secular law' as a particular category in the Western sense."[136] The Tibetan term for the "law of the kings" or "state law" denotes a conception of secular law that is more like the medieval Jewish and Christian conception of the divinely ordained kingship than the modern Western conception of a separation between Church and secular State.[137]

Perhaps more important than these structural similarities are the philosophical similarities found between the Tibetan Buddhist "legal cosmology" and the understandings of law displayed in the Christian and Jewish traditions. The most basic philosophical proposition that unites these different religious legal cultures is the idea that humans lack the cognitive perfection of the divine (which presupposes the idea that the divinity is all knowing, which in turn presupposes a belief in the divine). The core idea of Tibetan Buddhism, for example, is that "everything we apprehend in the world is mere illusion."[138] Without ignoring the profound differences separating Buddhist from Western thought, it is hard not to perceive a consonance here with Plato's conception of reality and illusion.[139] Plato, too, depicted a world of mortal beings in the grip of illusion; his cave parable presents us with human beings whose faculties of perception are radically cut off from metaphysical reality, which is understood to occupy a sphere that is transcendent and inaccessible to human reason. The lesson of the parable of the cave is much the same (and expressed in much the same terms) as the basic Buddhist belief that "we suffer from attributing significance to the dreamlike appearances resulting from the preconceived notions and categories that we carry with us and constantly use to interpret the world."[140] The fundamental problem, in both Buddhism and Plato's thought, is that "[t]hese categories of data, acquired through our senses, keep us ignorant of the true nature of reality."[141]

As Rebecca French has shown, "[t]his notion of illusion is of profound importance in comprehending the Tibetan view of reality, including legal reality."[142] It is of no less importance in comprehending salient traditions of Christian thought, including Christian legal thought. The idea that human perception and reason are illusory has played its most obvious role in the development of the antirationalist traditions of Christian thought, particularly those based on readings of Plato.[143] But the same basic idea underlies the so-called rationalist, Aristotelian traditions of Christian thought as well,[144] albeit less obviously. In particular, it underlies the traditional theological view, which recognizes the fallibility of human judgments and attempts, by way of classical rhetoric or other schemes, to rationalize the modes of human judgment without pretending that mistakes can be completely avoided. If this "rationalist" theology has not usually been framed in the vocabulary of reality and illusion that the mystics characteristically employed, it nonetheless rests on the same basic insight into the fallibility of human perception and the same basic belief in a transcendent reality.

A similar split between "rationalist" and "antirationalist" tendencies occurs in Jewish thought and in Muslim thought, coupled in each case with a similar underlying unity of belief in the fallibility of the human mind. As in Christianity, the most obvious manifestations of the idea that reality is transcendent and that ordinary perception is only a shadow of transcendent truth are found in the respective mystical, Gnostic, Platonist, and neo-Platonist traditions of these two religions.[145] But the same basic idea—that the faculties of human reason and perception are inherently susceptible to illusion and error—plays at least as important a role in the normative traditions of Judaism and Islam, which, like similar Christian traditions, try to reconcile the needs of the mortal world with its inherent limitations in the pragmatic spirit of Aristotelian rhetoric.

What the recurring split between rationalist and antirationalist tendencies suggests is that there is more than one way of responding to the basic problem of human imperfection. One way, which is epitomized by the mystical traditions of Judaism, Christianity, and Islam, along with Buddhism, Platonism, and the various schools of philosophical skepticism that erupted in ancient and early modern thought,[146] is to renounce the faculties of human reason, perception, and judgment, and all the human practices that rely on these faculties and to cultivate a mystical faith and a perpetual suspension of judgment about matters of this world—in short, to withdraw from the temporal world. Another way, the so-called rationalist one, is not to have any less faith in an all-knowing, all-powerful God or any more faith in human perfection[147] but to eschew the mystical flight from the world and

to struggle instead to find a way of reconciling the imperfect capacity for judgment of human beings with the requirements of both the temporal and the spiritual worlds.

Theological secularism is a typical product of such a rationalist or, better, antiantirationalist approach.[148] Conceding that the temporal world imposes certain necessities on human beings (e.g., physical necessities, such as the need for food, and social necessities, such as the need for protection from violence) and further conceding that there are inherent limits to our capacity to respond to these needs, so-called rationalist theologies conceive of temporal power as an adequate substitute for the perfect knowledge that we cannot have and as a positive requirement of life on this earth.

Implicit in theological secularism and rationalism, more generally, are three basic principles or intellectual attitudes, which are worth singling out. One is probabilism, which reflects a readiness to accept mere probabilities as a substitute for certainties. The second is the spirit of pluralism, which also follows from the absence of certain truths. Lacking perfect knowledge, people will inevitably reach different views about the correct way of adjudicating a case or rendering a judgment. If no one has access to divine omniscience and if human cognition is inherently flawed—but all we've got—then interpretive and normative disagreement may have to be accepted, at least to a point. Finally, and perhaps most obviously (though this obviousness is, I think, deceptive), theological secularism reflects the basic intellectual attitude of pragmatism.

These three principles—probabilism, pluralism, and pragmatism—are readily found in the various traditions of theological secularism that we have identified. Probabilism, for example, was a central feature of the modes of proof of the canon law, which in turn served as a model for both civil and common law.[149] Borrowing heavily from the classical rhetorical tradition derived from Aristotle, canon law and Christian theology took probabilistic reasoning to new levels. Probabilistic reasoning and modes of proof are integral to other legal traditions as well, including classical Islamic jurisprudence and Jewish law.[150] But because probabilism departs from the strict requirements of justice—mere probability, after all, and even a great probability are not the same as a certain truth—it is directly implicated in the problem of wrongful convictions and "judicial murder." Hence, it constitutes one of the defining elements of the profanity of law.

The intellectual attitude of pluralism is perhaps most easily discernible in legal traditions like Jewish law and classical Islamic jurisprudence that have historically celebrated interpretive pluralism. Interpretive pluralism is a well-known feature

of Jewish law. With no central authority, no pope, no state, and no higher courts claiming infallible judgment or the right to dictate the law, Jewish law tolerated, indeed cultivated, differing legal opinions. Classical Islamic jurisprudence similarly affirmed the necessity and value of interpretive pluralism.

The spirit of pluralism is clearly displayed in the doctrines and traditions that sanction the practice of interpretive pluralism within a single legal jurisdiction (e.g., the jurisdiction of Jewish *halakha* or of Muslim *shari'a* law). That same spirit is also embodied in the diversity of legal jurisdictions carved out by theological–secularist law. Again, the Jewish case is exemplary. By deferring to the law of the gentiles and the law of the state, Jewish law was able to sustain itself. Through the doctrines of the law of the kingdom and Noahide law, it carved out room for different groups and religions to have their own legal systems. That it was able to do so and thereby acquire some measure of legal autonomy for itself from a position of relative powerlessness, often in the face of intense hostility, is a testament not only to the pluralist spirit of Jewish law, but also to the de facto legal and cultural pluralism of the various states that hosted the Jewish minority.

The acceptance by imperial and hegemonic states of substate minority legal systems—often grudging, often accompanied by ulterior motives, and often abruptly revoked, but nonetheless a real and legally sanctioned form of legal and cultural pluralism—typifies the general spirit of pluralism adopted by legal systems committed to theological–secularist views. The spirit of pluralism is perhaps less consistently and less clearly on display in hegemonic legal cultures like those of Christian Europe, Islam, and Buddhist Tibetan than it is in the legal traditions of a stateless minority, like the Jews. But even the most hegemonic cultures have found themselves in the position of a persecuted or exiled minority at one point or another in their respective histories (most recently, in the case of Tibet). Because these communities were not in the position of vulnerable minorities at the time their legal systems were formed, the need for them to stake out space for diverse legal subcultures was not as palpable a matter of group self-interest for them as it was in the Jewish case.[151] Political sovereignty, religious hegemony, and cultural homogeneity were factors that tended to suppress the presence of interpretive and normative disagreements and to diminish the value of (and practical need for) pluralism. Instead, they tended to favor the institution of hierarchical organizations designed to suppress pluralism (like the Catholic Church or, to a lesser degree, the Buddhist monasteries).

