

Lamas, Oracles, Channels, and the Law: Reconsidering Religion and Social Theory

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A summer ago I returned to India for two months to look for new fieldsites and also to attend a series of ceremonies being conducted by the Dalai Lama in a previously closed section of the Greater Himalayas, the tiny Tibetan kingdom of Spiti. Nestled in a steep river valley up against the Chinese border, Spiti is known to Tibetologists from the earliest historical records as an ancient Tibetan Buddhist kingdom, located hundreds of miles to the west of the Tibetan capital, Lhasa. With the drawing of the territorial borders between China and India after the Chinese takeover of Tibet in 1960, Spiti was excluded from the Chinese controlled plateau by a mere five miles. It is now part of the Indian perimeter of defense against the Chinese, and there is a small military outpost in the valley. Until last summer, the valley was closed to all visitors.¹

Visiting the kingdom of Spiti was an exciting prospect. My research over the past fifteen years on Tibetan Buddhist legal systems drew me to Spiti as a possible site for on-the-ground examination of the legal procedures, fora, and rules I had encountered only as detailed historical reconstructions among the Tibetans. Here was the possibility of a living community that had been using the Tibetan Buddhist legal system up to the present day, largely unimpeded by the Indian government that had inherited it. At the same time, I was also reading widely on the topic of secularity in both law and religion, and I was anxious to return to a society considered nonsecular in order to try out some preliminary conjectures.

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1. For more information about this part of India, see S.C. BAJPAI, LAHUAL-SPITI: FORBIDDEN LAND IN THE HIMALAYAS (1987).

The group with which I was traveling with was an all-female crew comprised of myself, two Taiwanese Buddhist devotees, a San Diego obstetrician, a native South Asian, two students, and five Tibetan nuns, including our coordinator, Ani-la Karma Lekshe Tsomo, titular head of several nunneries in the Spiti area. We flew in from various parts of the world to meet in New Delhi in early June. Once past our initial passport and police problems, the group headed up to Spiti by bus and then jeep. The five-day trip was an exhausting, dangerous experience due to roads severely damaged by earthquakes and rains, and to the constant perils of passport seizure or inland permit denials at the many checkpoints along the way. Thanks to the savvy of the nuns, we made it, but many coming to attend the ceremony did not.

The ceremony, a two week religious initiation called the Kalachakra Tantra Yoga Initiation,² was conducted under diaphanous white tents spread out over an enormous field. The underlying purpose of the ceremony is to restore universal harmony and world-time, beginning with the arising of the universe and moving to the development of the skills necessary for time maintenance. The Tibetan text that the Dalai Lama recites instructs the practitioner on the correct path to enlightenment and builds verbally and visually the palace of the Kalachakra deity in mandalic form.³ Simultaneously, monks from the Dalai Lama's private monastery create an intricate sand-quartz mandala meant to represent the universe and the deity's palace in two dimensional space.

Why does this ceremony recreate time? Buddhist cosmology is ambivalent about the extent to which time requires motion and energy. Time in the Buddhist religious metaphysic has a different quality from Western notions of time. All cosmic realms in Tibetan Buddhism are arenas of absolute nonchange and constancy at the same time that they

2. *Kalachakra* is Sanskrit for "wheel of time." Said to have been written down by the mythical king Suchandra of Shambhala, the Kalachakra Tantra Yoga Initiation was introduced into Tibet in 1027 and is considered to be the basis of the Tibetan calendar. See THE SHAMBHALA DICTIONARY OF BUDDHISM AND ZEN 110 (Michael H. Kohn trans., 1991).

3. Perhaps the simplest modern explanation of the Kalachakra Tantra ritual and its aspects of time maintenance and re-creation is BARRY BRYANT, THE WHEEL OF TIME SAND MANDALA: VISUAL SCRIPTURE OF TIBET (1995). The classic and most respected study on the topic is GIUSEPPE TUCCI, THE THEORY AND PRACTICE OF THE MANDALA: WITH SPECIAL REFERENCE TO THE MODERN PSYCHOLOGY OF THE SUBCONSCIOUS (Alan Houghton trans., 1970). The best overall description by a renowned Tibetan teacher and his students is GESHE LHUNDUB SOPA ET AL., THE WHEEL OF TIME: THE KALACHAKRA IN CONTEXT (1985), but a close second is GESHE NGAWANG DHARGYEV, A COMMENTARY ON THE KALACHAKRA TANTRA (Gelong Jhampa Kelsang trans., 1985), supplemented by Dhargyev's excellent basic explanation of Buddhism in GESHE NGAWANG DHARGYEV, AN ANTHOLOGY OF WELL-SPOKEN ADVICE ON THE GRADED PATHS OF THE MIND (Alexander Berzin ed. & Sharpa Tulka trans., 1982). For more general descriptions of the use of the mandala in legal and political realms in this century, see REBECCA FRENCH, THE GOLDEN YOKE: THE LEGAL COSMOLOGY OF BUDDHIST TIBET (1995); and DAVID GELLNER, MONK, HOUSEHOLDER, AND TANTRIC PRIEST: NEWAR BUDDHISM AND ITS HIERARCHY OF RITUAL (1992).

encompass unceasing change. The one constant is that nothing in them remains or abides. Unless able to escape into the empty timelessness of Nirvana, all sentient beings remain on a cyclical wheel of rebirth. Time, then, unchanging in its endless changing, has the quality of static-state universal motion. The guardian of this universal process is the Kalachakra deity in his palace with his female consort. Thus the ceremony, by recreating his palace in detail, recreates unending changing time, the most basic process of the universe.

Near the end of the initiation, the Dalai Lama announced that he had decided to do a ceremony for the future of Tibet on Kunzom Pass, at 17,000 feet, where China, India, Spiti, and Lahul are all visible. This was a remarkable and auspicious opportunity for Tibetan Buddhists, and the excitement in the local community was palpable. At two a.m., in the early-morning moonlight of the day of the announced ceremony, I found myself running and jumping with several of the nuns across irrigation ditches and down small dirt paths on our way to the central road in the valley. We were scurrying to catch jeeps and buses that had been organized for the long, difficult journey up to the pass, the site of the ceremony. After many hours on the bus and a breathless two-mile ascent from a makeshift parking area, the scene on the top of the pass was arresting. The snow-peaked Greater Himalayas spread out in every direction in absolute silence. In the far distance, infinitesimal rivers headed to the north, east, and west. Pungent smoke from piles of burning juniper placed at each of the cardinal directions filled the thin air. Dancers from Spiti and Lahul in full dress lined up to perform their ritual dances while yak handlers stood with their bedecked animals, each hoping that His Holiness would ride his beast down the hill after the ceremony.

The Dalai Lama sat in a white Tibetan tent on the highest ground, near a snowbank, surrounded by a small assembly of chanting monks and nuns. When I arrived, he was listening to a female oracle who, reciting from a trancelike state of possession, was telling him the future of the Tibetan plateau and people. These activities went on for several hours. Then, at the moment the chanting stopped, the crowd gasped as three rings of ice crystals encircled the sun overhead. It was an auspicious place, an auspicious moment, an auspicious ceremony. There were rumors in the crowd that the Dalai Lama had been told that Tibet might, at long last, be freed. On his way down, the Dalai Lama recognized me, waved, and commented joyously on the good weather during the ceremony. Within minutes, it started to rain, and we all left in different directions for the long and dangerous return trip down from and out of the pass.

This Essay explores the evolution of two current social theories relevant to religion and law: the theory of secularization and the theory of detraditionalization. I frame the analytical discussions of these two theories with three narrative passages in italics—the first one, above, on the valley of Spiti—to contextualize and act as counterpoint to the major points of the argument. When reading the narrative passages, the reader should question the framing of the analytical presumptions in the theories; and when reading the analytical sections, the reader should question the framing of the narratives within these theories. My two central points are: first, that the current binary models derived from these theories, sacred/secular and traditional/detraditional, are, at the very least, inadequate; and, second, that a major reconceptualization of these theories within American legal thought is necessary.

This Essay tacks back and forth between the three italicized narratives and the discussions of the two current theories. In Part I, I explore the first theory, secularization. Secularization theory posits that societies move from a sacred religious framework to a secular privatized state in which the role and influence of religion eventually decrease and disappear. As we will see, this theory has fallen into disrepute in the religious studies and social science communities, a circumstance that has not been apprehended by the legal community.

After a second italicized narrative, Part II explores the theory of detraditionalization. Detraditionalization theory is presented conceptually through a binary model of society, with traditional society on one side and detraditional on the other. It repeats the first two ideas of secularization theory—transition from the sacred to the secular, and privatization—but it deemphasizes the third, the decline of religion. Next, in Part III, *Secularity and Detradition in the Law*, and Part IV, *Sacredness and Tradition in the Law*, I explore briefly how the theories of secularization and detraditionalization are currently framed in the legal academy.

In the third italicized narrative, I return to look again at the narratives in light of, and in spite of, the current theories. I conclude in Part V, *Reconsidering Secularization and Detraditionalization*, that the templates we use as default positions in this area have led us astray, and I then suggest responses to several of the problems with the formulations of these concepts. First, I argue that the core ideas of secular modernism or secularization theory—change in sacred worldview, privatization and the decline of religion—need to be disentangled within legal jurisprudence itself. Second, the legal academy needs to engage seriously the issues that currently occupy the American religious imagination. Third, the formulation of these positions into detraditional versus traditional models is too simplistic.

Fourth, the use of these theories to posit a new and radically different social order or a lost traditional society is often itself a deliberate act to carve out an ideological agenda, demark intellectual territory, or advance one political policy over another.

My final point returns to the ceremony of the first narrative, the recognition and maintenance within Tibetan Buddhism of the constancy of unrelenting change through time. Rather than conceptualizing law and religion in terms of static models, I argue, perhaps we need to consider that this very Buddhist idea, a stable religious canon advocating the concept of unceasing change and impermanence, has been and is becoming very American. In short, we should consider the possibility that our most stable tradition has become constant change and impermanence.

I. THE THEORY OF SECULARIZATION

Since the early nineteenth century, social analyses of religion have been guided by the concept of secularization, a theory of monumental weight that has been advocated and refined by each major social thinker in turn.⁴ The theory's commonsense premise is that the secularization of societies like that of Spiti, with its sacred Buddhist worldview as described above, is an inevitable consequence of the arrival of modernism as precipitated by technological development.⁵

4. Perhaps the most encompassing definition of secularization is that of Ernest Gellner in his classic piece, *French Eighteenth-Century Materialism*, in *A CRITICAL HISTORY OF WESTERN PHILOSOPHY* (Daniel John O'Conner ed., 1986). According to Gellner, the secularizing qualities of the Enlightenment included:

[the] rejection of supernatural or "spiritual" explanations of phenomena; an insistence or preference for explanations of phenomena in terms of the structure and activity of matter; a positive expectation that everything in nature and man can be explained in natural intramundane terms; determinism and empiricism in epistemology; hedonism and/or egoism in psychology; belief in reason as the guide and arbiter of life; rejection of the authority of tradition; utilitarianism in ethics and utilitarianism and/or democracy in politics; pragmatism with regard to the theory of truth; relativism; and belief in the power of education and of government and in the possibility of deliberate improvement of human life.

