

## PLURALISM, SECULARISM AND THE EUROPEAN COURT OF HUMAN RIGHTS

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### I. THE PLURALIST NORM OF THE EUROPEAN COURT OF HUMAN RIGHTS

The Article 9 religious freedom jurisprudence of the European Court of Human Rights most basically concerns the question of religious pluralism.<sup>1</sup> The “principle of pluralism seems to be the main—the core—principle” guiding the Court’s religious freedom jurisprudence, argues one of the Court’s judges.<sup>2</sup> Assessing the Court’s work in the area of religious freedom therefore requires considering its treatment of pluralism, which is the concept most often employed to interpret Article 9 of the European Convention on Human Rights.<sup>3</sup> The Court’s approach to religious pluralism is still heavily indebted to the decision in *Kokkinakis v. Greece*, a 1993 case involving a Jehovah’s Witness who had been repeatedly arrested and jailed for violating Greece’s

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1. See Aernout Nieuwenhuis, *The Concept of Pluralism in the Case-Law of the European Court of Human Rights*, 3 EUR. CONSTIT. L. REV. 368 (2007). Nieuwenhuis notes that

The concept of pluralism plays a prominent part in the case-law of the European Court of Human Rights (ECtHR). The Court considers “pluralism” as one of the main characteristics of a democratic society. That is to say that pluralism is an important factor determining the scope and impact of a number of fundamental rights such as the right to freedom of speech and the right to freedom of association. *Id.* at 368.

2. Françoise Tulkens, *The European Convention on Human Rights and Church-State Relations: Pluralism vs. Pluralism*, 30:6 CARDOZO L. REV. 2579 (2009).

3. Article 9 provides that:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others. The European Convention on Human Rights and its Five Protocols, Council of Eur., Nov. 4, 1950.

prohibition on proselytism. In the majority opinion finding that Mr. Kokkinakis's Article 9 rights had been violated, the Court writes the following:

As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.<sup>4</sup>

The most enduring aspect of the *Kokkinakis* decision has been its identification of religious freedom as a tool for protecting and advancing the goods of democratic pluralism. Pluralism, in other words, does not stand in the service of religious freedom; religious freedom stands in the service of pluralism. This understanding of the relationship between pluralism and religious freedom has deeply shaped the Court's interpretation of Article 9. For instance, decisions following the *Kokkinakis* framework have asserted that the Court should look to "pluralism and a sense of values" to find "inspiration" for interpreting Article 9.<sup>5</sup> The Court has likewise defined state neutrality in religion as necessary for "the preservation of pluralism."<sup>6</sup> A number of decisions have also argued that protecting the "autonomous existence of religious communities" is "indispensable for pluralism in a democratic society."<sup>7</sup> In short, the advancement of religious pluralism assumes a dominant role in the Court's interpretation of the meaning and ends of Article 9. Pluralism is both the means and the end of fostering genuine religious freedom.

The Court's approach to interpreting Article 9 stems from its having identified pluralism, and in particular religious pluralism, as an

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4. *Kokkinakis v. Greece*, App. No. 14307/88, 260 Eur. Ct. H.R., § 31 (1993).

5. See concurring opinion of Judge Pettiti, *Wingrove v. U.K.*, App. No. 19/1995/525/611, 24 Eur. Ct. H.R. 1 (1997).

6. *Bessarabia v. Mold.*, App. No. 45701/99, 35 Eur. H.R. Rep. 13, § 116 (2001).

7. *Holy Synod of the Bulg. Orthodox Church & Others v. Bulg.*, App. No. 35677/04, Eur. Ct. H.R., § 103 (2009); *Religionsgemeinschaft der Zeugen Jehovas & Others v. Austria*, App. No. 40825/98, § 61 (2008). See also *Lang v. Austria*, App. No. 28648/03, Eur. Ct. H.R., § 24 (2009) ("Observing that religious communities traditionally exist in the form of organised structures, the Court has repeatedly found that the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is, thus, an issue at the very heart of the protection which Article 9 affords"); *Church of Scientology Moscow v. Russ.*, App. No. 18147/02, Eur. Ct. H.R., § 72 (2007) ("the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords.").

essential feature of a rightly-ordered liberal society. In fact, the Court repeatedly speaks of pluralism as the sine qua non of a democratic order, the full and proper expression of liberal freedom. In *Bessarabia v. Moldova*, for instance, the Court links pluralism with the “concept of a democratic society,”<sup>8</sup> while the decision in *Ouranio Toxo v. Greece* proposes that a democratic society “is devoid of any meaning if there is no pluralism.”<sup>9</sup> The Court expresses a similar opinion in *United Communist Party of Turkey v. Turkey*, stating that “there can be no democracy without pluralism.”<sup>10</sup>

Pluralism is of such foundational importance to the Court because it fosters other liberal goods such as respect for diversity and toleration.<sup>11</sup> Pluralism is thus not only a good itself but that which nourishes the health of democratic life more widely. In this respect, the Court’s account of pluralism mirrors Robin Lovin’s account of “normative religious pluralism.” “In normative religious pluralism,” Lovin writes, “[r]eligious diversity is held to be a positive force in social life, giving moral and spiritual depth to civic discourse, enriching personal and family life, and even making the diverse religious communities themselves better representative of their faiths and traditions.”<sup>12</sup> By securing religious freedom, the Court endeavors to promote a religious pluralism that might sustain the moral life of European democracy. Religious pluralism, as the Court frames its analysis, is not one democratic virtue among many. It is the cornerstone of a human rights regime and the norm by which other norms are to be assessed.

## II. THE FAILURE OF RELIGIOUS PLURALISM

The European Court of Human Rights has rendered a number of opinions which seemingly advance the normative religious pluralism described above. Decisions involving Jehovah’s Witnesses and the registration of religious communities, to name just two prominent examples, illustrate the Court’s efforts to advance pluralism by

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8. *Bessarabia v. Mold.*, App. No. 45701/99, 35 Eur. H.R. Rep. 13, § 119 (2001).

9. *Ouranio Toxo v. Greece*, App. No. 74989/01, 45 Eur. H.R. Rep. 277, § 35 (2005).

10. *United Communist Party of Turk. v. Turk.*, App. No. 133/1996/752/951, 26 Eur. H.R. Rep. 121, § 43 (1998).