But the differences among these different legal traditions on the score of pluralism should not be overstated. Imperial legal systems had mechanisms for sup-

pressing pluralism, but only to a point. Notwithstanding the social and political factors that enabled them to dominate subgroups and dissenters, each and every one of these historically dominant legal cultures historically exhibited a substantial degree of tolerance for pluralism, both with regard to subgroups and with regard to different schools of thought within their own religious legal cultures. One sees this most readily in the Islamic Ottoman Empire, where cultural pluralism was instituted in the form of the millet system.[152] More broadly, as Khaled Abou El Fadl has shown, interpretive pluralism was recognized and affirmed within Islamic jurisprudence as an inevitable consequence of making good-faith legal interpretations. Likewise, the Catholic tradition, arguably the most antipluralist tradition of the lot, found ways to countenance a not insignificant degree of interpretive pluralism, even as it simultaneously sought to suppress adopted doctrinal and institutional innovations such as the doctrine of papal infallibility, clearly aimed at suppressing such pluralism.[153]

Pluralism, like probabilism, at once reflects and conceals the profane nature of law. Pluralism concedes the ideal of perfect justice based on correct knowledge in exchange for multiple views of what justice requires, at least some of which are bound to be wrong. It involves the same practices of judgment as probabilism and entails the same risk of committing "judicial murder." Both pluralism and probabilism are essential ingredients of the secularist theology, which justifies taking this risk (and thus profaning the law) for the sake of avoiding the allegedly greater risk of "destroying the world" through judicial inaction.

Encompassing both the principles of probabilism and pluralism, pragmatism is the overarching intellectual framework of theological secularism. Clearly, it was pragmatic for Jews to find a way to rationalize submitting to the dominant host states that imposed their laws on them, just as it was clearly pragmatic for canon lawyers to find ways of harmonizing the law of the Church and the State rather than continually challenging the State's authority.[154] But we miss the point of the pragmatist philosophy embodied in secularist theology if we reduce it to a matter of making concessions to brute power solely on the basis of group or individual self-interest. As best expressed in the Aristotelian defense of rhetoric, pragmatism is not simply a matter of succumbing to power in the spirit of raw self-interest and Realpolitik. It is rather a matter of recognizing and accepting human needs and limitations, making practical utility (rather than transcendent truth) the measure of value, endorsing the utility of imperfect modes of knowledge (such as probabilism), and generally making the best of things as they are in the "real" world. We seriously misconstrue pragmatism if we imagine that pragmatic judgments

are based solely on calculations of self-interest and not on moral values. From the standpoint of pragmatism, pragmatism is itself a moral value. The altruistic goals of pursuing public utility and meeting social needs are as much pragmatic criteria for actions and judgments as self-interest is. Indeed, from the standpoint of pragmatist thought, self-interest and altruism, pragmatism and morality, are false oppositions.

Pragmatism involves turning the mystical insight into the illusory nature of human knowledge about transcendent values on its head. Instead of fleeing from judgment and repudiating the human conceptual and perceptual apparatus for all its blind spots and flaws, the pragmatist valorizes that cognitive apparatus, blind spots and all. Without denying the faultiness of human reason and perception, the pragmatist regards those faculties as useful tools for accomplishing social and scientific goals.

Pragmatism, pluralism, and probabilism are features of every secularist theology, of every theological tradition that supplies a justification for the exercise of secular legal authority and the enforcement of a necessarily profane law. To put it the other way around, the adoption of the principles of pragmatism, pluralism, and probabilism necessitates the acceptance of some version of secular law, which departs from—and runs the risk of violating—sacred legal ideals. That is not to say that these intellectual attitudes or principles show up to exactly the same degree in every theological–secularist tradition. For example, pluralism arguably plays a greater role in Jewish law and classical Islamic jurisprudence than it does in either Catholic or Tibetan Buddhist systems of law. But this is only a matter of degree. Even the latter allow the limited, but hardly trivial, form of pluralism that is embodied in the simple fact of having multiple or at least dual, secular, and religious jurisdictions. Likewise, probabilistic thinking may be most marked in the Christian canon law and the civil law systems; but it is undeniably present in the common law and in classical Islamic jurisprudence and Jewish law as well.

The point, after all, is not the fatuous one that all legal systems are the same. The point, rather, is that there is a basic predicament—the predicament of having to render judgments with limited intellectual equipment at the cost of otherwise allowing crimes to be committed with impunity and thus "destroying the world"—to which all legal systems have to respond. Of course, legal systems do not all experience, or respond to, this predicament in precisely the same way. Indeed, within any single legal system, we see different responses to this predicament, including denial that the predicament exists. What we can say, after surveying the Christian

and Jewish legal traditions (and briefly dipping into several others), is that there is one particular way of responding to the predicament that keeps resurfacing. We see not identical, but broadly similar, versions of this response in different legal cultures, including but not limited to our own. This is the response that we have called theological secularism, a set of theological arguments for accepting secular legal authority on pragmatic grounds, as imperfect and profane as secular power is.

Mutations of Secularist Theology:
Modern Fundamentalism and Secularism

A tension lies at the heart of secularist theology. On the one hand, secularist theologies are committed to the rendering of judgments, and justice, by secular authorities. On the other hand, secularist theology is mindful of the fallibility of secular courts, unbound by the stringent evidentiary requirements of sacred law. In the spirit of pragmatism, secularist theology endorses making judgments on the basis of probabilistic reasoning, accepting the merely probable in place of certain truths. In the spirit of pluralism, however, secularist theology refrains from endorsing the objective truth of any one interpretation of a legal controversy.

In practice, it is difficult to maintain these attitudes all at once. Psychologically, it is almost impossible to render judgments and maintain the awareness that these judgments are liable to error at the same time. A heightened awareness of the fallibility of human reason is more likely to prevent one from reaching any judgment at all. Conversely, the process of reaching a judgment, in and of itself, seems to have the effect of suppressing our awareness of the fallibility of our own and others' reasoning.[155]

It is customary to describe the intellectual position taken by theological secularists as a "rationalist" one in contradistinction to the "antirationalist" position assumed by skeptics and mystics who eschew making judgments in the temporal "world of illusion." If this label is taken to imply some degree of faith in human reason, enough to warrant exercising human reason, the label is fair enough. But if, as is common, these labels are taken to suggest that the so-called rationalist, the theological secularist, does not share the antirationalist's skepticism about human reason, then they are profoundly misleading. The theological secularist has no less skeptical a view of the illusory nature of human judgments and perceptions than the antirationalist does. But the theological secularist sees no better alternative; indeed, the theological secularist perceives that the only alternative to having human

beings, temporal authorities, make judgments that violate sacred law is something even worse: unrestrained aggression leading to the destruction of the world.

It is for this reason that I prefer the term "anti-antirationalist" to "rationalist" to describe the basic attitude toward human reason found in theological secularism. The anti-antirationalism of theological secularism is really just another way of describing the conception of reason embodied in Aristotelian pragmatism—not an "objectivist" conception of reason but, rather, a "subjectivist" one that nonetheless provides a warrant for human action and decision.

There is obviously a very fine line between affirming the validity of subjective legal decisions and validating those decisions as objectively correct. Decision makers will naturally experience a tension between recognizing the subjectivity of legal decisions and making them. Theological secularism may be defined as the systematic attempt, on the part of theologically minded jurists and legally minded theologians, to keep the sense of that tension alive—to sustain the tension between these intellectual postures, to prevent the tension from collapsing and having one intellectual posture (certainty or uncertainty, conviction or doubt) dominate. In practice, this is very hard to do.

The theory of theological secularism always had the tendency to degrade in practice. Awareness of the subjectivity of legal decisions simply cannot be consistently sustained. If practitioners of secular law could not always keep the awareness of their subjectivity and fallibility firmly in mind, the religious sensibility of theological secularism, rooted in an appreciation of the gap between the human and the divine, served as a prod to remember what was constantly in danger of being forgotten. The religious sensibility of theological secularism functioned, albeit intermittently, to heighten awareness of the frailty and limits of the human mind.