Id. at 278.

5. The presumed inevitability of secularization is an important part of the thesis. As late as 1966, an esteemed theology professor presented this commonsensical position when he stated that, "in certain modern cultures, if not all, religion so conceived is clearly on the defensive." BERNARD E. MELAND, *THE SECULARIZATION OF MODERN CULTURES* 161 (1966). Bryan R. Wilson states:

The concept of secularization is not employed in any ideological sense, neither to applaud its occurrence, nor to deplore it. It is taken simply as a fact that religion—seen as a way of thinking, as the performance of particular practices, and as the institutionalization and organization of these patterns of thought and action—has lost influence in both England and the United States in particular, as it has in other western societies.

BRYAN R. WILSON, *RELIGION IN SECULAR SOCIETY: A SOCIOLOGICAL COMMENT* at xi (1966). He concludes:

The whole significance of the secularization process is that society does not, in the modern world, derive its values from certain religious preconceptions which are then the basis for social organization and social action. . . . [Modern] religion does not begin to compare in

With secularization, the influence of religion will decline and religious rituals and beliefs will be privatized. Since the middle of the nineteenth century, social theorists from Alexis de Tocqueville to Karl Marx, from William James to Sigmund Freud, and from Emile Durkheim to Max Weber and Talcott Parsons, have espoused versions of this theory as either an evolutionary or a universal teleological process.

The benefits of secularity are the foundation of Sigmund Freud's castigation of religion as a universal obsessional neurosis based on repression and displacement of instinct.⁶ Emile Durkheim wrote on the unavoidable move from homogeneous, undifferentiated, mechanical societies to heterogeneous, specialized, organic societies.⁷ Max Weber predicted an evolutionary progression from religious society to a modern society that views science as its religion and then ultimately secularizes science itself.⁸ More recent formulations in the works of Bryan Wilson, Peter Berger, Thomas Luckmann, and Niklas Luhmann have refined but continued this theme.⁹ In short, secularization has been a central background premise for all social theory of the last century and a half.

There are three aspects of secularization theory that I would like to parse out.¹⁰ The first aspect is the transition from the sacred to the secular worldview through the processes of modernity: that is, differentiation of society, the scientific method, and the market economy. The central thesis here is that the displacement of religion from its position of authority to a position of equivalence or even

its influence with the total religious world view which prevailed in simple society and the subsumption of all activities and all institutions in the religious orientation to the world. The diversification of society destroyed the dominance of religion and redistributed its functions. The diminution of diversity . . . does not restore religion.

Id. at 227.

6. See SIGMUND FREUD, *THE FUTURE OF AN ILLUSION* (W.D. Robson-Scott trans., 1953) (1928); SIGMUND FREUD, *Obsessive Actions and Religious Practices*, in 9 *THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD* 117 (James Strachey trans., 1953) (1900).

7. See EMILE DURKHEIM, *THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE* (Joseph Ward Swain trans., London, G. Allen & Unwin 1915) (1912); see also EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (W.D. Halls trans., N.Y., Free Press 1984) (1893); EMILE DURKHEIM, *PROFESSIONAL ETHICS AND CIVIC MORALS* (Cornelia Brookfield trans., N.Y., Routledge 1992) (1950).

8. See MAX WEBER, *Science as a Vocation*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* (H.H. Gerth & C. Wright Mills eds., 1946).

9. See PETER L. BERGER, *THE SACRED CANOPY* (1967); THOMAS LUCKMANN, *THE INVISIBLE RELIGION: THE PROBLEM OF RELIGION IN MODERN SOCIETY* (Macmillan 1967) (1963); NIKLAS LUHMANN, *THE DIFFERENTIATION OF SOCIETY* (1987); WILSON, *supra* note 5.

10. These three "moments" of the theory of secularization are drawn in large part from JOSÉ CASANOVA, *PUBLIC RELIGIONS IN THE MODERN WORLD* (1994). It should be noted that several other authors have different formulations. David Martin, for example, employs at least "four main spheres of secularization." DAVID MARTIN, *THE RELIGIOUS AND THE SECULAR: STUDIES IN SECULARIZATION* 55 (1969).

diminution is inevitable with the rise of the secular state. In the medieval European system, the Catholic Church mediated between temporal activities, divided into sacred and secular, on the one hand, and the other-worldly activities of God, on the other. The Protestant Reformation and the Enlightenment gradually broke the institutional power of the Church. After secularization, the realms were no longer mediated by the Church, and religion was forced to find a reduced place within the secular temporal realm.

The second aspect of secularization, often called privatization, relies on the thesis that the influence and scope of religion moves gradually from an external to an internal private space. As the inner part of the person became the sphere for the free expression of religion, influenced by the writings of Martin Luther, the locus of religious authority shifted from predominant institutions to individual inquiry. An example of the privatization thesis is presented in *The Invisible Religion*,¹¹ wherein Thomas Luckmann argues that religion and religious institutions become marginal with the onset of modernity because the modern search for meaning becomes personal and connected to a new religious consciousness. This is the "invisible religion" of modern society, the individual search for private religious meaning and self-realization. The individual actor segments each kind of daily activity into a series of unrelated, unconnected part-time roles of which religion is only one.¹² This aspect of secularization theory stresses the growth of individual agency and actualization, the construction of the self as the center of society.

The third aspect of the secularization thesis, the decline of religious influence, practice, and belief, follows from the other two. In the modern world, religion gradually decreases and eventually disappears, becoming only a habit of the very old. The decline is a natural consequence of the loss of place, the rise of a consumer culture, the contraction of time, and the role of science in addressing and answering important human questions.¹³

11. LUCKMANN, *supra* note 9.

12. Luckmann's thesis is that modern industrial society has developed its own sacred cosmos comprised of the major themes of "individual 'autonomy,' self-expression, self-realization, the mobility ethos, sexuality and familism," and the "subordinate themes" of "getting along with others, adjustment, a fair shake for all, togetherness," and so forth. The structures of the modern sacred cosmos "represent the emergence of a new social form of religion which, in turn, is determined by a radical transformation in the relation of the individual to the social order." LUCKMANN, *supra* note 9, at 113-14.

13. The best study of decline in religion is Theodore Caplow and his colleagues' 1983 restudy of Muncie, Indiana, comparing it to the original study by the Lynds in 1924. They assessed eleven major indicators of decline over that sixty-year period as follows: "(1) a decline in the number of churches per capita of the population; (2) a decline in the proportion of the population attending church services; (3) a decline in the proportion of rites of passage held under religious auspices . . . ; (4) a decline in religious endogamy; (5) a decline in the proportion

Beginning in the 1970s, however, several scholars, including Andrew Greeley¹⁴ and David Martin,¹⁵ looking at evidence from the United States, began to question the “death of God” and the “rise of the secular city.”¹⁶ Their interest was prompted by growing evidence that American society was becoming less, rather than more, secular. Church membership was increasing not declining.¹⁷ In 1976, a born-again Baptist, Jimmy Carter, was elected President¹⁸ and Operation Rescue and other religious organizations were responding publicly to abortion and creationism. Millions of Americans were tuning in to televangelical religious programs such as Jim and Tammy Bakker’s *Praise the Lord* cable network, as well as the programs of Jerry Falwell of the Moral Majority, Oral Roberts, Pat Robertson, Jimmy Swaggert, and others.¹⁹ Concurrently, in the wake of the 1973 oil crisis and the subsequent Shi’ite Islamic revolution that returned Ayatollah Khomeini to Teheran, the world became aware of Iran’s

of the labor force engaged in religious activity; (6) a decline in the proportion of income devoted to the support of religion; (7) a decline in the ratio of religious to non-religious literature; (8) a decline in the attention given to religion in the mass media; (9) a drift toward less emotional forms of participation in religious services; (10) a dwindling of new sects and of new movements in existing churches; and (11) an increase in attention paid to secular topics in sermons and liturgy.” Although religion had changed in “Middletown,” none of these indicators showed a decline in religion over the period. THEODORE CAPLOW ET AL., *ALL FAITHFUL PEOPLE: CHANGE AND CONTINUITY IN MIDDLETOWN’S RELIGION* 34 (1983).

14. See ANDREW M. GREELEY, *UNSECLAR MAN: THE PERSISTENCE OF RELIGION* (1972) [hereinafter GREELEY, *UNSECLAR MAN*]; see also ANDREW M. GREELEY, *RELIGIOUS CHANGE IN AMERICA* (1989).

15. David Martin calls his book a “demolition” of the theory of secularization. See DAVID MARTIN, *THE RELIGIOUS AND THE SECULAR: STUDIES IN SECULARIZATION* (1969); see also CAPLOW ET AL., *supra* note 13; DAVID MARTIN, *A GENERAL THEORY OF SECULARIZATION* (1978).

16. This is a reference to the conceptual framework of modern secular theology by Harvey Cox. Cox distinguishes between secularization that frees religion and society from oppressive custom and traditions, and secularism, which he thinks is a new dogmatic ideology with its own closed worldview, much like a new religion. See HARVEY COX, *THE SECULAR CITY* (1965).

17. There are now several different studies describing these statistics. See, e.g., *UNSECLAR AMERICA* app. (Richard John Neuhaus ed., 1986) (providing statistics). Greeley’s work for the Committee on Social Indicators of the Social Science Research Council analyzing and comparing long-term data is particularly interesting. He finds no indication that American religion is decreasing and states that “[t]he secularization model, which has never been confirmed by the data and has often been disproved—as in this book—nonetheless remains as strong as ever in scholarly and journalistic circles, unshaken and apparently unshakable.” GREELEY, *UNSECLAR MAN*, *supra* note 14, at 128. Martin E. Marty states that from 1920 to 1956, membership in several American churches increased 50%. See MARTIN E. MARTY, *RELIGIOUS EMPIRE* (1970), *quoted in* JAMES DAVISON HUNTER, *AMERICAN EVANGELICALISM: CONSERVATIVE RELIGION AND THE QUANDARY OF MODERNITY* 49 (1983).

18. See generally Leo P. Ribuffo, *God and Jimmy Carter*, in *TRANSFORMING FAITH: THE SACRED AND SECULAR IN MODERN AMERICAN HISTORY* (M.L. Bradbury & James B. Gilbert eds., 1989) [hereinafter *TRANSFORMING FAITH*].

19. See generally GILLES KEPEL, *THE REVENGE OF GOD: THE RESURGENCE OF ISLAM, CHRISTIANITY AND JUDAISM IN THE MODERN WORLD* 103-05 (Alan Braley trans., 1994).

militant re-Islamicization movement²⁰ as well as resacralization and fundamentalist movements in Israel, Pakistan, and India.