11. *See, e.g., Ouranio Toxo v. Greece*, App. No. 74989/01, 45 Eur. H.R. Rep. 277, § 35 (2005) (pluralism described as involving “genuine recognition of, and respect for, diversity and the dynamics of traditions and of ethnic and cultural identities”); *97 Members of the Gldani Congregation of Jehovah’s Witnesses & 4 Others v. Ga.*, App. No. 71156/01, 46 Eur. H.R. Rep. 613, § 132 (2007) (pluralism ensures that competing groups “tolerate each other”).

12. Robin W. Lovin, *Religion and Political Pluralism*, 27 *MISS. C. L. REV.* 91, 91 (2007).

protecting the rights of religious minorities.<sup>13</sup> At the same time, the Court has also failed in a number of cases to advance the sort of normative pluralism it associates with religious freedom. These decisions, while diverse in important respects, nevertheless reflect a discernable pattern: most commonly, they are cases where religion challenges Europe's secular identity in a manner that the Court deems threatening. The most prominent of these cases are those involving Muslim headscarves.

The first such headscarf case was *Dahlab v. Switzerland*.<sup>14</sup> A teacher in a state primary school converted to Islam and decided to wear a covering over her hair. After a number of years during which she wore the garment without problem, the Director General of Public Education demanded that she cease wearing the garment.<sup>15</sup> When the matter came before the European Court of Human Rights, the Court held that the teacher's Article 9(2) right to manifest her religious beliefs was outweighed by the state's interest in "protecting the rights and freedoms of others and preserving public order and safety."<sup>16</sup> Pluralism, in this instance, was deemed to undermine the overriding goal of "preserving religious harmony," and the Court therefore permitted limitations on the teacher's freedom of public religious expression.<sup>17</sup>

In *Şahin v. Turkey*, decided a few years after *Dahlab*, the Court held that there was no violation of Article 9 when the University of Istanbul prohibited students from wearing headscarves.<sup>18</sup> After citing the above-quoted language about pluralism from *Kokkinakis*, the Court reasoned that religious freedom must nevertheless be restricted "in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected."<sup>19</sup> Pluralism, as such, is to be "based on dialogue and a spirit of compromise entailing various concessions . . . in order to maintain and promote the ideals and values of a democratic society."<sup>20</sup> According to this logic, while pluralism is an essential democratic value, the scope of pluralism must be restricted to preserve

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13. See, e.g., *Religionsgemeinschaft der Zeugen Jehovas & Others v. Austria*, App. No. 40825/98 (2008); *97 Members of Gldani Congregation of Jehovah's Witnesses & 4 Others v. Ga.*, App. No. 71156/01, 46 Eur. H.R. Rep. 613 (2007); *Holy Synod of the Bulg. Orthodox Church & Others v. Bulg.*, App. No. 35677/04, Eur. Ct. H.R., § 103 (2009); *Church of Scientology Moscow v. Russ.*, App. No. 18147/02 (2007).

14. *Dahlab v. Switz.*, App. No. 42393/98, Eur. Ct. H.R. (2001).

15. *Id.* at § 1.

16. *Id.* at § 4.

17. *Id.* at § 4.

18. *Leyla Şahin v. Turk.*, App. No. 44774/98, Eur. Ct. H.R. (2004).

19. *Id.* at § 106.

20. *Id.* at § 108.

democracy for all. In this instance, Muslim university students had to compromise the freedom to manifest religious identity for the sake of preserving democratic values. The Court thus not only circumscribed the scope of permissible pluralism but also defined religious freedom and democracy as potentially oppositional.

In 2008, the Court issued yet another opinion involving headscarves in *Dogru v. France*.<sup>21</sup> This case involved a Muslim student, aged eleven, who was disciplined for wearing a headscarf to her physical education class. Following the pattern established in *Dahlab* and *Şahin*, the Court again found that the student's Article 9 rights were not violated by the restriction. The logic of the decision is largely the same as that of the predecessor cases. Referencing *Şahin*, the Court "reiterates that the State may limit the freedom to manifest a religion, for example by wearing an Islamic headscarf, if the exercise of that freedom clashes with the aim of protecting the rights and freedoms of others, public order and public safety."<sup>22</sup> The Court therefore concludes that protecting democratic culture might require limitations on religious expression. While this principle is itself largely uncontroversial, the Court's focus on the limits of pluralism rather than the conditions of its flourishing marks a further turn from the *Kokkinakis* norm.

These three cases are difficult to square with the Court's stated interest in advancing religious pluralism. Of course, these decisions might be treated as mere outliers that reflect the particular conditions of Europe's struggle with public Islam.<sup>23</sup> The decisions, particularly *Leyla Şahin*, might similarly be read as narrowly reflecting the Court's deference to the "margin of appreciation" in matters of state secularity. Yet, while these decisions all address the scope of religious pluralism within a limited set of circumstances, they should not be understood as narrowly addressing the prerogatives of the state with respect to public Islam. The implications, and the indeed the governing jurisprudential impulses, are much broader.

One indication of the broader forces at work in these cases is the Court's recent decision in *Lautsi v. Italy*.<sup>24</sup> In this case, currently before the Court's Grand Chamber, a mother of schoolchildren objected to the

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21. *Dogru v. Fr.*, App. No. 27058/05, 49 Eur. H.R. Rep. 8 (2009).

22. *Id.* at § 64.

23. It has been widely noted that the Court's approach to religious freedom favors established majority religions. See, e.g., Peter G. Danchin, *Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law*, 49 HARV. INT'L L.J. 249 (2008). See also, JEAN-FRANÇOIS RENUCCI, ARTICLE 9 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION 15-16 (Council of Europe Publ'g 2005).

24. *Lautsi v. Italy*, App. No. 30814/06, Eur. Ct. H.R. (2009).

presence of the crucifix in public school classrooms, contending that this practice was contrary to the secularist principles by which she wished to raise her children. The Court unanimously held that the presence of this religious symbol violated Article 9. As in the headscarf cases, the Court's opinion in *Lautsi* is built around an assessment of pluralism. In reaching its decision, the Court considers the distinctive role that schools have, above any other social institution, in promoting the values and practices of democratic pluralism.<sup>25</sup> In light of this role, the Court holds, the hanging of crucifixes undermines pluralism because it might disturb religious minorities.<sup>26</sup>

While *Lautsi* differs from the headscarf cases in significant ways, the underlying logic is similar:<sup>27</sup> the Court endorses restrictions on public religious expression for the ostensible purpose of protecting democratic pluralism. The Court does so in *Lautsi* by pairing religious pluralism with neutrality, in particular, an account of neutrality that removes religion from public life and expression. Neutrality is not presented as the equal right to public religious expression but rather a public space free from the impositions of religion. *Lautsi* might thus be paired with the headscarf decisions to demonstrate a pattern of thought in which the Court associates democratic pluralism with the circumscription of public religious expression. This principle stands squarely against the *Kokkinakis* endorsement of religious pluralism as a normative good for democratic life and culture.