With the erosion of religious faith, the ideas of theological secularism, which shaped our legal systems, were deprived of the theological base that had served in the past to heighten our awareness of our cognitive limits. But secularization did not cause the ideas of theological secularism to disappear wholesale. Instead, the result was that secular legal systems continued to reflect all of the basic ideas and principles and intellectual attitudes of theological secularism *except* the religious awareness of the gap between the human and the divine. Pragmatism, pluralism, and probabilism, a belief in the necessity of secular courts and effective law enforcement, the theory of dual (or multiple) jurisdictions for secular and religious law, and most basically, a belief in the necessity of law all continue to play a role in our modern, secular conception of law. All that is missing from the list of theologi-

cal secularism's core beliefs is the mindfulness of our liability to error, fostered by the religious belief in an omniscient divinity and a gap between the human and the divine. Arguably, mindfulness of the faultiness of human judgments could remain a part of our conception of law without the prod of religious belief. But query what other than religious belief actually serves the function of heightening the awareness of our cognitive limitations that is ordinarily suppressed in the absence of religious belief.

One of the most provocative claims made by Enlightenment scholars is the suggestion that the roots of liberal values, such as pluralism and tolerance, lie in the pagan approach of "to each his own god" and that it was only the advent of the exclusivist monotheistic faiths of Judaism and Christianity that, for a long protracted "dark age," put liberalism into eclipse. In this story, paganism is figured as a sort of protoliberalism, and the monotheistic faiths of Christianity and Judaism becomes the prototype of antiliberalism. From the point of view of the story that we have been telling, however, it is the secularist theologies (of Christianity, Judaism, and other faiths) that look like the source of liberal ideas. Modern-day secularism, and more particularly, secular liberalism, might be seen as the apotheosis of the ideas and ideals of theological secularism. Pragmatism, probabilism, and pluralism, a commitment to separate jurisdictions for Church and State, the basic idea of a secular state, and the value of secular law are all hallmarks of modern, secular, liberal political philosophy. They are also the hallmarks of traditional theological–secularist thought. To put it otherwise, secular liberalism represents the apotheosis of theological secularism—the ultimate secularization of theological secularism, yielding a version of theological secularism in which the concept of the secular itself has been secularized, such that the realm of secular law is no longer seen as a specialized area of God's domain but, rather, as a realm entirely independent of any religious conception.

If liberal secularism embodies the ideas of theological secularism without the theology, then modern-day fundamentalist movements embody the ideas of theological secularism without the secularism. Deprived of the edifice of reasoning that makes the case for a secular law alongside religious law, fundamentalism becomes the placeholder for the perception of the profane nature of secular law. Seizing on the traditional religious insight into the illusory and fallible nature of human judgments, fundamentalism is cut off from the equally traditional religious insight into the destructive nature of sacred law in the temporal realm. In fundamentalism, the traditional religious attitudes of probabilism, pragmatism, and pluralism go by the

wayside, with the ironic result that there is nothing left to temper the fundamentalists' own interpretive and normative judgments, even as they insist on the fallible nature of human reasoning in the secular realm.

But if the estrangement of fundamentalists from the attitudes of probabilism, pluralism, and pragmatism cultivates a kind of hubris, the estrangement of secularism from the religious conception of the sacred and the profane does too. Bereft of a religious sensibility, there is little to temper the confidence of secular liberals in their own judgments. True, they are explicitly committed to pluralism, probabilism, and pragmatism, values that in and of themselves counsel against hubris. But as we have seen, in practice, the sense of the subjectivity of one's own judgments is almost impossible to sustain. Lacking the religious mindset to function as a constant reminder and heightener of the awareness of the limits of the human mind, liberal secularism all too readily displays a hubris that galls religious believers and other critics of an overweening liberalism.

Oblivious to the profane nature of the secular, oblivious to the profane nature of law, secular liberalism could not but outrage those religious believers who themselves do not fail to perceive the profanity of secular law. Of course, not all religious believers share this hostility to secular law. Many, perhaps most, religious believers today endorse secular law and liberal values, an endorsement that does not merely reflect the influence of modern secularism on religion but that is rooted in their own religious traditions. In the eyes of religious believers who keep faith with the traditional ideas of theological secularism embedded in their religion, it is the fundamentalists speaking in their name who are oblivious to the insights and demands of their religion—and who, in so doing, are corrupting the faith and profaning the law.

This is a dangerous situation. And it is not a situation that can be alleviated by simply being more tolerant of religion, including fundamentalism. Liberal tolerance is, in and of itself, for reasons that should now be clear, an offense to those religious believers who have lost touch with the tradition of theological secularism. Ironically, the more tolerant and "respectful" of diverse religions secular liberalism is, the more outrageous to such believers it will be.

The polarization of liberal secularism and religious fundamentalism that we are witnessing today represents the splintering apart of the ideas and tensions that were traditionally held together in secularist theology. It is tempting to think that this set of ideas never could have held together, that it was an impossible project all along. After all, the lines between antirationalism, anti-antirationalism, and rationalism

are exceedingly fine and often tend to blur. Even before the emergence of modern secularism and fundamentalism, theological secularism was constantly threatening to degenerate into sheer rationalism—an untempered and unwarranted faith in reason—as opposed to sustaining the more nuanced and mindful attitude of anti-antirationalism. In the course of the history of any given legal religious tradition, theological secularism has all too often degraded into its opposite and been eclipsed by contrary theologies. Despite all this, the fact of the matter is that the tensions that define and animate theological secularism were sustained and contained within the theological–secularist traditions of numerous cultures for hundreds, if not thousands, of years. Impossible or not, they did "hold together," and they exercised a lasting influence on the shape of our legal and political institutions and the way we think about religion and law. Theological secularism was always in danger of forgetting itself precisely because the tensions within it are so hard to maintain. It is high time for us to remember.

Notes

1. This passage is contained in the "amidah," said at daily prayers in addition to being included in the high holy day services. It is drawn from Psalm 119, the full text of which reads:

> 119:18 Open Thou mine eyes, that I may behold wondrous things out of Thy law.
> 119:19 I am a sojourner in the earth; hide not Thy commandments from me.
> 119:20 My soul breaketh for the longing that it hath unto Thine ordinances at all times.
> 119:21 Thou hast rebuked the proud that are cursed, that do err from Thy commandments.
> 119:22 Take away from me reproach and contempt; for I have kept Thy testimonies.
> 119:23 Even though princes sit and talk against me, thy servant doth meditate in Thy statutes.
> 119:24 Yea, Thy testimonies are my delight, they are my counselors.

2. Karl Löwith, *Meaning in History* (Chicago: University of Chicago Press, 1949), 46–47. Löwith is quoting Karl Marx and Friedrich Engels, *Marx-Engels Gesamtausgabe*, I., Abt., I/1, 242 ff.

3. Löwith, *Meaning in History*, 64.

4. R. B. Friedman, "On the Concept of Authority in Political Philosophy," *Authority*, Joseph Raz, ed. (New York: New York University Press, 1991), 83, cited in Khaled Abou El Fadl, *Speaking in God's Name: Islamic Law, Authority and Women* (Oxford: One World Publications, 2001), 19.

5. On the difficulty of distinguishing disbelief from misbehavior, see Alan Charles Kors, *Atheism in France 1650–1729: The Orthodox Sources of Disbelief*, vol. 1 (Princeton, NJ: Princeton University Press, 1990), 17–19.

6. The idea of the "withering away" of the state is from Friedrich Engels, *Herr Eugen Dühring's Revolution in Science [Anti-Dühring]* (Chicago: Charles H. Kerr, 1935), 292. Karl Marx does not use the term with regard to religion but does refer to Judaism as having reached a point at which "it must necessarily begin to disintegrate." See "On the Jewish Question," *The Marx-Engels Reader*, Robert Tucker, ed. (New York: W. W. Norton, 1972), 48.