Beginning in the 1960s, a transformation also began to take place in American religious institutions, a change championed by some participants and observers as necessary. Exemplary of this embracing of new ideas were the reforms of Vatican II, from 1962 to 1965,²¹ including both the removal of some older saints who had never been officially canonized (most famously Saint Christopher) from the universal calendar, and liturgical revision (replacing liturgical Latin with the vernacular languages of the church communities).²² A resurgence of social conscience rooted in scripture appeared as Martin Luther King, Jr. used religion to promote a civil rights political agenda and as right-to-life advocacy emerged after *Roe v. Wade*.²³ Some churches, including constituencies within the Catholic and Pentecostal Christian Churches, took up social causes in Latin America and Asia. Women began to knock at the doors of theological institutions and seminaries, in which they were increasingly welcome. Theological educational institutions such as the Harvard Divinity School were radicalized by the liberation theology of Gustavo Gutierrez, a Peruvian priest who espoused the idea that Christian commitment includes solidarity with the poor and their struggle for salvation.²⁴ Postmodern theology, with its emphasis on religious uncertainty and radical deconstruction of religious texts, was another offshoot of these changes.²⁵

20. See generally YOUSSEF M. CHOUERI, *ISLAMIC FUNDAMENTALISM* (1990); HENRY MUNSON, JR., *ISLAM AND REVOLUTION IN THE MIDDLE EAST* (1988).

21. The Second Vatican Council, or Vatican II, "succeeded in producing the greatest changes in the Roman Catholic Church since the Council of Trent in the 16th century." OXFORD DICTIONARY OF WORLD RELIGIONS 1017-18 (1997).

22. See A NEW DICTIONARY OF SACRAMENTAL WORSHIP 162 (Peter E. Link ed., 1990).

23. 410 U.S. 113 (1973). Stephen Carter discusses this issue in STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* (1993).

24. See ROBERT MCAFEE BROWN & GUSTAVO GUTIERREZ: *AN INTRODUCTION TO LIBERATION THEOLOGY* (1990); see also GUSTAVO GUTIERREZ, *THE POWER OF THE POOR: SELECTED WRITINGS* (1983); GUSTAVO GUTIERREZ, *A THEOLOGY OF LIBERATION: HISTORY, POLITICS AND SALVATION* (1973); GUSTAVO GUTIERREZ, *THE TRUTH SHALL MAKE YOU FREE* (1990).

25. Mark Taylor, Carl Raschke, and Edith Wyschogrod are three innovative scholars in this movement applying postmodern methodology and thought to religious studies. Mark Taylor specifically attacks the dyadic foundation of the Western theological tradition and ruminates about the religious uncertainty of the present. In the same way that early theologians "insisted upon the inseparability of art and religion," Taylor is convinced that "certain developments in contemporary art and architecture provide untapped resources for religious reflections" in an a/theology of resistance. MARK TAYLOR, *DISFIGURING: ART, ARCHITECTURE AND RELIGION* 5 (1992); see also MARK TAYLOR, *ERRING: A POSTMODERN A/THEOLOGY* (1984). Carl Raschke has argued that the Biblical Scriptures can be reread to support the absolute equality of men and women in society. He also blurs the boundaries between the two models that figure largely in the second half of this paper, traditional and detraditional society. He states that the postmodern is not the detraditional but rather a "recovery of the richness of the 'natural' signifiers, if not a return to the naturalism or realism of the late classical era. . . . Postmodern

By the mid-eighties, the entire academic community was confronting a resurgence of interest in religion and religious societies in the wake of resacralization at home and abroad. Granting agencies were supporting awards to do research on homogeneous religious populations, such as my initial fieldwork on the Tibetan Buddhists. The American Academy of Sciences and other foundations began a large international investigation into fundamentalist religious groups²⁶ called the "Fundamentalism Project." Based at the University of Chicago, the coordinators of the study, Martin Marty and Scott Appleby, pulled together experts on resacralization movements from around the world.²⁷

What theorists were gradually discovering was that many of the core ideas of secular modernism theory had to be uprooted, reexamined, and perhaps discarded.²⁸ Some noted that modernizing

style enfolds within itself, tradition without bowing before the canon, form without formality, beauty without monumentality, coherence without symmetry." CARL A. RASCHKE, *FIRE AND ROSES: POSTMODERNITY AND THE THOUGHT OF THE BODY* 5 (1996); see also CARL A. RASCHKE & SUSAN RASCHKE, *THE ENGENDERING GOD: MALE AND FEMALE FACES OF GOD* (1995). Edith Wyschogrod writes on our conceptualizations of mass deaths, such as at Hiroshima and Auschwitz, and also on the life narratives of saintly figures and what they tell us about moral existence in postmodern times. See EDITH WYSCHOGROD, *SAINTS AND POSTMODERNISM: REVISIONING MORAL PHILOSOPHY* (1990); EDITH WYSCHOGROD, *SPIRIT IN ASHES: HEGEL, HEIDEGGER AND MAN-MADE MASS DEATH* (1985).

26. Modern religious fundamentalism can be defined as having the following characteristics: a comprehensive religious worldview as "an irreducible basis for communal and personal identity . . . revealed truth as whole, unified and undifferentiated," Martin E. Marty & R. Scott Appleby, *Conclusion: An Interim Report on a Hypothetical Family*, in *FUNDAMENTALISMS OBSERVED* 814, 817 (Martin E. Marty & R. Scott Appleby eds., 1991), literalism and extremism, the repudiation of "secular-scientific notions of progress and gradual historical evolution," *id.* at 819, the "dramatiz[ation] and even mythologiz[ing of] their enemies," *id.* at 820, protection of "the group from contamination" to maintain purity, *id.* at 821, "missionary zeal," *id.* at 822, and "charismatic and authoritarian male leaders," *id.* at 826.

27. See *id.*; MARTIN E. MARTY, *FUNDAMENTALISMS AND SOCIETY: RECLAIMING THE SCIENCES, FAMILY AND EDUCATION* (1993); MARTIN E. MARTY, *FUNDAMENTALISMS AND THE STATE: REMAKING POLITICS, ECONOMIES AND MILITANCE* (1993). There were several other large multiauthored projects produced at this time on the same subject. See, e.g., *FUNDAMENTALISM IN COMPARATIVE PERSPECTIVE* (Lawrence Kaplan ed., 1992); see also *THE POLITICS OF RELIGION AND SOCIAL CHANGE* (Jeffrey K. Hadden & Anson Shupe eds., 1988); *PROPHETIC RELIGIONS AND POLITICS* (Jeffrey K. Hadden & Anson Shupe eds., 1986) [hereinafter *PROPHETIC RELIGIONS*]; *SECULARIZATION AND FUNDAMENTALISM RECONSIDERED* (Jeffrey K. Hadden & Anson Shupe eds., 1989). For an excellent study of the relationship between American fundamentalism and issues of gender, see MARGARET LAMBERTS BENDROTH, *FUNDAMENTALISM AND GENDER: 1875 TO THE PRESENT* (1993).

28. David Martin began this endeavor by asking how secularization theory was used and what its roots were:

This essay has argued that two of the most widely accepted concepts of secularization current today (the growth of scientific thinking, the alienation of the proletariat) are rooted in a utopian metaphysics concerning an ultimate harmony. . . . These metaphysical systems transpose Judeo-Christianity . . . by transferring a monism of nature to a monism of society.

MARTIN, *supra* note 10, at 35. Karel Dobbelaere, while interested in maintaining secularization theory, has called for an investigation into methodology to "scale functional differentiation . . . [and] check our hypothesis empirically." Karel Dobbelaere, *The Secularization of Society? Some Methodological Suggestions*, in *SECULARIZATION AND FUNDAMENTALISM RECONSIDERED*, *supra* note 27, at 38.

nations, such as Turkey, that accepted technological developments and capitalism had not witnessed the secularization of their population nor even a decline in religion.²⁹ Others, considering the public versus the private sphere, wondered whether privatization of religion precipitated the transformation or loss of public religion.³⁰ Still others remarked that secularization, when it did occur, proceeded at different rates and in different permutations in each society.³¹ Many commented that resacralization rather than secularization was the major modern global phenomenon. In their final summary assessing all of the gathered information, Martin Marty and Scott Appleby of the Fundamentalism Project noted that most fundamentalism movements were modern creations with a strong religious cosmology, and often public rather than privatized religions.³² These were profoundly unsettling conclusions.

By the late eighties, the theory of secularization or secular modernity, a cornerstone of the social theory of religion, had fallen into disrepute in religious studies and in most social science communities.³³ The inexorable movement of a society like Spiti's from its devoutly religious cosmology and strong internal and external

29. Ernest Gellner, for example, postulated, in contradiction to the theory of secularization, that the advent of industrial and technological capitalism need not be accompanied by either democracy or secularity: "In the West, we have become habituated to a certain picture, according to which Puritan zeal had accompanied the early stages of the emergence of a modern economy, but in which its culmination was eventually marked by a very widespread religious lukewarmness and secularization. . . . But on the evidence available so far, the world of Islam demonstrates that it is possible to run a modern, or at any rate modernizing, economy reasonably permeated by the appropriate technological, educational, organization principles and combine it with a strong pervasive, powerfully internalized Muslim conviction and identification." ERNEST GELLNER, *POSTMODERNISM, REASON AND RELIGION* 22 (1992).

30. On the public/private distinction, see generally *THE PUBLIC/PRIVATE DISTINCTION* (Jeff Weinraub & Krisnan Kumar eds., 1996). On the ambiguities and problems with the public/private distinction in religion, see *PROPHETIC RELIGIONS*, *supra* note 27.

31. "What the sociology of religion needs to do is to substitute for the mythical account of a universal process of secularization, comparative sociological analyses of historical processes of secularization, if and when they take place." CASANOVA, *supra* note 10, at 17.

32. Marty and Appleby found that current fundamentalist religious movements are modern rather than traditional, first in the sense that they are shrewdly exploitative of modern processes, ideologies, instrumentalities, technologies, and organizational methods and structures. Second, fundamentalist movements vary widely in their approach to the sacred and in their "patterns of passive withdrawal from and active engagement with the outside world." Marty & Appleby, *supra* note 26, at 840. Some of these religious movements, in other words, are private while others are highly public. Third, fundamentalist movements provide their members with a "whole, unified and undifferentiated" revealed truth amounting to a totalizing integrated worldview. *Id.* at 818. This finding indicates that a sacred religious cosmology can be effectively invented or created in a modern setting. See *also id.* at 817-40.

33. For example, Jeffrey Hadden predicted in 1989 that secularization theory will be radically revised or relegated to the category of a marginally useful heuristic pedagogical device, not unlike the theory of 'demographic transition.' The secular is not going to disappear from modern cultures any more than the sacred. But if secularization is to be a useful construct for analyzing a historical process, it will have to be significantly refined.