*Bayatyan v. Armenia* represents yet another recent case that raises questions about the Court's commitment to religious pluralism.<sup>28</sup> In *Bayatyan*, the Court held that there was no violation of Article 9 when a Jehovah's Witness was imprisoned for refusing to perform military service because he was a conscientious objector. While the Court does not directly frame its analysis in terms of pluralism, the decision offers further insight into how the Court understands the relationship between religion and public life. The Court impliedly accepts a framing of religion as a threat to democratic politics that must be managed through the denial of certain forms of religious expression. Particularly revealing is the Court's claim that a liberal interpretation of

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25. *Id.* at § 47.

26. *Id.* at § 55-56.

27. A theme that emerges in the Article 9 cases is the Court's understanding of religious freedom as involving a balancing of the individual rights of the minority against the perceived group interests of the majority. Danchin, *supra* note 23, at 286-87. Yet the inequitable manner in which this principle is applied ought to be troubling. It is particularly notable that the majority's interest in *Lautsi* (to preserve and express an aspect of religious culture and ethical significance) was not deemed sufficiently important in *Lautsi* to outweigh the right of students from minority religions to be free of religious symbols, yet the interest of the majority in the headscarf cases (to uphold a secular culture) was deemed sufficient to restrict the conduct of religious minorities.

28. *Bayatyan v. Arm.*, App. No. 23459/03, Eur. Ct. H.R. (2009).

conscientious objection too easily permits citizens to “refuse to perform their obligation” to the state.<sup>29</sup> Under this approach, religious pluralism is suffocated and the space between person and state collapsed. All that remains is the naked power of the state to shape the meaning of the public.

Albeit in different ways, all of these cases involve situations in which the Court has rendered decisions at tension with normative religious pluralism. The “pluralism indissociable from a democratic society” is undermined by the logic of these decisions, resulting in the limitation of religion as a factor that might shape democratic public life and culture. *Bayatyan* and the headscarf cases involve the forcible privatization of religion; *Lautsi* involves the forcible removal of religious expression from public life.

One might explain these decisions on the grounds that the Court holds, in the assessment of one leading scholar, “a narrow and often confused concept of religious freedom.”<sup>30</sup> These decisions might alternatively be understood as reflecting the Court’s prudential attempt to balance the rights of religious minorities against the prerogatives of the state. Willi Fuhrmann, a judge on the European Court of Human Rights, describes the Court’s religious freedom jurisprudence in these terms. The Court, he argues, has endeavored to secure “pluralism and tolerance as the hallmarks of democratic society,” by considering both the “rights of minority religious groups” and the “responsibility of states to protect the religious sensibilities of the majority.”<sup>31</sup> Yet, while these explanations illuminate aspects of the Court’s work, there is a more fundamental explanation that must be considered, for in the end, these decisions are neither internally incoherent nor mere prudential exercises in the balancing of interests.<sup>32</sup> They rather reflect the Court’s adoption

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29. *Id.* at § 49.

30. CAROLYN EVANS, *FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 200 (Oxford Univ. Press 2001).

31. Willi Fuhrmann, *Perspectives on Religious Freedom from the Vantage Point of the European Court of Human Rights*, *BYU L. REV.* 829, 838 (2000).

32. HALDUN GÜLALP, *SECULARISM IN EUROPE, AS REFRACTED THROUGH THE PRISM OF THE EUROPEAN COURT OF HUMAN RIGHTS: COMPARATIVE ANALYSIS OF STATE-CHURCH RELATIONS AND THE STATE REGULATION OF RELIGION* 26, available at <http://www.juristras.eliamep.gr/wp-content/uploads/2009/09/secularism-in-europeas-refracted-through-the-prism-of-the-european-court-of-human-rights.pdf>. Gülalp proposes that

historically ingrained cultural assumptions about not only the division between Christianity and Islam but also between Western and Eastern Christianity have played a part in the reasoning of the judges of the ECtHR. One could never prove this definitively, although it goes without saying that people normally behave according to received and dominant cultural knowledge. What appears as incoherence to Carolyn Evans . . . can be made sensible if this knowledge is taken into account.

of a secular logic that has shaped its interpretation of Article 9 and of the meaning of religious pluralism.<sup>33</sup>

### III. SECULAR LOGIC AND THE PROBLEM OF RELIGIOUS PLURALISM

While no single factor can fully account for the Court's Article 9 decisions, this paper argues that the Court's commitment to a mode of secular logic has been particularly important in limiting its ability to render decisions consistent with the principle of normative religious pluralism. This secular logic is not expressly hostile towards religion. Yet, it does serve as a background assumption that informs the Court's reasoning about the public life of religion. In particular, this logic promotes the principle that European political life ought be fundamentally secular in its constitution and that religion is therefore "more a problem . . . than a solution."<sup>34</sup> Even as the Court defines religious pluralism as the hallmark of the liberal democratic order, this pluralism is locked within the bounds of a secular political narrative. Pluralism thus remains in a tenuous position, easily sacrificed when the Court encounters cases that challenge the predominance of this secular narrative.<sup>35</sup>

One source of this secular logic is the cultural context within which the Court operates. Europe has increasingly cut itself off from traditional religious beliefs and practices in a manner that has left it a pervasively secular culture. As the Parliamentary Assembly of the Council of Europe stated in a 2007 Recommendation, "Over the last twenty years, religious worship has declined markedly in Europe." The Recommendation proceeds to note that, "Fewer than one European in five attends a religious service at least once a week, whereas twenty years ago the figure was more than twice that."<sup>36</sup> While differences exist across Europe, "[t]he existing evidence in Western Europe consistently and unequivocally shows" that "traditional religious beliefs . . . have steadily declined throughout Western Europe,

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33. Ingwill Plesner argues that the *Dalab* and *Şahin* decisions support "the impression that the Court at least accepts fundamentalist secularism as one legitimate state approach to religion." See Plesner, "The European Court on Human Rights between fundamentalist and liberal secularism," Paper for the seminar on *The Islamic head scarf Controversy and the Future of Freedom of Religion or Belief*, Strasbourg, France 28-30 July 2005, available at <http://www.strasbourgconference.org/papers/index.php>.