7. On the Christian origins of liberalism, see Jeremy Waldron, *God, Locke, and Equality: Christian Foundations in Locke's Political Thought* (Cambridge: Cambridge University Press, 2000). For liberal ideas within Islam, see Khaled Abou El Fadl, *Islam and the Challenge of Democracy* (Princeton, NJ: Princeton University Press, 2004) and *The Place of Tolerance in Islam* (Boston: Beacon Press, 2002). See also *Liberal Islam: A Sourcebook*, Charles Kurzman, ed. (Oxford: Oxford University Press, 1998) and Lenn E. Goodman, *Islamic Humanism* (Oxford: Oxford University Press, 2005). The identification of a Jewish tradition of political-philosophical thought, including liberal strains of thought, is the project of the multivolume series *The Jewish Political Tradition*, Michael Walzer, Menachem Lorberbaum, Noam J. Zohar, and Yair Lorberbaum, eds. (New Haven, CT: Yale University Press, vol. 1, 2000; vol. 2, 2003). In his introduction to the series, Walzer speaks of "the ways in which" the Jewish tradition of political thought "*follows, parallels,* and *strains against* Greek, Arabic, Christian, and secularist modes of thought"(emphasis added), vol. 1, xxiii–xxiv. He might well have added that the Jewish political tradition *adumbrates* other modes of political thought, especially the Christian and secularist traditions.

8. Throughout this chapter, I use the terms *secularist theology* and *theological secularism* interchangeably.

9. One of the things I hope this chapter will make clear is the extent to which the term *the Western tradition* is a misnomer.

10. Rebecca French, *The Golden Yoke: The Legal Cosmology of Buddhist Tibet* (Ithaca, NY: Cornell University Press, 1995), 57–60. The term *legal cosmology* is French's.

11. See Peter Gay, *The Enlightenment: The Rise of Modern Paganism* (New York and London: W. W. Norton, 1977). The most provocative argument, suggested though not explicitly stated by Gay, endorsed by some scholars and denied by others, is that Enlightenment figures saw in ancient polytheism an adumbration of the pantheistic views ascribed (rightly or wrongly) to radical proponents of religious tolerance such as Spinoza, Bayle, and Hume. Conversely, it is suggested that the radicals of the Enlightenment saw ancient practices of religious tolerance as having been eclipsed by early formulations of monotheism. Whether any particular Enlightenment thinker was monotheistic, pantheistic, or atheistic in his own beliefs and whether any particular thinker equated monotheism with intolerance and pantheism with tolerance—or rather, adhered to quite the opposite view—are much-vexed questions of interpretation in the secondary literature. It may well be that the association

of ancient paganism with liberal tolerance, and monotheism with illiberal faith, is more an artifact of the historiography of the Enlightenment than of any actual Enlightenment figure. Be that as it may, J. G. A. Pocock has noted, "[i]t is clear . . . that the rebirth of modern paganism, as a twentieth-century historian [Gay] has termed 'The Enlightenment,' entailed a fairly drastic rewriting of the history of ancient paganism, which must be made to appear as far as possible deist rather than polytheist, philosophical rather than animist." Pocock, *Barbarism and Religion: Narratives of Civil Government*, vol. 2 (Cambridge: Cambridge University Press, 1999), 107.

12. *Lewis & Short Latin Dictionary*, available at http://www.perseus.tufts.edu/cgi-bin/ptext?doc=Perseus%3Atext%3A1999.04.0059.html; see also *Oxford Latin Dictionary*, 2nd ed. (Oxford: Oxford University Press, 2001), 55, 108, 109.

13. *Lewis & Short.*

14. Ibid. (defining *sacro*).

15. Ibid. (defining *sanctum*).

16. Ibid. (defining *sanctuarium*).

17. Ibid. (defining *saecularis*).

18. Ibid. (defining *mundanus*). In pre-Christian usage, the Latin *saeculum* meant "century," and the adjective *saecularis* referred chiefly to the secular games, which were held regularly at very long intervals. My thanks to Clifford Ando for this point.

19. A similar split and slippage between the two meanings are found in Freud's gloss on the Polynesian word for "taboo." Compare Sigmund Freud, *Totem and Taboo: Some Points of Agreement Between the Mental Lives of Savages and Neurotics*, tr. and ed. James Strachey (London: Routledge & Kegan Paul, 1961), 18–19:

> "'Taboo' is a Polynesian word. It is difficult for us to find a translation for it, since the concept connoted by it is one which we no longer possess. It was still current among the ancient Romans, whose '*sacer*' was the same as the Polynesian 'taboo.' So, too, the '*ayos*' of the Greeks and the '*kadesh*' of the Hebrews must have had the same meaning as is expressed in 'taboo' by the Polynesians. . . .
>
> "The meaning of 'taboo,' as we see it, diverges in two contrary directions. To us it means, on the one hand, 'sacred,' 'consecrated,' and on the other 'uncanny,' 'dangerous,' 'forbidden,' 'unclean.' The converse of 'taboo' in Polynesian is '*noa*,' which means 'common' or 'generally accessible.' . . .
>
> "'Properly speaking taboo includes only (a) the sacred (or unclean) character of person or things, (b) the kind of prohibition which results from this character, and (c) the sanctity (or uncleanness) which results from a violation of the prohibition.'" (quoting from the *Encyclopedia Britannica* entry on *taboo* by Northcote W. Thomas).

My thanks to Daniel Stolzenberg for pointing out the double meaning of "profane" and to Martha Umphrey for leading me to the same point in Freud.

20. *Lewis & Short* (defining *consecro* II. B. as "to hallow, recognize as holy" [eccl. Lat.]).

21. Ibid. (defining *"religio"* as "Concerning the etymology of this word, various opinions were prevalent among the ancients. Cicero [. . .] derives it from relegere . . . ; whereas Servius [. . .], Lactantius [. . .], Augustine [. . .], al., assume religare as the primitive . . .). Modern etymologists mostly agree with this latter view, assuming as root lig, to bind, whence also lic-tor, lex, and ligare; hence religio sometimes means the same as obligatio[. . .]" (citations omitted).

22. Ibid. (defining *religiosus*).

23. Ibid. (defining *sacrilegus*, and *sacrilegium* "I. *The robbing of a temple, stealing of sacred things, sacrilege;* II. *violation* or *profanation of sacred things, sacrilege*").

24. As Robert Cover observed, "[t]here is a difference between sleeping late on Sunday and refusing the sacraments, between having a snack and desecrating the fast of Yom Kippur." See Robert M. Cover, Foreword, *"Nomos* and Narrative," *Harvard Law Review* 97: 8 (November 1983).

25. Stanley Fish, *Self-Consuming Artifacts: The Experience of Seventeenth-Century Literature* (Berkeley: University of California Press, 1973), 5.

26. Plato, *Phaedrus*, quoted in Fish, *Self-Consuming Artifacts*, 5–6.

27. Ibid., 5.

28. Ibid., 6, 12.

29. Ibid., 7.

30. Kathy Eden, *Poetic and Legal Fiction in the Aristotelian Tradition* (Princeton, NJ: Princeton University Press, 1986), 8; see also, Fish, *Self-Consuming Artifacts*, 15–21.

31. Eden, 8.

32. Kathy Eden, *Hermeneutics and the Rhetorical Tradition: Chapters in the Ancient Legacy and Its Humanist Reception* (New Haven, CT: Yale University Press, 1997); see also Eden, *Poetic and Legal Fiction*.

33. "Plato . . . finds little to praise in the analogy [between the rhetorical art of the tragic stage and the law court] until his work, the *Laws*, where he compares the best legal constitution, as an accurate *mimesis* of the intentions of the lawgiver, to the finest tragedy." Eden, *Poetic and Legal Fiction*, 8.

34. Robert Newsom, *A Likely Story: Probability and Play in Fiction* (Piscataway, NJ: Rutgers University Press, 1988), 3.

35. The question of whether the intellectual tradition of classical rhetoric was in any sense a *religious* one, containing within it a conception of divinity and a perception of a gap between the mortal and the divine, is an exceedingly complicated one turning on numerous factors, including the religious or nonreligious nature of Aristotle's thought; the religious or nonreligious nature of the *practice* of classical rhetoric, in antiquity and later; and the religious nature of the various intellectual traditions that emerged as the chief continuators the Aristotelian rhetorical tradition.