SECULARIZATION AND FUNDAMENTALISM RECONSIDERED, *supra* note 27, at 23.

representations of religion to a fully secular society was no longer seen as inevitable. Indeed, an excellent recent work on this topic opens the first chapter with the sentence: "Who still believes in the *myth* of secularization?"³⁴ The author, José Casanova, goes on to state:

How can one explain this reversal? How could there have been so much myth before and so much light now? . . . The answer has to be that it is not reality itself that has changed, as much as our perception of it and that we must be witnessing a typical Kuhnian revolution in scientific paradigms. . . . [T]here can be no doubt that we are dealing with a radical change in intellectual climate and in the background worldviews which normally sustain much of our social-scientific consensus.³⁵

Last summer, in the height of a blazing Colorado June, I took five days off to attend an academic conference entitled "Spirituality in Education," put on by the Naropa Institute in Boulder, Colorado. The brochure that Naropa sent stated: "The Spirituality in Education Conference gathers eminent scholars and spiritual leaders to inquire into the nature, spirit and practice of contemporary education." The conference was conducted on a grassy lawn in a voluminous white tent that could seat up to two hundred, with a full view of the Rocky Mountains, a setting that reminded me immediately of the initiation in Spiti.

*The scholars and spiritual leaders invited to attend were an interesting lot. There were some academics: the famous world-religions scholar from Berkeley, Huston Smith; the Chair of the Environmental Studies Program at Oberlin and author of *Earth in Mind*, David Orr;³⁶ a professor emeritus of Temple University, Rabbi Zalman Schachter-Shalomi; a professor of theology and previous head of the Martin Luther King, Jr. Memorial, Vincent Harding; and the twelfth president of Wellesley College, Diana Chapman Walsh. Slated to attend as panelists were several other well-known persons, including a Buddhist scholar, a physicist, a famous Quaker author, a medical school professor, an anthropologist who has become a Buddhist teacher, the head of a Vermont holistic education resource center, and a former New York City school teacher who writes on education. This was, to say the least, an eclectic group.*

34. CASANOVA, *supra* note 10, at 11.

35. *Id.*

36. See DAVID ORR, *EARTH IN MIND: ON EDUCATION, ENVIRONMENT AND THE HUMAN PROSPECT* (1994).

I must admit that my attendance at the conference was a thinly disguised attempt to hear and speak with its most famous lecturer, the Dalai Lama of Tibet, who was scheduled to give a general address and to conduct a smaller discussion session. It was a chance for me to talk with him about one of my ongoing projects, translating the Tibetan law codes, without having to go to Dharamsala, in the mountains of India, where his government-in-exile sits. So I felt a bit uneasy at this conference, an interloper who was attending and picking up her security pass to the white tent every day with a single-mindedness that was antithetical to the whole process.

From the start, it was impossible not to notice the astonishing mélange of ideas, persons, and religious traditions at this conference. I sat for part of the proceedings with Ileana Porras on my left, an international law professor from the University of Utah whom I met just by chance, and on my right, a variety of other attendees.³⁷ Rob, a “channel,” was perhaps the most perplexing and interesting.³⁸ Dressed in what I would describe as well-pressed Lands’ End attire, he told me that he had graduated from the University of Chicago Law School and currently practiced bankruptcy law in Chicago with an important firm. In 1983, while sitting alone in his apartment, he was visited by spirits. He stated that his “first connection with them was familiar and pleasant, I never wanted to see things or go out of my body, so that didn’t happen, but they can touch me and I know when they are there.” For twelve years, Rob told no one except his close family members. His sister asked her psychiatrist about Rob’s spirit visits; he responded that Rob obviously was having psychotic episodes. Today, Rob is more accepting of “his gift” and holds seances in which the spirits talk through him. Rob’s parting comments to me were that people need to accept that there are different types of realities; they have to learn to communicate with the spiritual, rather than simply materialist, realm. As Rob said, “The answers to the mysteries of the universe are intensely simple, it’s just that we don’t look for them. It’s like not getting a joke a hundred times.”

To an outside observer, it was obvious that nothing “academic” would be accomplished at this conference in the sense that no jobs were being decided, no particularly new theories were being advanced, no

37. These included a local Boulder artist, teachers from Wyoming, the speaker on holistic education from Vermont, a Taoist who professed an interest in the poetry of bell hooks, a self-described “ecoterrorist” who had formed a special community in southern Kansas, a community college English teacher from Florida, and a trained legal mediator who described her religious affiliation as “pagan.”

38. Because Rob has not publicly announced his channeling and maintains a large and important law practice, I changed his name to hide his identity. The people who channel spirits call themselves “channels” rather than the more common “channelers.” See MICHAEL BROWN, *THE CHANNELING ZONE* (1997).

one worried much about impressing either themselves or others. As one of the participants put it, "I love being at a conference that is not bounded by credentials!" There were no loud outbursts, no rapid-fire talks, few instances of heated discussions or repartee, no hurried meetings in the hallways. Cappuccino carts and falafel wagons, t-shirt sellers and spiritual book dealers attracted attention between the lectures. The mood was relaxed, inquiring, empathic, cathartic. After breaking into small group sessions,³⁹ the full group coalesced again in the large tent for various "jump-start activities" followed by panel discussions. The jump-start activities consisted of meditation exercises, breath training, gospel-hymn singing, yoga instruction, Tibetan chanting, Jewish and Christian prayer sessions, body-mind stretching exercises, and sacred space ceremonies. Each night after the dinner break, there was a short poetry or dance performance followed by a lecture and comments from the conference faculty.

The theme of the conference was perhaps best expressed by the physicist Jeremy Hayward in his address, "Unlearning to See Sacredness." To paraphrase his talk, he stated that scientific materialism has become our religion, embodied in every part of our world, including our education system, making our world spiritless and soulless. John Gatto, a former New York City public school teacher, echoed this theme in a speech describing the contemporary education system, which he characterized as the commodification of small children and young adults. According to Gatto, buying things, producing things, getting things—from material purchases to law degrees to placements in jobs—has become the center of our lives and our education system. David Orr spoke about the need to find meaning in locality and place; he said we need to slow down the velocity of our production, we need to listen rather than to make new rules, new ideas, new houses.

Near the end of the conference, in a flurry of anticipation and excitement among the participants, the Dalai Lama arrived for his major address. He stepped up onto the platform, smiled, bowed with folded hands, and was seated along with his translator and two security guards. He closed his eyes for quite a long period to settle himself before speaking and then rearranged himself and his robes in the chair. From the hushed anticipation in the audience, it was clear that he represented the authentic religious person, the exotic and yet highly familiar, the canonically devout and yet ecumenically acceptable religious voice. He began simply:

39. We were asked to break out into a variety of smaller groups after each lecture. In my small session, the facilitator rang a bell and told us to sit silently for a few minutes meditating on our breath. Participants in the small sessions used terms like "sacred space," "opening experience," "feeling connected," "authenticity," and "my inner silence."

The important thing is to be happy, isn't it? Humans are always suffering. They say, I am stressed out, I am anxious. Many people come to me and say this. Also . . . hmmm . . . humans have anger, hate, jealousy, and their intelligence becomes destructive. So I feel that a warm heart is really priceless; we all have the potential to develop a caring, compassionate heart through our education. This is what will make us happy.

After an hour and a half of detailing Buddhist philosophy, the Dalai Lama closed with these thoughts:

Training your mind through meditation is the only answer. You as an individual must train your own mind in a constant effort to be calm and to show gentleness and compassion to others. . . . Having a calm mind and a good heart . . . hmmm . . . these are the most important things in education. Okay, I am done.⁴⁰

He beamed a large smile to the audience and bowed several times with clasped hands in all directions.

The audience was captivated by the Dalai Lama and his message; it was silent for several seconds, and then everyone jumped up and burst into thunderous applause. Most participants walked out of the tent in a hushed, mesmerized state.

II. THE THEORY OF DETRADITIONALIZATION

As the theory of secularization was turning from a foundational truth into a mythological beast, a new formulation with very old roots arose in religious studies and other academic fora: the theory of detraditionalization.⁴¹ This new positing of secularity operated in terms of a binary dualism—traditional versus posttraditional.⁴² The

40. Training the mind is the center of moral regulation and the goal of all education in Tibetan Buddhist communities. Mind training and inner morality are also the center of the legal system for Tibetan Buddhists because it is the afflicted mind that creates the conflict and unhappiness that brings about legal disputes. The purpose of resolving a legal dispute is ultimately to create calm minds in the parties. See FRENCH, *supra* note 3.

41. Detraditionalization has been described in various ways. Perhaps the most concise description is by Anthony Giddens, who asserts the radical disjunction between two worlds, the traditional and the post- or detraditional: "[T]he radical turn from tradition intrinsic to modernity's reflexivity makes a break . . . with preceding eras." ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* 175-76 (1991). The word "tradition" comes from the Latin, *tradere*, to hand over or deliver. In English it means "a description of a general process of handing down" with "a strong and often predominant sense of this entailing respect and duty." RAYMOND WILLIAMS, *KEYWORDS* 320 (1981).

42. As Barbara Adam notes:

The first thing to be noticed when we examine the concept of detraditionalization is its reliance on dualistic analyses and either-or frameworks of meaning; authority based on tradition *or* reflexivity, located without *or* within, in pre-given *or* (self-)constructed orders. Detraditionalization is constituted with reference to tradition . . . *fixed* with reference to a postulated past condition and narrowly defined in terms of what it is *not*.

Tibetan Buddhists of Spiti in the first narrative were no longer seen as inevitably progressing toward secularism. Now an image of them could be fixed and then juxtaposed in opposition to modern secular society, the world of the just-described Naropa conference: authentic traditional Tibetan Buddhism versus ersatz detraditional New Age religion.

In detraditionalization theory, modern society is a post- or detraditional world, a world that has gone beyond, that has lost sight of tradition. Paul Heelas, a British academic well known for his work in religion and cultural studies at Lancaster University, describes the loss of tradition:

All those politicians, public commentators and academics who announce the demise of tradition surely have good grounds for doing so. They can point to the loss of faith in once familiar landmarks, in long-standing values, more specifically in religion (less than 10 percent now go to church on Sunday), in the family (single people now make up a quarter of all British households), in the monarchy and in the political system (over 40 per cent of people under the age of 25 did not vote in 1992).⁴³

The current social theory of detraditionalization is presented conceptually through an opposition of two models of society, with traditional society on one side and detraditional society on the other.⁴⁴ This Durkheimian opposition of types of societies is both structural and temporal. On one side, there is the older traditional society, less complex, more integrated, localized, religious, and community-based. The natural order of things in the traditional society is pre-given and accepted, the cultural metanarrative is sacred, ancient, and authoritative. The community and the social worldview leave less movement for the individual. Time is cyclical and tied to diurnal and seasonal cycles such as the harvest; change is incremental

Barbara Adam, *Detraditionalization and the Certainty of Uncertain Futures*, in DETRADITIONALIZATION 134, 136 (Paul Heelas ed., 1996) [hereinafter Adam, *Detraditionalization*]; see also BARBARA ADAM, *TIME AND SOCIAL THEORY* (1990); BARBARA ADAM, *TIMEWATCH: THE ANALYSIS OF TIME* (1995) [hereinafter ADAM, *TIMEWATCH*].

43. Paul Heelas, *Introduction: Detraditionalization and Its Rivals*, in DETRADITIONALIZATION, *supra* note 42, at 1, 1.

44. That the "old and rather tired controversies about rationalization and secularization which have preoccupied sociologists and others for many years" have been replaced is confirmed by John Thompson:

In recent years this line of reflection [on tradition] has been renewed and imaginatively extended by Ulrich Beck and Anthony Giddens, among others. They have used terms such as "detraditionalization" and the emergence of "post-traditional society" to describe what they see as an inescapable aspect of the formation of modernity.