34. Richard John Neuhaus, *Secularizations*, 190 FIRST THINGS 24 (Feb. 2009).

35. Islam represents a particular difficulty for Europe, given the extent to which it challenges "some deeply held European assumptions" about the private nature of faith. Grace Davie, *Is Europe an Exceptional Case*, THE HEDGEHOG REV. 32 (2006).

36. Parliamentary Assembly of the Council of Europe, Recommendation 1804 (2007), § 6, available at <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta07/erec1804.htm>.



particularly since the 1960s.”<sup>37</sup> Whether Europe is a cultural outlier or at the vanguard of progressive global secularization remains a matter of debate; yet, Europe has clearly established itself as a decidedly secular society, and it is within this milieu that the Court engages the question of religious pluralism.<sup>38</sup>

This secularism manifests itself not merely in religious indifference but, more deeply, as a form of cultural identity and understanding. Europe has become “*laïque* (secular) in terms of mentalities.”<sup>39</sup> As a consequence, Europe has undergone a process that a Belgian theologian terms “detraditionalization.” Detraditionalization encompasses secularization but also involves a deeper experience of “socio-cultural interruption” in the transmission of religious identity.<sup>40</sup> European secularization might thus be understood as the negation of inherited cultural and moral identity. Secular Europe denies its history, particularly its religious history and has thus become a civilization “that does not understand itself.”<sup>41</sup> Pope Benedict, among others, has similarly lamented the resultant cultural amnesia which, he argues, has bred a “self-hatred that is nothing short of pathological.”<sup>42</sup>

This self-hatred has often taken as its object the religious elements of culture that constitute the idea of Europe. Rather than creating a void of public meaning, the secularization of Europe has produced a new breed of intolerance. Pope Benedict, for instance, has written extensively about the new strain of anti-Christianity in Europe in which fidelity to traditional religious values “is labeled intolerance, and relativism becomes the required norm.”<sup>43</sup> The Pope points to a Swedish preacher who received a prison sentence for teaching against homosexuality, as well as the refusal to include a reference to Christianity in the proposed European constitution.<sup>44</sup> Debate in the

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37. PIPPA NORRIS & RONALD INGLEHART, *Uneven Secularization in the United States and Western Europe*, in DEMOCRACY AND THE NEW RELIGIOUS PLURALISM 34 (Thomas Banchoff ed., Oxford Univ. Press 2007).

38. See Davie, *supra* note 35, at 23.

39. Jean-Paul Willaime, *European Integration, Laïcité and Religion*, in RELIGION, POLITICS AND LAW IN THE EUROPEAN UNION 24-25 (Lucian N. Leustean & John T.S. Madeley eds., Routledge 2010).

40. LIEVEN BOEVE, *GOD INTERRUPTS HISTORY: THEOLOGY IN A TIME OF UPHEAVAL* 21 (Continuum 2007).

41. Lieven Boeve, *Europe in Crisis: A Question of Belief or Unbelief? Perspectives from the Vatican*, 23 MODERN THEOLOGY 206 (2007).

42. Robert Carle, *Pope Benedict XVI Confronts Religious Relativism*, 45 CULTURE & SOC'Y 549, 554 (2008).

43. JOSEPH RATZINGER & MARCELLO PERA, *WITHOUT ROOTS: THE WEST, RELATIVISM, CHRISTIANITY, ISLAM* 128 (Basic Books 2006). See also Carle, *supra* note 40.

44. *Id.* at 128.

United Kingdom over the Equality Bill has raised similar issues, while the British press has recently witnessed a spate of commentary over growing intolerance towards Christians.<sup>45</sup> The religious pluralism that has arisen under these conditions has been less concerned with accommodating difference than finalizing the “exclusion of religion [and, particular, Christianity] from social life.”<sup>46</sup>

Although animated by different concerns, the Muslim scholar Tariq Ramadan has also written about the ways in which Europe’s failure to know itself and its history hinders its ability to nurture a robust pluralism. Ramadan writes that:

Europe cannot survive, and neither can the West, if it keeps striving to define itself in exclusive terms and in opposition to the other—Islam or Muslims—of whom it is afraid. What the West, including of course Europe, most needs today may not be so much dialogue with other civilizations as actual dialogue with itself. It needs to acknowledge the facets of its own self that it has too long refused to see and that even now prevent it from enhancing the wealth of its religious and philosophical traditions. The West and Europe must come to terms with the diversity of their past in order to master the necessary pluralism of their future.<sup>47</sup>

It should be noted that Ramadan’s comments are directed, in part, against Pope Benedict’s identification of Europe with Christianity, a characterization that Ramadan sees as necessarily defining Muslims as outsiders. Yet, this important point aside, both Ramadan and Benedict are participating in a common struggle to define space for religious identity within the bounds of a secular Europe that relegates religion to the margins of meaning. In particular, both have drawn attention to the ways in which the destabilization of European self-understanding has created a less open and pluralistic Europe. Europe’s failure to know itself has left it ill-positioned to know and encounter the religious other. While religious pluralism remains an important political value for the Court, it is ultimately a thin pluralism based more in an “agnostic

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45. See, e.g., POPE BENEDICT XVI, FREEDOM COMES BEFORE EQUALITY, available at <http://www.guardian.co.uk/commentisfree/belief/2010/feb/01/pope-benedict-equality-legislation>; “The religious rights of Christians are treated with disrespect,” available at <http://www.telegraph.co.uk/comment/letters/7528487/The-religious-rights-of-Christians-are-treated-with-disrespect.html>; “Labour has erased God from political life, warns Bishop of Durham,” available at <http://www.timesonline.co.uk/tol/comment/faith/article7017240.ece>.

46. “Address of His Holiness Benedict XVI to the Participants in the 56th National Study Congress Organized by the Union of Italian Catholic Jurists,” Dec. 9, 2006, available at [http://www.vatican.va/holy\\_father/benedict\\_xvi/speeches/2006/december/documents/hf\\_ben\\_xvi\\_spe\\_20061209\\_giuristi-cattolici\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/december/documents/hf_ben_xvi_spe_20061209_giuristi-cattolici_en.html).