36. On the impact of Aristotelianism on European philosophy, see Amos Funkenstein, *Theology and the Scientific Imagination from the Middle Ages to the Seventeenth Century*

(Princeton, NJ: Princeton University Press, 1989); Arthur Hyman and James J. Walsh, eds., *Philosophy in the Middle Ages: The Christian, Islamic and Jewish Traditions* (Indianapolis, IN: Hackett, 1983); John F. Wippel, *Medieval Reactions to the Encounter Between Faith and Reason* (Milwaukee: Marquette University Press, 1995). See also Richard M. Fraher, "'Ut nullus describatur reus prius quam convincatur' Presumption of Innocence in Medieval Canon Law?" *Proceedings of the Sixth International Congress of Medieval Canon Law.* Berkeley, CA, July 28–August 2, 1980, Stephan Kuttner and Kenneth Pennington, eds. (Rome: Biblioteca Apostolica Vaticana, 1985). Fraher writes that "social and political conditions led to the widespread adoption—or one might better say adaptation—of the learned law of the Romano-canonical tradition as real-world, workaday law," 498.

For the Christian encounter with Aristotelianism, see Francis Nigel Lee, *A Christian Introduction to the History of Philosophy* (Nutley, NJ: Craig Press, 1969); Richard McKeon, *Aristotelianism in Western Christianity* (Chicago: University of Chicago Press, 1939); John Marenbon, *Aristotelian Logic, Platonism, and the Context of Early Medieval Philosophy of the West* (Aldershot, UK: Variorum, 2000); Gunnar Skirbekk and Nils Gilje, *A History of Western Thought: From Ancient Greece to the Twentieth Century* (London: Routledge, 2001); Fernand van Steenberghen, *Thomas Aquinas and Radical Aristotelianism* (Washington, DC: Catholic University of America Press, 1980). On the Muslim encounter, see Majid Fakhry, *Philosophy, Dogma, and the Impact of Greek Thought in Islam* (Aldershot, UK: Variorum, 1994); Dimitri Gutas, *Avicenna and the Aristotelian Tradition: Introduction to Reading Avicenna's Philosophical Works* (Leiden: E. J. Brill, 1988); Barry S. Kogan, *Averroes and the Metaphysics of Causation* (Albany: State University of New York Press, 1985); Oliver Leaman, *History of Islamic Philosophy* (London: Routledge, 1996); F. E. Peters, *Aristotle and the Arabs: The Aristotelian Tradition in Islam* (New York: New York University Press, 1968). On the Jewish encounter, see Daniel H. Frank and Oliver Leaman, eds., *History of Jewish Philosophy* (London: Routledge, 1997); Lenn E. Goodman, *Jewish and Islamic Philosophy: Crosspollinations in the Classical Age* (Edinburgh: Edinburgh University Press, 1999); Isaac Husik, *A History of Medieval Jewish Philosophy*, trans. D. Silverman (New York: Schocken, 1973); John Inglis, *Medieval Philosophy and the Classical Tradition: In Islam, Judaism and Christianity* (Richmond, UK: Curzon Press, 2001); Husain Kassim, *Aristotle and Aristotelianism in Medieval Muslim, Jewish, and Christian Philosophy* (Lanham, MD: Austin & Winfield, 2000).

37. Richard M. Fraher, "The Theoretical Justification for the New Criminal Law of the High Middle Ages: '*Rei Publicae Interest, Ne Crimina Remaneant Impunita*,'" (hereinafter "New Criminal Law"), *University of Illinois Law Review* no.3 (1984): 592. In general, see Jill Harries, *Law and Empire in Late Antiquity* (Cambridge: Cambridge University Press, 2001); Fritz Schulz, *History of Roman Legal Science* (Oxford: Clarendon Press, 1963); Peter Stein, *Roman Law in European History* (Cambridge: Cambridge University Press, 1999).

38. R. C. Mortimer explains that "[t]he word 'canon' meant, originally, a straight rod or line, something by which you measure; and so a definite rule." Mortimer, *Western Canon Law* (Berkeley: University of California Press, 1953), 9. Charles Donahue points to the differ-

ence between *"kanon*, the Greek word for 'rule' or 'guide,'" from which "canon" is derived, and *"nomos*, the Greek word for 'law,'" which he takes "to suggest that canons are not the Judaic law by which, in some sense, the observant Jew believed that he was justified, nor the *nomos* of the Greeks, a word redolent of overarching philosophical ideas," but rather a set of technical rules lacking in theological and philosophical content. See Donahue, "Comment on R. H. Helmholz, Conflicts Between Religious and Secular Law," *Cardozo Law Review* 12: 3–4 (1991): 731–732. As described by Mortimer, the word *canon*

> is applied to creeds, which are the rules of faith, its defined content by reference to which heresy can be measured. It is applied to the books of the Bible; for they fall with the line drawn by the Church and so are those which the rule of the Church recognizes as portions of Holy Scripture. It is applied to the clergy, who fall within the line and so are on the list. For many centuries now it has been applied in this sense only to those clergy who are on the list of a Cathedral; but in Patristic times it was applied to all the clergy on the list of a Bishop. The commonest application of the word, for us, is to the definitions or rules drawn up and agreed upon by a Council. In its strictest sense canon law means laws or canons passed by councils. It came . . . to include a great deal else besides, but in origin and strictly speaking, canon law is the law contained in the canons. And canons define and determine the organisation of the Church and the conduct and duties of its members. They set forth the norm or standard in these matters accepted and expected by the Church. Mortimer, *Western Canon Law*, 9.

39. Mark 12: 17; Matthew 22: 21; Luke 20: 25. The beginning of Romans 13 (New King James Bible) reads:

> 1. Let every soul be subject to the governing authorities. For there is no authority except from God, and the authorities that exist are appointed by God. 2. Therefore whoever resists the authority resists the ordinance of God, and those who resist will bring judgment on themselves. 3. For rulers are not a terror to good works, but to evil. Do you want to be unafraid of the authority? Do what is good, and you will have praise from the same. 4. For he is God's minister to you for good. But if you do evil, be afraid; for he does not bear the sword in vain; for he is God's minister, an avenger to execute wrath on him who practices evil. 5. Therefore you must be subject, not only because of wrath but also for conscience' sake. 6. For because of this you also pay taxes, for they are God's ministers attending continually to this very thing. 7. Render therefore to all their due: taxes to whom taxes are due, customs to whom customs, fear to whom fear, honor to whom honor.

40. See Thomas Aquinas, *A Summa of the Summa: The Essential Philosophical Passages of St. Thomas Aquinas' Summa Theologica Edited and Explained for Beginners*, Peter Kreeft, ed. (Ft. Collins, CO: Ignatius Press, 1990), 522–523, 525, 529–530. Aquinas states that it is necessary for there to be laws framed by people in addition to natural law, as some individuals need law to prevent them from acting in a depraved manner. This law should be framed

to benefit the common good of a community, but it should be flexible enough to allow for individual cases where it would work an injustice to apply it strictly. See also Reinhold Niebuhr, "Augustine's Political Realism," *The City of God: A Collection of Critical Essays*, Dorothy F. Donnelly, ed. (New York: Peter Lang, 1995), 140–141, which notes that while Augustine recognized that members of "the city of god" or those who pursued spiritual endeavors lived within the "city of the world," they were always separate from it as they did not share the same goal as the citizens of the earthly city (*The City of God*, bk. 19, chap. 17).

41. See Fraher, "New Criminal Law"; "Ut nullus"; "Conviction According to Conscience: The Medieval Jurists' Debate Concerning Judicial Discretion and the Law of Proof," *Law and History Review* 7: 1 (Spring 1989), 23–24; and "Preventing Crime in the High Middle Ages: The Medieval Lawyers' Search for Deterrence," in *Popes, Teachers, and Canon Law in the Middle Ages*, James Ross Sweeney and Stanley Chodorow, eds. (Ithaca, NY: Cornell University Press, 1989), 212–233.

42. Fraher, "Ut nullus," 504.

43. Ibid., 494.

44. Ibid.

45. Ibid.

46. Fraher, "Conviction According to Conscience," 27–29. Here Fraher argues strenuously against the view that the critical developments in criminal law procedure that occurred in twelfth-century Europe resulted from a religious skepticism about the human capacity for judgment. But elsewhere, he cites the twelfth-century following of the Roman law of proof as the reason that Pope Innocent III's proclamation, "Rei publicae interest, ne crimina remaneant impunita," met with a mixed response among jurists. See Fraher, "New Criminal Law," 593–594.