John B. Thompson, *Tradition and Self in a Mediated World*, in *id.* at 89, 89; see also JOHN B. THOMPSON, *IDEOLOGY AND MODERN CULTURE: CRITICAL THEORY IN THE ERA OF MASS COMMUNICATION* (1990); JOHN B. THOMPSON, *THE MEDIA AND MODERNITY: A SOCIAL THEORY OF THE MEDIA* (1995).

and slow. The example of Spiti, the agrarian Himalayan kingdom that has retained its ancient ways, fits nicely on this side of the dichotomy.

On the other side of this opposition looms the post- or detraditional new society, complex, highly diffuse, and globally based. The worldview is secular in detraditional society and the status quo is unstable, constantly pushed and reflexively questioned.⁴⁵ Technology, fast communication systems, and mass consumer culture capitalism have weakened “traditional bonds to cultural values, social positions, religion [and] marriage.”⁴⁶ The individual is the paramount focus of the society and its primary actor within institutional bureaucracies. Time, a fast staccato pulsing, is tied to the clock. At every turn, there are multiple formulations, myriad choices, hybridic amalgams and New Age pastiches. The Spirituality in Education Conference at Naropa may be placed on this side of the opposition.

This opposition of societies has protean forms and is used in social theory to contrast a wide variety of pasts with the present; for example, the *pre-* versus *post-*Enlightenment periods,⁴⁷ the feudal period versus the modern public sphere,⁴⁸ or the most common

45. One of the most insightful analysts of reflexivity in late modernity is Anthony Giddens. See GIDDENS, *supra* note 41; ANTHONY GIDDENS, *MODERNITY AND SELF-IDENTITY: SELF AND SOCIETY IN THE LATE MODERN AGE* (1991) [hereinafter GIDDENS, *MODERNITY*].

46. Heelas, *supra* note 43, at 5. Paul Heelas outlines the factors that have created the posttraditional world by undermining the “authoritative or ‘sacred’ properties of cultural metanarratives”: technology, the speeding up of communication, pluralistic cultures, “the fragmented, variegated range of beliefs and values,” loss of faith, confusion, and the undermining of “the exclusivistic claims and credibility of what was previously homogeneous and therefore unquestioned. In sum, ‘plausibility structures’ lose their credibility—even collapse.” *Id.* at 4.

47. There is a wide variety of pre-post-Enlightenment dualistic models in social theory from which to choose: for example, Jacques Le Goff’s discussion of how the medieval imagination differs from the modern, see JACQUES LE GOFF, *MEDIEVAL IMAGINATION* (Arthur Goldhammer trans., University of Chicago Press 1988) (1985); Stanley Tambiah on the dichotomy between pre-Enlightenment traditional religious and modern scientific worldviews, see STANLEY TAMBIAH, *MAGIC, SCIENCE AND RELIGION AND THE SCOPE OF RATIONALITY* (1990); Brian Tierney’s works citing and comparing the correct moral conscience of the medieval period, see BRIAN TIERNEY, *AUTHORITY AND POWER: STUDIES ON MEDIEVAL LAW AND GOVERNMENT* (1980); BRIAN TIERNEY, *THE CRISIS OF CHURCH AND STATE, 1050-1300* (1964); BRIAN TIERNEY, *RELIGION, LAW, AND THE GROWTH OF CONSTITUTIONAL THOUGHT, 1150-1650* (1982); and Talal Asad’s premise that the inner moral order and the personal discipline of medieval religion is absent in modern religion, see TALAL ASAD, *GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM* (1993).

48. Jürgen Habermas posits a difference between the feudal period of the Middle Ages, which had no real public sphere, and the public sphere emerging in the 18th century and then developing in the 19th and 20th centuries into a realm of mass consumption, communication, and publicity. See JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., 1996); JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* (Thomas Burger trans., 1989); JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* (Thomas McCarthy trans., 1987); see also HABERMAS AND THE UNFINISHED PROJECT OF MODERNITY: *CRITICAL ESSAYS ON THE PHILOSOPHICAL DISCOURSE OF MODERNITY* (Maurizio Passerin d’Entreves & Seyla Benhabib eds., 1997). For an interesting new take on the question of public spheres, see *THE PHANTOM PUBLIC SPHERE* (Bruce Robbins ed., 1993).

current versions of modern versus late-modern⁴⁹ or postmodern society.⁵⁰ The expanding fields of postmodern theory and cultural studies are based on this concept of a radical disjunction—classical notions of a closed, traditional society juxtaposed against a comprehensive global detraditionalized society, an open, choice-filled, contingent, urban, risk-filled, desituated world of personal preferences.⁵¹

The current theory of detraditionalization also repeats the first two ideas of secularization theory—sacred to secular worldview and privatization—but judiciously deemphasizes the third and most problematic of the three, the decline in religion. As to the first of these ideas, detradition means a loss of a “belief in pre-given or natural orders of things,” and, particularly, in tradition-bearing institutions.⁵² This loss of belief in a natural order has been accompanied by a turn to reflexivity, a constant questioning of traditional institutions.⁵³ Charles Taylor has explained it as a fundamental shift in point of view toward a critical stance and away from the traditional “doctrine of correspondences,” in which a person lives in a religious world of “publicly understood subjects of divine and secular history, events and personages that had heightened meaning, as it were, built into them.”⁵⁴

The second part of the theory of detraditionalization is described as the shift of authority from “without to within,”⁵⁵ mirroring the privatization aspect of secularization theory. Here, the individual has become the center of authority, and the individual voice has become the preeminent source of legitimization. At the same time, the individual is no longer able to act as a coherent moral subject.⁵⁶ The

49. Anthony Giddens prefers the term “late modernity” to the more common “postmodernity” because he thinks that current society is part of, and perhaps a reaction to, modernity. See GIDDENS, *supra* note 41; GIDDENS, MODERNITY, *supra* note 45.

50. See DAVID HARVEY, THE CONDITION OF POSTMODERNITY: AN INQUIRY INTO THE ORIGINS OF CULTURAL CHANGE (1989); FREDRIC JAMESON, POSTMODERNISM OR THE CULTURAL LOGIC OF LATE CAPITALISM (1991).

51. See, e.g., CULTURAL STUDIES (Lawrence Grossberg et al. eds., 1992); THE CULTURAL STUDIES READER (Simon Doring ed., 1993); FROM MODERNISM TO POSTMODERNISM: AN ANTHOLOGY (Lawrence Cahoon ed., 1996).

52. Heelas, *supra* note 43, at 2.

53. See *supra* note 42.

54. CHARLES TAYLOR, ETHICS OF AUTHENTICITY (1991) [hereinafter TAYLOR, ETHICS]; see also CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY (1989).

55. Heelas, *supra* note 43, at 2.

56. There is a tension in this aspect of detraditionalism. While the detraditional self is the center, it is understood by several scholars as an empty center without identity or authority, without any moral or communal sensibilities, see GELLNER, *supra* note 29; or as a sort of “homeless mind,” see PETER BERGER, THE HOMELESS MIND (1974); or only as a congeries of created consumer desires, see Douglas Kellner, *Popular Culture and the Construction of Postmodern Identities*, in MODERNITY AND IDENTITY 141 (Scott Lash & Jonathan Friedman eds., 1992).

Becks have described it this way: “[F]ar more than earlier, individuals must, in part, supply for themselves, import [modern guidelines] into their own biographies through their own actions . . . one has to *do* something, to make an active effort.”⁵⁷ Individual identities must be constructed into an “‘elective biography,’ a ‘reflexive biography,’ or a ‘do-it-yourself biography.’”⁵⁸ This theory, then, has a more postmodern flavor to it, and it often includes a normative evaluation, to the effect that tradition is good and detradition is bad, or vice versa.

The theory of detraditionalization and its correlate, tradition, traces a different scholarly lineage from that of secularity, stretching back to Edmund Burke’s analysis of the French Revolution.⁵⁹ More recently, Edward Shils has examined social understandings of tradition, noting the neglect of its study in the social sciences;⁶⁰ also, Eric Hobsbawm has focused on the invention of tradition, that is, the process through which modern phenomena come to be legitimated as “traditional.” His example is the ancient and immemorial pageantry of the British monarchy, which he demonstrates is not an ancient artifact but a product of the late nineteenth and early twentieth centuries.⁶¹ The socially constructed nature of traditions was taken a step further by Benedict Anderson in his work on nationalism. Anderson reasoned that a range of possible scripts had developed for the story of the rise of a nation, stories about essentially imagined communities.⁶² One of the most interesting current discussions on the concept of tradition is Barbara Adam’s work on the way in which tradition encodes our understandings of time.⁶³

Where and how do these ideas surface in law and legal theory? Both of these theories are reflected, albeit often indirectly, in legal writing. Secularization theory in its classical form, although dead in

57. Ulrich Beck & Elisabeth Beck-Gernsheim, *Individualization and “Precarious Freedoms”*: *Perspectives and Controversies of a Subject-oriented Sociology*, in DETRADITIONALIZATION, *supra* note 42, at 23, 25.

58. *Id.*; see also ULRICH BECK, *RISK SOCIETY: TOWARDS A NEW MODERNITY* (Mark Ritter trans., 1992); ULRICH BECK ET AL., *REFLEXIVE MODERNIZATION: POLITICS, TRADITION AND AESTHETICS IN THE MODERN SOCIAL ORDER* (1994). This theoretical move to the individual is related to the reflexive and interpretive turn in the social sciences over the past 25 years that has brought Weber’s concepts of feeling and meaning to the fore.

59. See EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* (Conor Cruise O’Brien ed., Harmondsworth, Eng., Penguin Books 1969) (1790).

60. See EDWARD SHILS, *TRADITION* (1981).

61. He takes “invented tradition” to mean “a set of practices, normally governed by overtly or tacitly accepted rules and of a ritual or symbolic nature, which seek to inculcate certain values and norms of behaviour by repetition, which automatically implies continuity with the past.” Eric Hobsbawm, *Introduction: Inventing Traditions*, in *THE INVENTION OF TRADITION* 1, 1 (Eric Hobsbawm & Terence Ranger eds., 1983).

62. See BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (1983).

63. See ADAM, *TIME AND SOCIAL THEORY*, *supra* note 42; ADAM, *TIMEWATCH*, *supra* note 42.

much of the academy, is still very much alive in legal theory. Detraditionalization theory, which posits that the world can be understood in terms of two opposing models, has recently become more important in the legal community. Legal scholars employ this framework, both to create a picture of the law-world using this dichotomy and to argue strenuously that one of the models is better or more appropriate or more legally sound than the other.

These normative evaluations of either of the opposing social models depend on context. Some legal academics celebrate the second half, the detraditional half of the model, finding the removal of restraints and rigidity and the emancipation from traditional rule-imposing institutions to be exhilarating. Part III, *Secularity and Detradition in the Law*, discusses secularization and explores some examples of a detraditional approach by the Supreme Court and current postmodern jurists.