47. TARIQ RAMADAN, WHAT I BELIEVE 83 (Oxford Univ. Press 2010).

shrugging of the shoulders” than an embrace of the particular goods of religion.<sup>48</sup> Religion might be tolerated so long as it does not challenge the predominance of the secular. Yet as the Court’s jurisprudence reveals, this tolerance is unstable for it depends on the generosity of the host.

The Court’s secular logic is not only fed by cultural forces but also by the very idea of human rights relied upon to advance religious pluralism. Human rights in its dominant form is a creation of the secular world. Paul Weller writes that

in a world existing on the other side of the impact of a historical condition known as modernity, the relationship between ‘religion’ and “human rights” can only appropriately considered within the context of a critical understanding of, an engagement with, the impact of another basic reality that is signified by the terminology of the “secular.”<sup>49</sup>

It is necessary to assess the relationship between religion and human rights in light of the secular because the modern concept of human rights stands over and against religion. In its strongest formulation, the concept of human rights rests on a totalizing secular logic that aims to supersede theo-logic.<sup>50</sup> Human rights drew upon inherited religious concepts and categories but was ultimately cut off from any dependence on these religious foundations.<sup>51</sup> Religion was not needed as a source of understanding and, indeed, human rights provided a way to construct a common political morality that avoided the sectarian violence of politicized religion.<sup>52</sup> Thus one of the hallmarks of modernity was the

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48. Jean Bethke Elshtain, *While Europe Slept*, 191 *FIRST THINGS* 33 (2009).

49. Paul Weller, ‘Human Rights,’ ‘Religion’ and the ‘Secular’: *Variant Configurations of Religion(s), States(s) and Society(ies)*, in *DOES GOD BELIEVE IN HUMAN RIGHTS? ESSAYS ON RELIGION AND HUMAN RIGHTS* 151 (Nazila Ghanea-Hercock, Alan Stephens & Raphael Walden eds., Martinus Nijhoff Pubs. 2007).

50. Rowan Williams describes this process in terms of the “secular government [assuming] a monopoly in terms of defining public and political identity.” Rowan Williams, *Civil and Religious Law in England: A Religious Perspective*, 10 *ECCLESIASTICAL L.J.* 265 (2008).

51. A number of scholars have explored the ways in which a certain conception of the secular is pregnant with Christian theology. See, e.g., ROBERT MARKUS, *CHRISTIANITY AND THE SECULAR* (Univ. Notre Dame Press 2006). Michael Horton argues that modernity’s “appeal to universal foundations that bypassed appeals to revelation” arose, in part, from the failure of Christianity to fully exploit the resources of the Reformation doctrine of the two kingdoms. Michael Horton, *In Praise of Profanity: A Theological Defense of the Secular*, in *EVANGELICALS AND EMPIRE: CHRISTIAN ALTERNATIVES TO THE POLITICAL STATUS QUO* 262-63 (Bruce Ellis Benson & Peter Goodwin Heltzel eds., Brazos Press 2008).

52. Kristin Deede Johnson summarizes this development in writing that “liberal invocations of tolerance have their roots in a very distinct epistemology, which includes a belief that through the use of reason all people can be unified around a body of common truths and morals.” KRISTIN DEEDE JOHNSON, *THEOLOGY, POLITICAL THEORY AND PLURALISM: BEYOND TOLERANCE AND*

reconstruction of public life, in the words of Benedict, as a “domain of reason alone.”<sup>53</sup> Human rights, in turn, became the moral superstructure of a social order in which religion was sequestered within private life. John Witte, for instance, describes the modern human rights movement as an attempt “to harvest from the traditions of Christianity and Enlightenment the rudimentary elements of a new faith and a new law that would unite a badly broken world.” While Christian traditions “participated actively as midwives in the birth of this modern rights revolution” they eventually were eclipsed by the very tradition to which they had given birth.<sup>54</sup>

This historical narrative necessarily avoids engaging the full complexities of the intellectual genealogy of human rights. It should be noted that the secular tradition of human rights, though it maintains a primacy within the human rights movement, is not the only tradition of understanding human rights. Religious communities continue to be actively engaged in all aspects of human rights, perhaps more so now than at any point during the history of the modern human rights movement. Nevertheless, the totalizing impulses guiding the secular tradition continue to define human rights and religion in adversarial terms. Hilary Putnam argues, for instance, that “isn’t it the case that if any one of the major faiths holds on its triumphalist and supersessionist claims then indeed religion is part of the problem, and not part of the solution.”<sup>55</sup> Strong universal religious claims cannot, in other words, be reconciled with the universal ambitions of liberal human rights. The response is thus to delimit the particularity of theology in favor of the universality of secular reason. The resulting account of human rights is described starkly by international law scholar Louis Henkin, who writes that:

in its contemporary articulation, the human rights ideology, aiming at universality (and developed during years when half the political

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DIFFERENCE 2 (Cambridge Univ. Press 2007). The common morality, in turn, depended on the creation of a new liberal anthropology. John Milbank argues that liberalism invented a wholly artificial human being who has never really existed. . . . This is the pure individual, thought of in abstraction from his or her gender, birth, associations, beliefs and also, crucially . . . from the religious or philosophical beliefs of the observer of this individual, as to whether he is a creature made by God, or only material, or naturally evolved and so forth.

John Milbank, *The Gift of Ruling*, 85 NEW BLACKFRIARS 212-39 (2004).

53. RATZINGER & PERA, *supra* note 43, at 62.

54. John Witte, Jr., *Law, Religion and Human Rights*, COLUM. HUM. RTS. L. REV. 5-6 (1996).

55. Hilary Putnam, *Monotheism and Humanism*, in HUMANITY BEFORE GOD: CONTEMPORARY FACES OF JEWISH, CHRISTIAN AND ISLAMIC ETHICS 2 (William Schweiker, Michael Johnson & Kevin Jung eds., Fortress Press 2006).

world was committed to atheism), has eschewed invoking any theistic authority. . . . The human rights ideology does not see human rights as integral to a cosmic order. It does not derive from any sacred text. Its sources are human, deriving from contemporary human life in human society. Human rights is a political idea and ideology that claims to reflect a universal contemporary moral intuition.<sup>56</sup>

To cite one additional example, Michael Ignatieff similarly urges moving beyond “foundational arguments” based on religious assertions in order “to build support for human rights on the basis of what such rights actually do for human beings.” Ignatieff is even more forceful in adding, “Human rights is the language through which individuals have created a defense of their autonomy against the oppression of religion.”<sup>57</sup>