47. Fraher, "Preventing Crime," 214.

48. Ibid., 214–215.

49. Donahue, "Comment on R. H. Helmholz," 731; Daniel Boyarin, *A Radical Jew: Paul and the Politics of Identity* (Berkeley: University of California Press, 1994), 134–135, 139–141. See also Alan F. Segal, *Paul the Convert: The Apostolate and Apostasy of Saul the Pharisee* (New Haven, CT: Yale University Press, 1990), 258.

50. Fraher, "Preventing Crime," 215 (first emphasis added, second emphasis in the original) where he cites "the most influential of Augustine's and Gregory's writings on ecclesiastical toleration of wrongdoing . . . collected in Gratian's *Decretum*, C. 23 q.," ibid., n. 10.

51. But see ibid., 219: "By the end of the twelfth century, with the spirit of reform triumphant at Rome, the hierarchy had long since abandoned the policy that earthly misdeeds should be tolerated in this life and left to divine judgment."

52. R. H. Helmholz, "Conflicts Between Religious and Secular Law: Common Themes in the English Experience, 1250–1640," *Cardozo Law Review* 12: 3–4 (1991), 708–710; Fraher, "Preventing Crime," 215, which discusses the principle *de occultis non judicat ecclesia*; Fraher, "New Criminal Law," 593.

53. Barbara Shapiro, *Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence* (Berkeley: University of California Press, 1991), 251.

54. John H. Langbein, *Torture and Law of Proof: Europe and England in the Ancien Regime* (Chicago: University of Chicago Press, 1977), 75.

55. Ibid., 5–8.

56. Fraher, "Preventing Crime" 228; see also "Conviction According to Conscience," 46, which contends that not all medieval jurists believed that humans lacked the capacity to judge but that jurists were aware of human fallibility; see also Langbein, *Torture*, 7, which states that human judgment was necessary because the abolition of ordeal by the Fourth Lateran Council effectively destroyed the prior system of God judging the accused via ordeal. The judgment of humans was made palatable by the development of torture, as judges would have no discretion, because the accused would have confessed or two witnesses secured; see generally J. H. Baker, *An Introduction to English Legal History*, 4th rev. ed. (London: Butterworths, 2005), 4–6, which provides an overview of the use of torture and trial by ordeal in England.

57. Fraher, "Preventing Crime," 222; but see "Conviction According to Conscience," 62, where Fraher suggests that the implementation of torture had less to do with the difficulties imposed by the two-witness rule and more to do with the Church's campaign against heresy and the secular campaign against treason and sedition, as these crimes often involved little physical evidence. See also Langbein, *Torture*, 6–7, which proposes that the strict requirements of proof mandated by Roman canon law resulted in the adoption of torture as a means to extract confessions, thus subverting the two-witness requirement of proof by having the defendant admit guilt.

58. Langbein, *Torture*, 8–10.

59. For a full analysis of the doctrine, its origins and contemporary meaning, and the context of the utterance of Innocent III, see Fraher, "New Criminal Law," 577–581.

60. Ibid., 594.

61. Ibid., 584–586. Here Fraher asserts that the maxim "Rei publicae interest, ne crimina remaneant impunita" issued by Innocent III, was used by judges and lawyers to chip away at defendants' rights under canonical traditions.

62. Ibid., 594.

63. Helmholz, *The Spirit of Classical Canon Law* (Athens: University of Georgia Press, 1996), 116–117. Helmholz describes in general the division between secular and canon law.

64. I do not mean to imply that little thought went into the theological–secularist "solution." In fact, some of the ablest minds were recruited to the project of working out this practical dilemma, and many of the discussions exhibit an acute awareness of the issues and difficulties entailed. But that there was a serious problem with the solution—never solved, only finessed—is, I think, undeniable. Needless to say, modern, secular thinkers have not come up with any better solutions to the problem of reconciling the needs of law enforce-

ment with the vagaries of human knowledge and the uncertainties of proof, as recent experiments with emergency law have made painfully clear.

65. Mortimer, *Western Canon Law*, 9.

66. Ibid., 16–17. Subsequent lawbooks from the ancient period added such subjects as (from the Canons of Nicaea) "(1) Of those who castrate themselves. (They are not to be ordained.) (2) Of the newly baptized. (They are not to be ordained immediately.) (3) Of the kind of woman who may be allowed to live in the same house as the clergy (i.e., clerical housekeepers)," or (from the Canons of Neo-Caesarea) "(1) Priests not to marry. (2) No marriage with deceased husband's brother. (3) None to marry often".

67. Donahue, "Comment on R. H. Helmholz," 734.

68. This, to some extent, contradicts Donahue, who maintains there is little of theological import in canon law. See ibid., 730–731, 734.

69. For discussions of the conflicts between Church and secular law, see Helmholz, "Conflicts Between Religious and Secular Law," 707–708, where he discusses the conflict between Thomas Becket and Henry II over the punishment of "criminous clerks"; ibid., 708–709, where he describes the dispute between canon law and common law over which had jurisdiction regarding the inheritance of advowsons, or the right to introduce a cleric as a parson to a parish; ibid., 711, where he states the general conflict of jurisdiction between common and canon law; ibid., 717–718, where he discusses the conflict between canon law prohibiting clerics from shedding blood and their role as judges in common law courts, which enforced the death penalty. Also see note 72 for further references to Henry II's dispute with Becket.

70. Fraher, "Conviction According to Conscience," 24–28; "New Criminal Law," 592–593.

71. Fraher, "Preventing Crime," 223.

72. See Fraher, "New Criminal Law," 577–578, which discusses the conflict concerning "criminal jurisdiction over the English clergy" as the original trigger to the conflict between King Henry II and Thomas Becket in the late twelfth century; see also Donahue, "Comment on R. H. Helmholz," 733, where he proposes that Henry's dispute with and eventual martyring of Thomas Becket led to the realization by both the monarch and the Church that each would have its own sphere of legal control, secular law and canon law, respectively; see also, C. R. Cheney, "The Punishment of Felonous Clerks," *English History Review* 51: 202 (April 1936), 215–236. Cheney proposes that in the century and a half following Becket's murder, the *privilegium fori* was broadened and generally observed in England but that slowly the privilege was eroded until felonous clerks were again subject to punishment by secular courts after being degraded and removed from the ranks of the clergy. (Remnants of the debate regarding the punishment of felonous clerks linger to this day and are visible in the Church's defense of clergy in the 2002 abuse scandal.)

73. Fraher, "Preventing Crime," 223. "Cynus concluded that *inquisitio* had been invented as an extraordinary measure to enhance the efficiency of the criminal process."

74. For example, rules of construction and jurisdiction that legitimized local customary practices that deviated from the traditional formal rules, such as "custom confers jurisdiction" and "the best interpreter of a law is custom." See Helmholz, "Conflicts Between Religious and Secular Law," 716.

75. Ibid., 717.

76. Joseph H. Lynch, *The Medieval Church: A Brief History* (London: Longman, 1995), 118–119. For a more recent consideration of the issue, consider Pope John Paul II Jesus Christ, Messiah Priest General Audience—February 18, 1987. http://www.vatican.va/holy_father/john_paul_ii/audiences/alpha/data/aud19870218en.html.

77. Helmholz, "Conflicts Between Religious and Secular Law," 708.

78. Ibid.

79. Ibid., 718.

80. Ibid., 719.

81. The point is not just that great ingenuity was exercised by jurists to find ways of harmonizing the systems of secular and ecclesiastical law, as Helmholz has demonstrated, "Conflicts Between Religious and Secular Law," 727. On a more basic level, the need for solutions to the conflicts presented between secular and spiritual law arose from the fact that the two systems of law overlapped and were both contained within a larger political system.

82. Ibid., 721–722.

83. Fraher, "Conviction According to Conscience," 48–50; and "New Criminal Law," 594–595, regarding the relationship between the Church and criminal procedure.