Other legal academics posit the dichotomy to advance the traditional half of the model and concomitantly decry the detraditional as pure contingency, a noisome disorder that will only lead to further chaos. Legal and other scholars promoting this return to tradition are discussed in Part IV, *Sacredness and Tradition in the Law*. The communitarian nostalgic impulse, the growth in originalism, and the program of the New Religionists are briefly described. In each of these legal movements, the traditional model plays an important part, although in a variety of ways: as a coherent image of a former constitutional glory, as a rhetorical device to advance a political or religious position, as a way of imagining a possible other reality, or as an inquiry into the role of tradition in law itself.

III. SECULARITY AND DETRADITION IN LAW

Most legal theorists do not know that secularization theory is now considered, at best, a complicated myth. As a consequence, secularity remains the primary conceptual focus of most arguments on the First Amendment. As such, the standard legal academic model of religion is understandably not a strong description of a sacred religious cosmology, a set of beliefs or rituals. Rather, it is a description of a "secular public moral order"⁶⁴ that allows both for tolerance, neutrality, and equality between religions and also for protection for

64. This term is used by Kathleen Sullivan, who goes on to state: "Secular governance of public affairs is simply an entailment of the settlement of the Establishment Clause of the war of all sects against all." Kathleen Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 198-99 (1992). For a cogent statement of the need to retain liberal ideals in the face of the current New Religionist agenda, see Stephen Macedo, *Transformative Constitutionalism and the Case of Religion: Defending the Moderate Hegemony of Liberalism*, 26 POL. THEORY 56 (1998).

the secular sensibilities of the individuals in the central space.⁶⁵ The liberal academic model also falls on the modern detraditional side of the detraditional/traditional opposition, supporting technology and a scientific worldview as a basic foundation for society.⁶⁶

The privatization aspect of detradition theory has been advanced by the Supreme Court since the mid-1960s. In the early military draft cases of *United States v. Seeger*⁶⁷ and *Welsh v. United States*,⁶⁸ the Court was asked to look at personal beliefs about religion with respect to conscientious-objector status. In *Welsh*, Justice Black stated that the Court is not bound by “traditional or parochial concepts of religion” and that a personal moral code is equivalent to theistic belief for the purposes of the statute if “these beliefs play the role of a religion and function as a religion” in the individual’s life.⁶⁹ These cases press for the post- or detraditional. They uncouple the statutory definition of “religion” from a historically legitimated set of ideas and institutional attachments centered around theistic, extra-worldly beliefs and practices, making religion a private choice. This language supports the shift of authority from “without to within” and echoes Luckmann’s “invisible religion” thesis: the idea that religion has become the individual’s search for private religious meaning.⁷⁰

65. Justice Brennan’s dissent in *Goldman v. Weinberger*, 475 U.S. 501, a case in which an Orthodox rabbi was denied the right to wear a yarmulke in the Air Force, notes the importance of the secular sensibilities of individuals to religious markers:

The Government notes that while a yarmulke might not seem obtrusive to a Jew, neither does a turban to a Sikh, a saffron robe to a Satchidananda Ashram-Integral Yogi, nor dreadlocks to a Rastafarian. . . .

Id. at 519 (Brennan, J., dissenting).

As a consequence, in pluralistic societies such as ours, institutions dominated by a majority are inevitably, if inadvertently, insensitive to the needs and values of minorities when these needs and values differ from those of the majority.

Id. at 523-24 (Brennan, J., dissenting).

66. Two examples of the Supreme Court’s support for a scientific worldview are *Epperson v. Arkansas*, 393 U.S. 97 (1968), on Arkansas’s anti-evolution statute, and *Edwards v. Aguillard*, 482 U.S. 578 (1987). At issue in *Edwards* was the constitutionality under the First Amendment of Louisiana’s Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act of 1982, LA. REV. STAT. ANN. § 17:286.1-.7 (West 1982). For the majority, Justice Brennan stated that the requirements of secularity and neutrality are fulfilled by a “comprehensive science curriculum” and not by a creation-science class. *Edwards*, 482 U.S. at 586.

67. *United States v. Seeger*, 380 U.S. 163 (1965).

68. *Welsh v. United States*, 398 U.S. 333 (1970).

69. *Id.* at 339. There are many other examples of the Court promoting privatization of religion, such as Chief Justice Burger’s statement in *Lemon v. Kurtzman* that “the Constitution decrees that religion must be a private matter, . . . a private choice.” *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971).

70. Colin Campbell has warned, however, that “the positive claims surrounding the detraditionalization thesis should be regarded as suspect on the grounds that it is a mistake to imagine that a decline in the power and influence of tradition automatically leads to a world in which individuals engage in more reflexive forms of conduct.” Colin Campbell, *Detraditionalization, Character and the Limits of Agency*, in *DETRADITIONALIZATION*, *supra* note 42, at 149.

Another example of a group celebrating the move to a post- or detraditional world is undoubtedly the postmodernists. The advent of postmodern jurisprudence in the 1960s is often described as a radical disjunction. From Law and Economics to Critical Legal Studies, from Feminist Jurisprudence to Critical Race Theory, each of these new movements takes as a central tenet the disestablishment of the traditional pregiven Langdellian “natural order of things” in law. But each presents a different reformulation, a different detraditionalization from the Langdellian model of law.

Postmodern jurisprudence within the legal academy exhibits aspects of detraditional thought. Gary Minda, in *Postmodern Legal Movements*, describes postmodern legal thought as having “recovered and exposed contradiction, paradox, and ambiguity within the fragmentary features of American jurisprudential theory.”⁷¹ This postmodern era in legal scholarship is a period of “instability” due to “proliferating new discourses and intellectual practices for the study of jurisprudence,” with “multiple discourses and methodologies that le[a]d to major paradigm shifts.”⁷² The key intellectual themes, according to Minda, are all detraditional: “antifoundationalism, antiessentialism, social construction and deconstruction.”⁷³

Perhaps the most interesting aspect of both secularization and detraditionalization theory as they appear in the legal academy is the general absence of religion. Minda’s 350-page book never mentions religion. Although a florescence of religious thought and spiritualism has blossomed in the United States in the last thirty years, none of the celebratory postmodern jurisprudential movements in law has included religion—New Age or fundamentalist, liberation theology or channeling—in any form.

IV. SACREDNESS AND TRADITION IN THE LAW

Championing the other half of the model, many recent books, both scholarly and popular, such as Alan Bloom’s *The Closing of the*

71. GARY MINDA, *POSTMODERN LEGAL THOUGHT* 190-91 (1995).

72. *Id.* at 191.

73. *Id.* Peter Schanck, in outlining the key features of detraditionalization in the law, gave four postmodern features he found noteworthy:

(1) The self is not and cannot be an autonomous, self-generating entity; it is purely a social, cultural, historical, and linguistic creation. (2) There are no foundational principles from which other assertions can be derived; hence, certainty as the result of either empirical verification or deductive reasoning is not possible. (3) There can be no such thing as knowledge of reality; what we think is knowledge is always belief and can apply only to the context within which it is asserted. (4) Because language is socially and culturally constituted, it is inherently incapable of representing or corresponding to reality; hence, all propositions and all interpretations, even texts, are themselves social constructions.

Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2508-09 (1992).

American Mind,⁷⁴ have taken as their central motif the shallowness of current society and the need for a return to more traditional values. Another theme is the return to “real religion” as opposed to a detraditionalized “kitsch” version of religion.⁷⁵ Richard Neuhaus’s journal, *First Things*, takes as its basic premise the need for a more serious religious perspective in political, social, and legal thought.⁷⁶

These themes present the contrasting plaintive view that detraditional society is disordered, contingent, valueless, destructive, and degenerate.⁷⁷ Supporters of tradition celebrate a pregiven natural order supported by tradition-bearing institutions, community, a sense of place, and the deemphasis of the individual.⁷⁸ There is often a constructed or imagined aspect to these works, a nostalgic and romantic cast to their depiction of the previous order. Communitarianism, in both its political and scholarly forms, is one such example of a restatement of tradition as a return to an idealized past, a healthier, more stable social order.⁷⁹ Hillary Rodham Clinton’s recent book, *It Takes a Village*, draws on similar communitarian themes of retraditionalization.⁸⁰

74. ALAN BLOOM, *THE CLOSING OF THE AMERICAN MIND: HOW HIGHER EDUCATION HAS FAILED DEMOCRACY AND IMPOVERISHED THE SOULS OF TODAY’S CHILDREN* (1987).

75. Robert Bellah has argued in a series of books that the moral order and communal focus of our society with its original basis in biblical religion has been shattered by modern capitalism, secular liberalism, and individualism. See ROBERT N. BELLAH, *THE BROKEN COVENANT* (1975); ROBERT N. BELLAH, *THE GOOD SOCIETY* (1992); ROBERT BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985). For a more popular version of the thesis that we have lost “real religion,” see David Klinghoffer, *Kitsch Religion*, in *DUMBING DOWN: ESSAYS ON THE STRIP MINING OF AMERICAN CULTURE* 250 (Katharine Washburn & John F. Thornton eds., 1996).

76. *First Things* is published by the Institute on Religion and Public Life in New York City. Richard John Neuhaus argued in the influential book *THE NAKED SQUARE: RELIGION AND DEMOCRACY IN AMERICA* (1984), that democracy is threatened by secularization, which saps the necessary integrating moral vision of society and leaves us without a shared moral discourse.

77. Paul Heelas has called this point of view the “doom-and-gloom thesis.” Paul Heelas, *On Things Not Being Worse, and the Ethic of Humanity*, in *DETRADITIONALIZATION*, *supra* note 42, at 200, 201. The pessimistic scholars he characterizes as worried about cultural metanarrative collapse include Peter Berger, Anthony Giddens, Fredric Jameson, Alasdair MacIntyre, Alan Bloom, Arnold Gehlen, John Kenneth Galbraith, and Christopher Lasch. See *id.*, at 201-02. In another sense, decrying the present and praising the past is itself a traditional move in American social theory. As Timothy W. Luke aptly puts it, “seeing the past (tradition) in ruins and the present (modernity) as its ruination is now ‘traditional’ for us.” Timothy W. Luke, *Identity, Meaning and Globalization: Detraditionalization in Postmodern Space-time Compression*, in *id.* at 109, 114.

78. The Supreme Court made its classic statement of the traditional way of life in the famous case *Wisconsin v. Yoder*, 406 U.S. 205 (1972). There Chief Justice Burger stated that the Amish exemplify our traditional “early national life” and have “sought to return to the early simple, Christian life, deemphasizing material success, rejecting the competitive spirit and seeking to insulate themselves from the modern world” and finding salvation in the life of “a church community separate and apart from the world and worldly influences.” *Id.* at 217.