The secular understanding of human rights has had a particularly pronounced impact in European politics and culture. Although religion and human rights need not exist in a zero-sum relationship, the recent history of Europe would seem to indicate that to some extent they have. Human rights are, in Elie Weisel’s phrase, a “secular religion” that have replaced traditional faith communities and commitments as the ordering civilization morality.<sup>58</sup> “European man,” George Weigel writes, “has convinced himself that in order to be modern and free, he must be radically secular.”<sup>59</sup> Religion thus stands at tension with the idea of a human rights culture. It is not at all surprising that Europe has increasingly defined itself, often in contradistinction to the United States, as a human rights culture at the very time it has seen the dissolution of its religious identity.<sup>60</sup>

The reverberations of this drama might be discerned, if only faintly, in the Court’s wrestling with religious freedom. As heritors of the secular human rights tradition, the Court operates within a tradition of thought that has adopted the view that religion is problematic for political life. The Court has, to be sure, endeavored in certain ways to

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56. Louis Henkin, *Religion, Religions, and Human Rights*, in *DOES HUMAN RIGHTS NEED GOD* 146-47 (Elizabeth M. Bucar & Barbra Barnett eds., Eerdmans 2005).

57. MICHAEL IGNATIEFF & AMY GUTMANN, *HUMAN RIGHTS AS POLITICS AND IDOLATRY* 83-84 (Princeton Univ. Press 2001).

58. ELIE WEISEL, *THE PERILS OF INDIFFERENCE: LESSONS LEARNED FROM A VIOLENT CENTURY*, (Apr. 12, 1999), available at <http://www.pbs.org/eliewiesel/resources/millennium.html>.

59. GEORGE WEIGEL, *THE CUBE AND THE CATHEDRAL: EUROPE, AMERICA, AND POLITICS WITHOUT GOD* 53 (Basic Books 2005). See also George Weigel, *Europe’s Problem—and Ours*, 140 *FIRST THINGS* 118-25 (Feb. 2004).

60. Pierre Manent remarks that “one has the impression today that the greatest ambition of the Europeans is to become the inspectors of American prisons.” Pierre Manent, *Current Problems of European Democracy*, *MODERN AGE* 15 (Winter 2003).

create political space for religious expression. Yet, at the same time, the Court's inability to realize the full logic of its claims about religious pluralism reveals its capitulating to Europe's secular human rights culture. In the cases discussed above, which all involve situations in which the claims of religion intrude on the sacral preserve of secular politics, the Court is unwilling to further a religious pluralism that makes European public life a space of deep religious contestation. Pluralism is advanced only at the fringes of political meaning. By resisting the full implications of an embrace of normative religious pluralism, the Court denies admission to public life to those elements which most directly challenge and call into question the secular story of the world. Thus, under the rubric of human rights, the Court allows Europe to forestall a deep confrontation with itself and its future.

#### IV. HUMAN RIGHTS BEYOND SECULAR REASON

The Court has rightly identified religious pluralism as one of the central questions for human rights. Yet the Court has also insisted on addressing the question of religious difference from a commitment to "an unqualified secular legal monopoly"<sup>61</sup> Locating normative religious pluralism within a universal logic has resulted in an inconsistent series of judgments that lack a coherent jurisprudential framework. Establishing normative religious pluralism will therefore require moving beyond this hegemonic secular tradition and its assumptions about universality. Only by turning from the universal to the particular and from the secular to the post-secular can space be established for realizing normative religious pluralism—space within which theological traditions might contribute to the construction of human rights norms.

Moving beyond the secular human rights tradition begins with challenging the idea of universal reason and naming secular reason as a contingent and historically-conditioned logic. Along these lines, Javier Martinez argues that "for all its appeal to universal reason, the culture of the Enlightenment is just one more tradition, born of particular circumstances in the history of European Christianity." Secular reason therefore represents "one mode, historically conditioned and contingent, of understanding 'reason,' and one mode which is particularly limited

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61. Rowan Williams, *Civil and Religious Law in England: A Religious Perspective*, 10 *ECCLESIASTICAL L.J.* 262, 272-73 (2008). Williams invokes this phrase in discussing the possibility of English law recognizing the jurisdiction of religious law, but we might equally think of the "secular legal monopoly" as applying to formulations about the relation between the law and idea of human rights.

and reductive.”<sup>62</sup> Such critiques of secular reason are hardly novel, for they reflect the pervasive dissolution of modern assumptions. As one commentator writes, “the concept of ‘secularism’” has “been subjected to criticism and deconstruction.” In particular, secularism is “[n]o longer seen as a normative force of ‘neutrality,’ its political origins and anti-democratic potential [having] been revealed.”<sup>63</sup> At the same time, such critiques have achieved little currency within human rights, which remains in many respects the unspoiled offspring of Enlightenment aspiration. The regnant idea of human rights continues to be “dominated by European assumptions about universal rights” at a time when such strong notions of universalism have been questioned in so many other respects.<sup>64</sup> It is this very characteristic which makes human rights such a powerful and appealing vocabulary but which also makes it “the hardest of the great moral ideas to integrate, the hardest to square, with the reigning intellectual assumptions of the age.”<sup>65</sup>

A universality which suffocates the particular leaves little space for religious thought to serve as a constructive resource for reflecting on the goods of human rights. The project of opening human rights to theology therefore envisions shared fundamental norms arising not from a top-down logic but from the overlapping agreement of particular commitments. It is more helpful, in other words, to think in terms of a universality which finds its meaning from within pluralism, rather than a pluralism which is tolerated and accommodated within universality. After all, if it is the case that a “genuinely pluralistic liberalism must recognize that secularism is no more neutral than religion,” then modes of religious reason ought to be equally free to participate in the formation of shared values.<sup>66</sup> Religious traditions are not alien forms of logic to be bounded by secular reason but distinct modes of rationality that should share in shaping discourse on the meaning and content of human rights. As Robin Lovin proposes, “[i]nstead of beginning with universal principles of justice, political pluralism begins with the recognition of some particular good that opens a discussion of the conditions required for realization of the good in present circumstances and in relation to

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62. JAVIER MARTINEZ, “BEYOND SECULAR REASON”: SOME CONTEMPORARY CHALLENGES FOR THE LIFE AND THOUGHT OF THE CHURCH AS SEEN FROM THE WEST 3-5 (2004), available at <http://www.thedivineconspiracy.org/Z5205F.pdf>.