84. See, e.g., "The Charter of the Jews of the Duchy of Austria: July 1, 1244," *The Jew in the Medieval World: A Source Book 315–1791*, Jacob Rader Marcus and Marc Saperstein, eds. (Cincinnati, OH: Hebrew Union College Press, 2000), 31. This is an example of a medieval charter that governed Jews living in the duchy of Austria. Although the document does not specify that Jews could govern themselves, it was taken for granted that they would. The document actually grants the direct jurisdiction to the duke of Austria; see also Kenneth R. Stow, *Alienated Minority: The Jews of Medieval Latin Europe* (Cambridge, MA: Harvard University Press, 1993), 99–100. Stow cites Holy Roman Emperor Henry IV who granted Jews self-governance over themselves in all legal matters to attract Jews to his empire. However, if a Christian was involved, then the normal courts would take jurisdiction, although both Christian and Jewish witnesses could be called. On the general subject of Jewish self-government in the Middle Ages, see also Nomi M. Stolzenberg and David N. Myers, "Community, Constitution and Culture: The Case of the Jewish Kehilah," *University of Michigan Journal of Law Review* 25: 3 & 4 (1992), 633–670; C. Finkelstein, *Jewish Self-Government in the Middle Ages*, 2nd ed. (New York: Feldheim, 1964); Daniel J. Elazar and Stuart A. Cohen, *The Jewish Polity* (Bloomington: Indiana University Press, 1984).

85. James Carroll, *Constantine's Sword: The Church and the Jews—A History* (New York: Mariner Books, 2002), 70; James Parkes, *The Conflict of the Church and the Synagogue: A*

Study in the Origins of Antisemitism (London: Soncino Press, 1934), 37, 50–51; see also Boyarin, *A Radical Jew*, 122–123, 132–143, where he states that although Paul believed that people should not do anything they please, he did believe that it mattered more for Christians to comply with the true law of faith and not the "false law," which focused on physical observance of the law.

86. Boyarin, *A Radical Jew*, 134–140.

87. Donahue, "Comment on R. H. Helmholz," 731–732.

88. Ibid., 731. Donahue identifies three reasons for the lesser role of law in Christianity: (1) "Jesus rejected the legalism of the Pharisees." (2) "The apostolic mission was conceived as a mission to all mankind. . . . For the Church to have insisted on the observance of the whole of its laws would have severely limited, to say the least, its appeal to non-Jews. Thus, the law for the new church was not to be the Mosaic law, at least not the whole of the Mosaic law." (3) "[T]he Church received its first strong non-Jewish intellectual influences from the Greek world, and law was not the Greeks' long suit."

89. Ibid., 732.

90. Ibid., 731–732, 734: "there is relatively little theology in contemporary canon law."

91. Sir William Jones, introduction to "Institutes of Hindu Law or The Ordinances of Manu, According to the Gloss of Culluca; Comprising the Indian System of Duties Religious and Civil: Verbally Translated from the Original Sanscrit," 1794 (University of Southern California Special Collections Department, Los Angeles), iii. This work is a translation of ancient Hindu law written, according to Sir William Jones, around 880 B.C.E. The text exhibits the interconnectedness of religion and the law in such wide-ranging subjects as creation; education ("let the scholar when commanded by his preceptor and even when he has received no command, always exert himself in reading and in all acts useful to his teacher," further let him "always be decently appareled and properly composed"); marriage economics, private morals ("Traffick and moneylending are *satyanrita*; even by them *when he is deeply distressed*, may he support life, but service for hire is named *swavritti* or *dog-living*, and of course he must by all means avoid it.") (emphasis in original); diet, purification, and women ("never let her wish to separate herself from her father, her husband, or her sons; fore, by separation from them, she exposes both families to contempt"); government and military class; private and criminal disputes ("let the king or his judge, having seated himself on the bench, his body properly clothed and his mind attentively fixed, begin with doing reverence to the deities, who guard the world; and then let him enter on the trial of causes. Understanding what is expedient or inexpedient but considering only what is law or not law let him examine all disputes between parties, in the order of their several classes. By external signs let him see through the thoughts of men, by their voice, colour, countenance, limbs, eyes, and action"). The punishments imposed were often similar to those of the Old Testament. For example, "He who raises his hand or staff against another, shall have his hand cut, and he who kicks another in wrath shall have an incision made on his foot." Other subjects covered in the code include commercial and servile classes; the mixed classes and

sections on times of distress; penance and expiation; and transmigration and final beati-
tude. See also Patrick Olivelle, ed., *The Law Code of Manu* (Oxford: Oxford University Press,
2004).

92. Suzanne Last Stone, "Sinaitic and Noahide Law: Legal Pluralism in Jewish Law,"
Cardozo Law Review 12 (1991), 1157, 1161: "Jewish legal literature . . . is practical and argu-
mentative, rather than speculative or utopian. Legal theory is devoted to explaining the
proper governance of Jewish society, as set forth in the written and oral law"; see also,
Parkes, *The Conflict of the Church*, 35–37; Carroll, *Constantine's Sword*, 108. Carroll proposes
that with the destruction of the Temple and exile from Israel, observances of Torah, law,
increased in importance as a way for Jews to maintain a connection to Judaism.

93. J. David Bleich, "Jewish Law and the State's Authority to Punish Crime," *Cardozo
Law Review* 12: 3–4 (1991), 831; Stone, "Sinaitic and Noahide Law," 1166.

94. Aaron Kirschenbaum and Jon Trafimow, "The Sovereign Power of the State: A
Proposed Theory of Accommodation in Jewish Law," *Cardozo Law Review* 12: 3–4 (1991),
925–927, 936–937; Perry Dane, "The Maps of Sovereignty: A Meditation," *Cardozo Law
Review* 12: 3–4 (1991), 1000–1001; Malvina Halberstam, "Interest Analysis and Dina de-
Malkhuta Dina, A Comment on Aaron Kirschenbaum, The Sovereign Power of the State:
A Proposed Theory of Accommodation in Jewish Law," *Cardozo Law Review* 12: 3–4 (1991),
951–957. See especially Stone, "Sinaitic and Noahide Law," 1211, where she proposes that *dine
de-malkhuta dina* was not a concession to foreign law but a method of maintaining legal au-
tonomy. See also Gil Graff, *Separation of Church and State: Dina de-Malkhuta Dina in Jewish
Law* (Alabama: University of Alabama Press, 1985), 2. Graff contends that the principle not
only served as a "means of accommodation" but also as a "legal basis for resistance to the
arbitrary demands of the ruling power."

95. Arnold N. Enker, "Aspects of Interaction Between the Torah Law, the King's Law and
the Noahide Law in Jewish Criminal Law," *Cardozo Law Review* 12: 3–4 (1991), 1148; Stone,
"Sinaitic and Noahide Law," 1159; Carroll, *Constantine's Sword*, 50.

96. Bleich, "Jewish Law," 853, glossing Maimonides.

97. Ibid., glossing Nahmanides.

98. Stone, "Sinaitic and Noahide Law," 1170.

99. Kirschenbaum and Trafimow, "The Sovereign Power of the State," 939. The authors
provide as an example the case in which a sovereign forbidding the wearing of hats or *Kippot*
to celebrate a national holiday would not be in conflict with Jewish law, as the covering of
one's head is not required by the Torah, and therefore the interests of Jewish law are weak
and accommodation could be made.

100. Chaim Povarsky, "Jewish Law v. the Law of the State: Theories of Accommoda-
tion," *Cardozo Law Review* 12: 3–4 (1991), 950. Povarsky proposes that Jewish law is allowing
state law to be used in those instances where either there is no conflict between Jewish law
and state law or where "Jewish law by employing its own principles could accept such a
[state] law. The integrity of Jewish law is thus being preserved even while state law is be- ·

ing applied"; see also Kirschenbaum and Trafimow, "The Sovereign Power of the State,"
936–940, which states that the principle of *dina de-malkhuta dina* applies in monetary and
civil matters but in religious matters only when religious law is not essential or is weak; see
also Stone, "Sinaitic and Noahide Law," 1210–1211, which observes that recent scholarship
has emphasized the role of *dina de-malkhuta dina* as a means of maintaining Jewish legal
autonomy.