79. See *RIGHTS AND THE COMMON GOOD: THE COMMUNITARIAN PERSPECTIVE* (Amitai Etzioni ed., 1995).

80. Although she presents bureaucratic government as a major constituent of her idealized “village,” Clinton also emphasizes that children are the product not only of heredity and family, but also of a wider village that includes neighborhood and church. See HILLARY RODHAM

In law, there are two rather distinct movements toward tradition. The first, originalism, bears little resemblance to the theory of detraditionalization as posited by social theorists. Instead, the key issues of originalism have been framed in terms of the accuracy of the textual interpretations of the Constitution and the concept of precedent. Justice Antonin Scalia and others have been a central force in advocating a detailed examination of the Constitution within its social and historical context.⁸¹ Scholarship on the constitutional era, interpretation of the Constitution, and considerations of its social context, as well as discussions of the role of tradition and precedent in the law, have all grown extensively in the past decade.⁸² These are exercises in the reconstruction of tradition, and analyses of this body of work and its import have also been extensive.⁸³

The other legal movement toward tradition, headed by a group variously called the New Religionists or the Critical Religion Theorists,⁸⁴ concentrates on the issues significant in

CLINTON, IT TAKES A VILLAGE: AND OTHER LESSONS CHILDREN TEACH US (1995).

81. For a small sampling of the material in this area, see Daniel Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989); Allen R. Kamp, *The Counter-Revolutionary Nature of Justice Scalia's "Traditionalism,"* 27 PAC. L.J. 99 (1995); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); Lawrence B. Solum, *Originalism as Transformative Politics*, 63 TUL. L. REV. 1599 (1989); and David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

82. See, e.g., JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996); Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177 (1993); Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990); David Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035 (1991).

83. One commentator concluded that Justice Scalia's allegiance to an originalist interpretation of the Constitution is not as important as his allegiance to his own brand of traditionalism "in order to reach results that he finds politically congenial." Jeffrey Rosen, *Originalist Sin: The Achievement of Antonin Scalia and Its Intellectual Incoherence*, NEW REPUBLIC, May 5, 1997, at 26, 28.

Rosen does not cite Grant Gilmore, whose somewhat cynical observations of this process in the 1974 Storrs Lectures prefigured Rosen's views. Gilmore spoke of the movement of law as an oscillation between periods in which law was conceived of as traditional, formal, and a unified whole; and periods in which it was viewed as detraditional, pluralistic, diverse, innovative, and bottom-up:

During periods of apparent social dissolution the traditionalists, the true believers, the defenders of the status quo, turn to the past with an interest quite as obsessive as that of the radicals, the reformers and the revolutionaries. What the true believers look for, and find, is proof that, once upon a time, things were as we should like them to be: the laws of economics worked; the streams of legal doctrine ran sweet and pure; order, tranquility and harmony governed our society. Their message is: turn back and all will be well.

GRANT GILMORE, THE AGES OF AMERICAN LAW 102 (1977).

84. Theodore Y. Blumoff uses the term "New Religionists" to describe this group. See Theodore Y. Blumoff, *The New Religionists' Newest Social Gospel: On the Rhetoric and Reality of Religions' "Marginalization" in Public Life*, 51 U. MIAMI L. REV. 1 (1996). Ruth Teitel calls this new movement "Critical Religion Theory" See Ruth Teitel, *A Critique of Religion as Politics in the Public Sphere*, 78 CORNELL L. REV. 747, 754 (1993). The same group is described as attempting a "new infusion of religion into American politics" in Christopher L. Eisgruber, *Madison's Wager: Religious Liberty in the Constitutional Order*, 89 NW. U. L. REV. 347, 350 (1995). This group is different, in my opinion, from "Christian Legal Studies" or those espousing the idea of a moral tradition of scholars such as H. Jefferson Powell. See Jim Chen, *The Moral*

detraditionalization theory, namely, the preordained-natural-order worldview and the overemphasis on the individual. This group—including prominent members such as Michael Perry, Michael McConnell, Sanford Levinson, Winnifred Sullivan, Steven D. Smith, Philip Johnson, Kent Greenawalt, Stephen Carter, and Mary Ann Glendon—espouses the return to a serious consideration of religious issues in legal discourse.

Surprisingly, many of the New Religionists have focused on the decline of religion in the public sphere as a central problem, but their argument has taken a turn different from that of secularization theory. They do not state that *religion* itself is declining. Rather, they criticize liberal secular theory for restricting and causing the decline of religious expression within legal discourse. Michael McConnell, a self-proclaimed New Religionist, has stated that he is forced to be bilingual, conversant in both legal language and religious language, because he is not allowed to bring his religious views into legal discussions.⁸⁵ Some New Religionists see the increasing secularity of the public sphere as an example of the general decline in morality,⁸⁶ while others see it as diminishing a general understanding of religion.⁸⁷ Kent Greenawalt has questioned secularity as a sufficient basis for making political arguments and decisions,⁸⁸ and Michael Perry has pointed out the problems with moves by the administrative state into the realm of religion.⁸⁹ The exclusion of moral discourse

Tradition of American Constitutionalism: A Theological Interpretation of H. Jefferson Powell, 11 CONST. COMMENTARY 599 (1995). Also, the Law and Theology movement, with members such as Milner Ball, can be understood as related but distinct. See MILNER S. BALL, *THE WORD AND THE LAW* (1993).

85. This is a paraphrase of his statement made during a Religion and Law panel including Kent Greenawalt, Michael McConnell, and Bruce Ackerman at the American Association of Law Schools Meeting, San Antonio, Texas, January 1995.

86. Judge Arlin Adams cites Harold Berman for the proposition that religion is necessary to the foundation of the state: "People will desert institutions that do not seem to them to correspond to some transcendent reality in which they believe—believe in with their whole beings, and not just believe about, with their minds." Arlin Adams, *Recent Decisions by the United States Supreme Court Concerning the Jurisprudence of Religious Freedom*, 62 U. CIN. L. REV. 1581, 1598 (1994) (quoting HAROLD BERMAN, *THE INTERACTION OF LAW AND RELIGION* 73 (1974)).

87. Stephen Carter's thesis is that religion is treated as a hobby by modern liberals. See Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977. Stephen Carter's now-famous book *The Culture of Disbelief*, *supra* note 23, describes the ways in which the American legal system trivializes religion as an unimportant part of the human personality.

88. See KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* (1995); Kent Greenawalt, *Religious Convictions and Lawmaking*, 84 MICH. L. REV. 352, 398 (1985); Kent Greenawalt, *Religious Convictions and Political Choice: Some Further Thoughts*, 39 DEPAUL L. REV. 1019 (1990). In *Love and Power*, Michael Perry argues for the connection between the religio-moral consensus and political values such as human rights. See MICHAEL PERRY, *LOVE AND POWER* (1991).

89. See Michael Perry, *Religion, Politics and the Constitution*, 7 J. CONTEMP. LEGAL ISSUES 407 (1996) (arguing that the government should not judge religious practices or tenets). Sanford

from the law⁹⁰ and the lack of a holistic viewpoint are other topics of New Religionist writing.⁹¹ The New Religionists have also taken a fresh look at the period of the Framers of the Constitution and described the complex role of religion and the importance of the sacred worldview in the founding of our country.⁹²

But the New Religionists, like the postmodernists, also do not present the views of members of "New Religions" such as Scientology or the New Age spirituality movement, represented by Rob the Channel. The religions many of them represent tend to be majoritarian religions. Also, the New Religionists are often detraditional, not traditional, in terms of their support for the scientific viewpoint, technology, and consumer culture. And their belief in the possibility of a sacred worldview in modern culture fits neither model. These contradictions reveal the structural and theoretical problems with the current legal framing of these issues.

A summer ago, high on Kunzom Pass in the Greater Himalayas, the Dalai Lama of Tibet, surrounded by chanting monks and nuns, listened to an oracle in trance. This image has been the template in this paper for the traditional religious closed society, the society with a natural order worldview, cyclical time, hierarchy, and ritual. When examined closely, however, the Dalai Lama's visit to Spiti itself was very nontraditional: It would have been unacceptable for the charismatic head of the Tibetan state to travel outside of the capital city or to do this particular ceremony in public even twenty years ago. There are several other radically detraditional aspects to the narrative, including the establishment of nunneries and the outsider status and female sex of their founder. The ceremony on the pass was highly unusual due to its dangerous location and the use of a new female oracle from the region of Amdo, as well as for the head of state speaking directly to

Levinson, in his review of Perry's book *Love and Power*, *supra* note 88, states that religious reasons and sensibilities should not be excluded from political argument. See Sanford Levinson, *Religious Language and the Public Square*, 105 HARV. L. REV. 2061, 2076-77 (1992).

90. See Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984); R. Randall Rainey, *Law and Religion: Is Reconciliation Still Possible?*, 27 LOY. L.A. L. REV. 147 (1993). Other groups, besides the New Religionists, have made important claims about moral discourse. For instance, the work of James Boyd White and Martha Nussbaum provide primary examples from the Law and Literature movement. Law and Theology movement members, such as Milner Ball, have been writing in this area for some time.

91. See, e.g., Mary Ann Glendon, *Law, Communities and the Religious Freedom Language of the Constitution*, 60 GEO. WASH. L. REV. 672 (1992). For one of the most detailed and interesting critiques of current legal and religious discourse and its shortcomings in perspective, see WINNIFRED FALLERS SULLIVAN, *PAYING THE WORDS EXTRA: RELIGIOUS DISCOURSE IN THE SUPREME COURT OF THE UNITED STATES* (1994).

92. For two excellent examples of work in this area, see STEPHEN D. SMITH, *THE CONSTITUTION AND THE PRIDE OF REASON* (1998); and STEPHEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* (1995).

foreigners in public (about the weather, no less). While apparently traditional, this two-week period in Spiti can be understood as radically detraditional.

Similarly, the conference at Naropa and Rob the Channel do not serve well as templates for posttraditional, fragmented, secular society. America has a long history of spiritualism and connection to the supernatural, beginning in 1848 with the rapping fingers of young Kate Fox.⁹³ During spiritualism's heyday in the late nineteenth century, spiritual mediums throughout the country connected with a wide variety of dead relatives as well as historical figures ranging from Oliver Cromwell to Catherine of Aragon.⁹⁴ Imbued with the ideas of reincarnation and communication with the dead, American spiritualists such as William Henry Channing argued that each person was inherently divine and "an immortal image of the Infinite One."⁹⁵ Spiritualists were also very optimistic about their common vision for all humanity and the eventual union of science and religion, attitudes that were not shared by the mainstream religions of that period.⁹⁶ They were allied with the Transcendentalists and other mystical groups that have since had a lasting influence on American literature and philosophy.⁹⁷ The call to a move away from materialism at the Naropa conference, to reconnect to the spiritual center, to see sacredness in everyday life, to move from the mind to the heart, are messages that have typified evangelical and other religious movements in the United States since its origin. Indeed, those were also the central messages of some of the

93. Kate Fox was one of three sisters living in a farm house with her family in New York in 1848. Constant rapping on the walls had disturbed previous owners of the house. Mr. Fox's youngest daughter challenged the rapping sounds to repeat exactly her number of raps. Once communication was established, a code was developed that allowed the rapping spirit to reveal that he was a man who had been murdered in the house. Kate Fox and her sister, who are credited with starting spiritualism in America, spent their lives acting as mediums and allowing dead human personalities to speak through their agency. See SLATER BROWN, *THE HEYDAY OF SPIRITUALISM* (1970); ARTHUR CONAN DOYLE, *THE HISTORY OF SPIRITUALISM* (1926).