63. HALDUN GÜLALP, *supra* note 32, at 23.

64. WILLIAMS, *supra* note 61, at 270.

65. MICHAEL J. PERRY, *THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES* 7 (Oxford Univ. Press 1998).

66. Michael McConnell, *Old Liberalism, New Liberalism and People of Faith*, in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* 23 (Michael J. McConnell, Robert F. Cochran, Jr. & Angela C. Carmella eds., Yale Univ. Press 2001).

other goods.”<sup>67</sup> Opening human rights to theological traditions will establish that the goods of human rights should not be assessed solely with reference to the rational autonomous human person of modern thought. Rather, distinct theological anthropologies should inform discussion about the conditions required for realizing the goods of human rights.

A pluralist approach to human rights will produce significant points of overlap between religious and secular traditions, but there are equally significant points of tension. As Boeve writes, the fundamental divide in the modern world is “not that between different religious cultures, but that between the radical emancipation of man from God, from the roots of life, on the one hand, and the great religious cultures on the other.”<sup>68</sup> Pluralizing human rights draws this tension into the center of human rights discourse and invites the possibility of radical differences in meaning. Commentators from diverse religious traditions have remarked on the tension between religious and secular approaches to human rights. Paolo Carozza claims, for instance, that “[t]hat which has become over centuries an integral part of Catholic social thought is not the same, in source or consequence, as that of Enlightenment liberalism.”<sup>69</sup> Along similar lines, Kristin Johnson observes that Christianity and liberalism advance “vastly different” accounts of the human persons which reflect “differences in the ontologies that underlie their respective political and social thought.”<sup>70</sup> Jewish legal scholar David Novak takes note of the “great difference between religious members of a democracy and its secularist members, especially in the way they affirm human rights and even in the way they determine what some of these rights are.”<sup>71</sup> Finally, Muslim scholar Mohammad Kamalin proposes that while human rights norms are “a kind of shared universal,” “the Islamic conceptions of right, freedom and human rights leads us to the conclusion that there are differences between the theistic view of right and freedom when compared to what they mean in a secular context.”<sup>72</sup> Moving beyond secular reason allows these

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67. Lovin, *supra* note 12, at 101.

68. *Id.* at 212-13.

69. PAOLO CAROZZA, THE CATHOLIC INTELLECTUAL TRADITION AND HUMAN RIGHTS, 2 St. Michael's College (Mar. 7, 2005).

70. JOHNSON, *supra* note 52, at 224. Charles Mathewes similarly observes that “certainly Christian engagements with various exemplary modern secular Western thinkers reveals both deep continuities in affirmations about the worth of the individual, and fundamental differences in understandings of the human project.” CHARLES MATHEWES, THEOLOGY OF PUBLIC LIFE 137 (Cambridge Univ. Press 2007).

71. DAVID NOVAK, IN DEFENSE OF RELIGIOUS LIBERTY 106 (ISI Books 2009).

72. MOHAMAAD HASHIM KAMALI, SHARI'AH LAW: AN INTRODUCTION 206 (Oneworld



differences to matter for human rights and invites a constructive process of exchange and critique within faiths, between faiths, and between religious and non-religious traditions of thought. There are limits to pluralism and the danger that difference becomes its own absolute. Yet, the problem now confronting the Court is not the chaos of difference but the violence of uniformity and the impoverishment that comes from the marginalization of particularistic commitments.<sup>73</sup>

Opening the idea of human rights to theological rationalities challenges the inheritance of the modern tradition by collapsing the distinctions between reason and faith, secular and sacred, public and private. Pluralizing human rights calls into question a vision of politics in which people find common ground without “recourse to their ‘deep’ metaphysical and religious convictions.”<sup>74</sup> It is this possibility that perhaps concerns the Court and other guardians of the secular tradition, for it seems to invite liberal politics to be subsumed to theological dictate. However, to associate religious pluralism in human rights with a creeping theocratic impulse is to misunderstand the endeavor. The pluralization of human rights does place religion in a contest with modernity but rather draws religion into a conversation about the moral structure of modernity.<sup>75</sup> Pluralism invites what Kathryn Tanner describes as a “culture of self-criticism,” which is a culture willing to identify the possibility of truth and goodness in outside sources.<sup>76</sup> Such pluralism, though, is not an invitation to epistemic anarchy, but rather an occasion to encounter the other from the perspective of “a humbly confessed particularism” that requires a simultaneous disposition of confidence and openness.<sup>77</sup> In short, no single tradition, religious or

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73. WILLIAMS, *supra* note 61, at 271. Williams writes that, if the reality of society is plural—as many political theorists have pointed out—this is a damagingly inadequate account of common life, in which certain kinds of affiliation are marginalized or privatized to the extent that what is produced is a ghettoized pattern of social life, in which certain kinds of affiliation are marginalized or privatized . . .

74. MATHEWES, *supra* note 70, at 112.

75. This encounter is not one way but rather creates an occasion for religion to stand under the critical judgment of a tradition outside itself. Charles Taylor has written, for instance, of the ways in which “the secularist affirmation . . . of universal and unconditional rights” led to a prolongation of the gospel. In other words, it took the modern idea of human rights, born of “the break with Christendom,” for Christianity to discover new understandings about the authentic meaning of the Gospel. See CHARLES TAYLOR & JAMES HEFT, *A CATHOLIC MODERNITY?* 25-26 (Oxford Univ. Press 1999).

76. KATHRYN TANNER, *THE POLITICS OF GOD: CHRISTIAN THEOLOGIES AND SOCIAL JUSTICE* 223 (Fortress Press 1992).

77. In discussing the idea of “humbly confessed particularism,” Mathewes writes:

[O]ur understanding of the epistemological implications of those beliefs should make us always eager to engage other positions in dialogue. We are confident of the tradition’s

secular, is to monopolize political discourse over the meaning of shared public goods. Rather, there exist “multiple publics, overlapping yet each marked by its own telos, doctrine, and practices.” These multiple publics, in turn, open space for the “critical interaction”<sup>78</sup> in which democracy might advance “through dissent, difference, and dialogue.”<sup>79</sup>

The European Court at times appears to move in the direction of recognizing a pluralistic approach to human rights. On one occasion, the Court writes, “The emergence of tensions is one of the unavoidable consequences of pluralism, that is to say the free discussion of all political ideas. Accordingly, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing political groups tolerate each other.”<sup>80</sup> The refining tension of difference that defines a pluralistic turn is treated here as something which might enhance democratic culture.<sup>81</sup> Indeed, this statement from *Ouranio Toxo* reverses the standard logic which treats pluralism as the creation of toleration and instead treats toleration as a practice learned through enacted pluralism. On another occasion, the Court writes that a principle characteristic of democracy is “resolving a country’s problems through dialogue, without recourse to violence, even when they are irksome.”<sup>82</sup> The Court again positions itself to advance an account of democratic pluralism in which shared values are not imposed but rather discovered amidst difference. However, even though the Court gestures in this direction, it cannot ultimately develop an account of human rights that is open to genuine religious pluralism. These promising possibilities collapse in the face of a strong religious presence and the Court’s response is not openness but the subversion of dialogue and the privatization of religious faith.