101. Stone, "Sinaitic and Noahide Law," 1211; Povarsky, "Jewish Law v. the Law of the
State."

102. Stone, "Sinaitic and Noahide Law," 1210–1212.

103. Enker, "Aspects of Interaction," 1155.

104. Stone, "Sinaitic and Noahide Law," 1199: "Although the Talmud did not describe
the reported instances of extralegal punishment as an actual, developed system of judicial
jurisdiction, later authorities understood this tradition as establishing the legal basis for a
systematic exercise of rabbinic 'emergency' powers. With the dissolution of the Sanhedrin,
several jurists held that these powers could by exercised by the Exilarch and religious com-
munal leaders."

105. Ibid., 1159.

106. Enker, "Aspects of Interaction," 1144.

107. Stone, "Sinaitic and Noahide Law," 1157.

108. Ibid., 1193.

109. Ibid., 1157, 1193.

110. Enker, "Aspects of Interaction," 1145–1147.

111. Ibid., 1145, which describes the supplementary powers of the religious courts and
the king's authority.

112. Stone, "Sinaitic and Noahide Law," 1159.

113. Ibid., 1201.

114. Enker, "Aspects of Interaction," 1144.

115. Fraher, "New Criminal Law," 593; see also note 42.

116. Stone, "Sinaitic and Noahide Law," 1202.

117. Ibid., 1193.

118. Enker, "Aspects of Interaction," 1148.

119. Stone, "Sinaitic and Noahide Law," 1194. At other points in the text, Stone disputes
the claim that the doctrines discussed reflect an underlying concern with the gap between
human and divine judgment, saying, "It is not at all clear that confessional evidence is ex-
cluded from the Sinaitic system because it is an unreliable basis for determining guilt"; ibid.,
1180. Her words here seem to support the theory that the *halakha* reflects a concern about
the unreliability of human judgment. Fraher similarly resisted the parallel claim about
Christian conceptions of human judgment, while also providing support for that claim.
Fraher, "Ut nullus," 494, cites the rabbinic tradition of two witnesses as being a contribu-
tory element, along with the Roman law requirement of due process in criminal cases, the

Roman law's dictum that the burden of proof is on the accuser and the introduction of an egalitarian view of accuser and defendant being equal, in the creation of a conception of a presumption of innocence in medieval Europe.

120. William C. Placher, *A History of Christian Theology* (London: Westminster John Knox Press, 1983), 156–157; Brian Tierney, *The Crisis of Church and State 1050–1300* (Toronto: University of Toronto Press, 1988); Etienne Gilson, *Reason and Revelation in the Middle Ages* (New York: Scribner, 2000).

121. Enker, "Aspects of Interaction," 1145–1146.

122. Ibid., 1146.

123. Ibid., 1145.

124. Stone, "Sinaitic and Noahide Law," 1201.

125. Ibid., 1198.

126. Fraher, "Ut nullus," 494, where he notes that the rabbinic tradition of requiring two witnesses to establish proof of guilt in a criminal case was an element that added to the creation of a medieval presumption of innocence; see also Fraher, "New Criminal Law," 587. Fraher observed that the Church's continued use of the stringent requirements of proof forced it to ignore all but the most egregious misbehavior of clergy in the medieval period.

127. French, *The Golden Yoke*, 115–117.

128. Ibid., 13.

129. Ibid., 14.

130. Ibid.

131. Ibid.

132. Ibid.

133. Ibid., 14, 42.

134. Ibid., 46.

135. Ibid., 79.

136. Ibid., 100.

137. Ibid.

138. Ibid., 61.

139. On the similarities between Plato's philosophy and Buddhism, see A. N. Marlow, "Hinduism and Buddhism in Greek Philosophy," *Philosophy East and West* 4: 1 (April 1954), 35–45; Thomas McEvilley, *The Shape of Ancient Thought: Comparative Studies in Greek and Indian Philosophies* (New York: Allworth Press, 2002), 165, 168–169.

140. French, *The Golden Yoke*, 62.

141. Ibid.

142. Ibid.

143. Fish, *Self-Consuming*, 5.

144. I am using the terms *rationalism* and *antirationalism* loosely in much the same way as employed by Fish. Various usages of the terms appear in Christian thought with

sometimes more, sometimes less exactitude—with rationalism more commonly being juxtaposed to "irrationalism" (as opposed to "antirationalism").

145. On rationalism and irrationalism within Islam, see Karen Armstrong, *Islam: A Short History* (New York: Modern Library, 2002), 71, 84, 105, 154; John L. Esposito, *Oxford History of Islam* (Oxford: Oxford University Press, 2000); Annemarie Schimmel, *Mystical Dimensions of Islam* (Chapel Hill: University of North Carolina Press, 1975). For Judaism, see Gershom Scholem, *Major Trends in Jewish Mysticism* (New York: Schocken, 1995), 23, 131, 249, 304; and *The Messianic Idea in Judaism and Other Essays on Jewish Spirituality* (New York: Schocken, 1995), 24–30.

146. On the history of the philosophy of skepticism, see Richard H. Popkin, *The History of Scepticism: From Savonarola to Bayle* (Oxford: Oxford University Press, 2003), xvii–xix, where Popkin discusses the origins of the various skeptical positions and their relation to the ability of people to "know" or "not know" something for certain.

147. The so-called rationalists may well exhibit more faith in human cognition than the antirationalists, but that is not the same as having faith that human cognition can attain perfection.

148. The reference is to Clifford Geertz's felicitous phrase, "anti-anti-relativism." See Geertz, "Anti-anti-relativism," *American Anthropologist* 86: 2 (June 1984), 263–278. My preference for the "anti-anti" formulation reflects my sense that theological secularism is anti-antirationalist in that it refuses to give up on the exercise of human reason and the making of human judgments just because human reason and judgment are imperfect. The conventional way of referring to this stance as rationalist is misleading if taken to imply a lack of skepticism about human reason. In fact, the anti-antirationalist shares the skepticism about human reason expressed by antirationalists like Plato. What distinguishes the anti-antirationalist from the antirationalist is that the former puts more faith in human reason than the antirationalist does on the grounds that it does not follow from the fact that human cognition is imperfect that it is therefore inadequate or incapable of being improved.

149. Shapiro, *Beyond Reasonable Doubt*.

150. For the importance of probabilism in Islam, see Abou el Fadl, *Speaking in God's Name*, 39, 45, 85, 149, 160; and Bernard G. Weiss, *The Search for God's Law: Islamic Jurisprudence in the Writings of Sayf al-Din al Amidi* (Salt Lake City: University of Utah Press, 1992).

151. It should be noted, however, that the commitment to diverse legal cultures is present (at least according to *halakhik* views) even before the Jewish community finds itself obliged by the condition of exile to accept the existence of other legal systems.

152. For an overview of the millet system, see Ira M. Lapidus, *A History of Islamic Societies* (Cambridge: Cambridge University Press, 1988), 323–324, 599, 793, 821, 900.

153. On the battle between pluralist and authoritarian approaches to interpretation in Islamic theology and jurisprudence, see Khaled Abou El Fadl, *And God Knows the Soldiers: The Authoritative and the Authoritarian in Islamic Discourse* (Lanham, MD: University Press of America, 2001); and *Speaking in God's Name: Islamic Law, Authority and Women*

(Oxford: Oneworld Publications, 2001). On the Catholic case, see John Courtney Murray and J. Leon Hooper, eds., *Religious Liberty: Catholic Struggles with Pluralism* (Louisville, KY: Westminster/John Knox, 1993).

154. Gil Graff states that "[i]n the transition from corporate community to individual citizen, the principle *dina de-malkhuta dina* was frequently invoked as a measure of harmonizing the requirements of religious law with the demands of the state," although this did not mean it was purely a means of accommodation, as it also "provided a rationale for resistance to the implementation of unjust decrees." See Graff, *Separation of Church and State*, 133–134.

155. See Dan Simon, "A Third View of the Black Box: Coherence in Legal Decision Making," *University of Chicago Law Review* 511 (2004); "A Psychological Model of Judicial Reasoning," *Rutgers Law Journal* 1 (1998).