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basic story: humanity is in self-dividing revolt from God, and God has become incarnate in Christ, and continues to act in the world in the Holy Spirit, in order to restore us to our proper end.

That we know the story only in a mirror darkly “gives us a fundamentally Christian motive for engagement—*caritas*—a practice that synthesizes confession and dogmatism into a unitary yet triune action charged with faith, hope, and love.” MATHEWES, *supra* note 70, at 135-36.

78. JOHNSON, *supra* note 52, at 224.

79. Stephen Carter, *Liberal Hegemony, Religious Resistance*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 33 (Michael McConnell et. al eds., Yale Univ. Press 2001).

80. *Ouranio Toxo v. Greece*, App. No. 74989/01, 45 Eur. H.R. Rep. 277, § 35 (2005).

81. As one commentator writes in discussing the Court’s jurisprudence, “religious disagreement can be a sign that people are taking that pursuit seriously; but, more importantly, it can be a sign that individuals and religious communities are being accorded those political liberties necessary to foster the good of religion.” Christopher O. Tollefsen, *Is there Value in Religious Pluralism?*, PUBLIC DISCOURSE (June 12, 2009), available at <http://www.thepublicdiscourse.com/2009/06/270>.

82. *Bessarabia v. Mold.*, App. No. 45701/99, 35 Eur. H.R. Rep. 13, § 116 (2001).

The Court rightly recognizes that discussions of religious freedom must engage the challenge posed to “universalistic principles in the face of pluralism, the conflict of values, and the differing definitions of what is human and what is right held by the world religions.”<sup>83</sup> However, even as the Court identifies this challenge, it is unable to achieve the normative religious pluralism articulated in *Kokkinakis* as the proper response. And perhaps the Court cannot respond in this way because its jurisprudence is based on a secular universalistic rationality that places religious pluralism and human rights at odds. Religious pluralism is endorsed, but only so long as it does not impinge on the secular character of European public identity. The Court, in the end, is unwilling to cede its position as gatekeeper of public meaning.<sup>84</sup>

While this paper has focused on the religious freedom jurisprudence of the European Court of Human Rights, it also illuminates broader challenges confronting modern legal thought. The “modern paradigm” has aimed to “preserve the autonomy of law so that law has a secular foundation.”<sup>85</sup> Yet, the project of erecting a universal, secular, autonomous legal enterprise has failed, with the inability of human rights discourses to adequately account for religious pluralism being one consequence.<sup>86</sup> This paper has thus proposed pluralization, in particular by opening the idea of human rights to theological perspectives, as one way to overcome the limitations of the secular tradition.

Such pluralization, while posing a fundamental challenge to the precepts of the secular human rights inheritance, should nevertheless not be understood as auguring the dissolution of the secular. It aims rather to bring forth an alternative modernity, open to religious insights, which alone contain the resources for making explicable that which modern secular politics can no longer coherently account for.<sup>87</sup> Dominant traditions of thought about human rights have avoided confronting the question of “whether a human community can go on understanding itself . . . in the long run without some more or less explicitly theological underpinnings.”<sup>88</sup> Human rights have operated within a closed system

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83. Max Stackhouse, *Why Human Rights Needs God: A Christian Perspective*, in DOES HUMAN RIGHTS NEED GOD 31-32 (Mrs. Elizabeth M. Bucar & Mrs. Barbra Barnett eds., Eerdmans Pub. 2005).

84. JOHNSON, *supra* note 52, at 222-26. The Court, moreover, has not only worked within a secular paradigm but “been instrumental in shaping the meaning and normative content of secularism.” GÜLALP, *supra* note 32, at 24.

85. Mark C. Modak-Truran, *Beyond Theocracy and Secularism (Part I): Toward a New Paradigm for Law and Religion*, 27 MISS. C. L. REV. 201 (2007).

86. See, e.g., STEVEN D. SMITH, *LAW’S QUANDARY* (Harv. Univ. Press 2004).

87. See generally, OLIVER O’DONOVAN, *THE WAYS OF JUDGMENT* (Eerdmans Pub. 2005).

88. Remi Brague, *Are Non-Theocratic Regimes Possible?*, INTERCOLLEGIATE REV. 10-11

of meaning. Yet, this case study of the European Court of Human Rights has proposed that the closure of human rights to theology creates difficulties for advancing pluralism. Indeed pluralism, uniquely among the goods of human rights, raises questions and challenges that call for theological consideration. As Charles Mathewes recently argues, pluralism is better understood as the question of otherness, which is “from the beginning a problem demanding a thoroughly theological answer.”<sup>89</sup> It requires thinking about human political community from the perspective of relationality, which is to say love. We might therefore conclude that the problem with the secular tradition of human rights is not simply that it denies forms of religious expression but that it cuts off human rights from their deepest sources of meaning. Pluralism thus emerges in a new way as the central question for human rights, for it is through pluralization that there might emerge a reconstituted idea of human rights, indeed a reconstituted account of law, animated by the creative integration of constructive theology and legal theory.

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(2006). Javier Martinez similarly questions whether human rights can “found a real sociality or a true humanity.” MARTINEZ, *supra* note 62, at 6. Along similar lines, John Milbank argues that “the Church needs boldly to teach that the only justification for democracy is theological. Since ‘the people’ is potentially the *ecclesia*, and since nature always anticipates grace, truth ultimately lies dispersed among the people . . . because the Holy Spirit speaks through the voice of all.” MILBANK, *Liberalism Versus Liberalism*, in *THE FUTURE OF LOVE* 245 (Cascade 2009).

89. MATHEWES, *supra* note 70, at 108.