94. See BROWN, *supra* note 38, at 50-54. Most mediums were women, who played an important part in the spiritualism movement. See ANN BRAUDE, *RADICAL SPIRITS: SPIRITUALISM AND WOMEN'S RIGHTS IN NINETEENTH-CENTURY AMERICA* (1989). For a comparison to the role of women in the New Religions, see ELIZABETH PUTTICK, *WOMEN IN NEW RELIGIONS: IN SEARCH OF COMMUNITY, SEXUALITY AND SPIRITUAL POWER* (1997).

95. William Channing, *The New Church*, 3 *SPIRITUAL TELEGRAPH* 42 (1854).

96. Michael Brown points out several important differences between the two periods of spiritualism, the late 19th century and the late 20th century: "[W]hile nineteenth-century spiritualism saw science as the potential savior of spirituality, the New Age now sees spirituality as the savior of science." BROWN, *supra* note 38, at 51. He also says: "Spiritualists hoped to reform Christianity which they felt was corrupted by money and dogmatism" whereas "[c]hannels, in contrast, express little interest in Christianity." *Id.* at 52.

97. For a more detailed discussion of all of these mystical religious movements, including Theosophy, Swedenborg's New Jerusalem Church, and the American Spiritualist churches, see AMERICAN ALTERNATIVE RELIGIONS (Timothy Miller ed., 1995). The most unusual compendium on the topic of current New Age Religions yet assembled is surely ANDREW RAWLINSON, *THE BOOK OF ENLIGHTENED MASTERS: WESTERN TEACHERS IN EASTERN TRADITIONS* (1997).

original European sectarian settlers fleeing intolerant institutionalized religions in their homelands.

V. RECONSIDERING SACRED/SECULAR AND TRADITION/DETRADITION

What these exegeses of the two narratives highlight is the immediacy of our categorization of religious circumstances into cookie-cutter models of tradition and detradition and the general inadequacy of those characterizations. These templates act as default positions along with our false presumption of the inevitability of secularization and its necessity for modern, technological capitalism. Depicting time in temporal snapshots, these categories are not only inadequate, but are also characteristically false representations of reality. The narratives further highlight several of the issues and problems with the current formulations of religion in law.

First, secularization is now, in the most strident assessment, a theory in an advanced stage of dissolution. From a more sanguine perspective, it is, at the very least, more complex than the solid presumptions of Emile Durkheim and Max Weber. Regardless, it is a slim foundation for the major position of American legal academics. Cognizant of the Kuhnian shift that has taken place, scholars in religious studies and other fields have been working for several years on more refined analyses of secularity that could be used by the legal academy.⁹⁸ In particular, the core ideas of secular modernism theory—a change in worldview, the decline of religion, and privatization—need to be disentangled within legal jurisprudence itself. The privatization aspect—the move from without to within—needs to be reexamined in light of the recent legal analyses of individual rights and identity politics.

Second, the legal academy is simply not talking about many of the issues that currently seize the American religious imagination. As the New Religionists have pointed out, the standard secularist legal academic position is not a model of religion that fits within the state.

98. For a long time, Charles Taylor has called for a new type of conversation: "What our situation seems to call for is a complex, many-leveled struggle, intellectual, spiritual and political, in which the debates in the public arena interlink . . ." TAYLOR, *ETHICS*, *supra* note 54, at 120. The work of José Casanova, showing the different trajectories of secularization in Spain, Poland, Brazil, and the United States, is excellent. See CASANOVA, *supra* note 10. James Beckford and Thomas Luckmann have tried to do a more subtle analysis of secularization and modernity. See JAMES A. BECKFORD & THOMAS LUCKMANN, *THE CHANGING FACE OF RELIGION* (1989). Another example is Andrew Greeley, who posits five possible models for religion in society: a secularization model, a cyclic model, an episodic event model, a stability model, and a religious growth model. He then tests each of these against statistical data. See GREELEY, *UNSECCULAR MAN*, *supra* note 14. Linell Cady, in trying to determine the role that religion and theology can and should play in the public sphere, distinguishes between public religion, civic religion, and public theology. See LINELL CADY, *RELIGION, THEOLOGY AND AMERICAN PUBLIC LIFE* (1993).

It is rather a description of “secular public moral order,” protected from religious influence, that tolerates religions as it shields the secular sensibilities of individuals.⁹⁹ Current legal jurisprudential movements such as Law and Economics, Critical Legal Studies, and Feminist Legal Jurisprudence do not address religion critically nor present the model of religion their adherents would find most appropriate. The Supreme Court and the originalist group of legal scholars have been spending their energies determining what was said and thought two hundred years ago as a way of positing a traditional model that aligns more closely with changes they would like to see effectuated today. None of these scholars has considered the vast resacralization movement or the widely influential New Age Religion Movements typified by Rob the Channel, and few—the New Religionists are an exception here—do more than demonize as illiberal pontifications of the fundamentalist right the legal positions of groups operating within strong religious cosmologies. Creating new legal theories on religion without knowledge of these groups and ideas will be difficult.

Third, the current formulations of these positions into traditional versus detraditional models is just too simplistic. To begin with, the empirical picture is always more complex. There is a great deal of secularity in the current traditional viewpoints and sacredness in the current posttraditional views.¹⁰⁰ Using detraditionalization theory, the Tibetans and the Dalai Lama become “traditional” even though they have experienced and coped with enormous changes and have adapted to new environments, ambiguous political situations, and the advent of the information age. Similarly, Rob the Channel becomes a fleeting image of our decontextualized, fragmented, narcissistic postmodern age instead of a part of a long-standing American affair with religious spiritualism. Points made about these models, such as the critical reflexivity and pluralism of the current movement, the constant questioning of canons and institutions, and the multiple available trajectories, are presumed rather than examined or historically contextualized. Is religion in modern America more or less reflective about tradition than in 1517 with the hammering of the Ninety-Five Theses on the door of Wittenberg Cathedral? Are there

99. See Rebecca French, *From Yoga to Yoder: Traditional, Modern, and Postmodern Models of Religion in U.S. Constitutional Law* (May 1998) (unpublished manuscript, on file with author).

100. Martin Marty has described it this way: “In history, at least in American history, a secular society has not replaced a sacral one, nor is a new sacral society now in turn displacing a secular one. Almost wherever one looks in the past, one finds the two tangled, interposed, mirroring each other.” Martin E. Marty, *The Sacred and Secular in American History*, in *TRANSFORMING FAITH*, *supra* note 18, at 1, 3. What we have instead is a “religio-secular, operative-passional, sacro-secular life and society.” *Id.* at 8.

more or fewer religious trajectories available than during the Peasant War period of social and political unrest following the Reformation?

Fourth, the positing of a new and radically different social order or the positing of a lost traditional society is often itself a deliberate act, as social constructionist theory and the initial work of Hobsbawm and others reveal.¹⁰¹ These models are often posited in an effort to demark intellectual territory, to carve out an ideological agenda, to deal with what is perceived as rapid change, or to advance one political party over another. Tradition and detradition, in short, are often imagined and rarely investigated. We hear very little in the postmodern literature, for example, about how similar the advent of the new communications technology is to the introduction of comparable technical innovation in other periods, such as the printing press in Europe in the sixteenth century, which many credit as essential to the success of the Protestant Reformation. Similarly, this fixing of social models into sacred-traditional/secular-detraditional ignores the adaptation and creation of new traditions that occur constantly, the ongoing renewal of tradition-maintaining and tradition-eliminating processes. This constant renewal is not a duality; it is a *process*.¹⁰² All societies operate with habits, routines, procedures, and rules; and these elements of the society, even as they change, form a substantial part of its ongoing traditions.¹⁰³ Many "traditional" aspects of societies—science in the United States, for example—are old and ingrained and yet have managed to appear new and exciting.

One final point: The Buddhist ideas of tradition-maintaining and tradition-eliminating, of reconceptualizing tradition itself as an ongoing process of change, are pertinent to our present inquiry. The ceremony that I attended in Spiti, an ancient ritual that is handed down from one generation to the next within a monastery changing and adapting to each new generation, was designed to recreate time. Time in the Buddhist religious metaphysic is not a linear progression from one place to another, but a recognition that there is a constant, unrelenting change. Death, incarnation, rebirth—each represents a continuing process of renewal in Buddhism that is unchanging in its

101. See *supra* notes 61 and 62.

102. Barbara Adam has noted: "The conventional way of understanding the time-consciousness of ancient mythical cultures as distinct from modern Western societies is to impose the imagery of cyclical and linear time respectively. . . . Nietzsche can be held responsible for having disseminated this simplification most effectively and pervasively." ADAM, *TIME AND SOCIAL THEORY*, *supra* note 42, at 133. But, she notes, tradition, if one is to use the term, is best understood as a process that is continually self-renewing. See Adam, *Detraditionalization*, *supra* note 42, at 146-47.

103. See MICHAEL YOUNG, *THE METRONOMIC SOCIETY: RHYTHMS AND HUMAN TIMETABLES* (1988).

ceaseless changing. Throughout the almost two-week ceremony in Spiti, monks inside a temple next to the Dalai Lama constructed a large, intricate, brightly-colored quartz-sand mandala depicting every aspect of the palace of the guardian of this universal process, the Kalachakra deity with his female consort. With the last clang of the gong and the end of the ritual, the same monks who had spent three weeks, ten hours a day, painstakingly creating the sand mandala, after the first brief stroke of the Dalai Lama, took up a brush and swept the entire edifice away. Pouring the chaotic mixture of colored sand slowly into a bronze vessel, they cleaned the area and wiped off the surface. With this final ritual, the constancy of change and the temporal impermanence of all earthly practices was reenacted.

My final point is that we should consider the possibility that our most stable tradition has become constant change and impermanence. This is a very Buddhist idea, a stable religious canon advocating the concept of unceasing change and impermanence; but it has also been, and is becoming, very American. I argue that this is exactly why we are discussing the nostalgic past—we have embraced a tradition of constant change in most areas of law and religion.¹⁰⁴ Both science and the common law process are anchored in such an apparent contradiction; both are stable practices that forge ceaselessly changing patterns of renewal. They have already eliminated the binary duality of traditional and detraditional by focusing on the process of constant creation. What is perhaps different here, of course, is that the American tradition of change has been oriented historically toward progress and improvement, while the Buddhist idea is not.¹⁰⁵ Nevertheless, whether or not we are progressing, I would argue that our tradition in both religion and law, much like the mandala built and destroyed during the Kalachakra ceremony, has become one of both impermanence and change, sacredness and secularity.

104. Long an astute social theorist, Zygmunt Bauman states: "The paradox of tradition is that once it has been spoken, the tradition is no more what its spokesmen claim it to be. Tradition is invoked for the authority of its silence Tradition vanishes in the self-same discourse which purports to make its presence tangible." Zygmunt Bauman, *Morality in the Age of Contingency*, in *DETRADITIONALIZATION*, *supra* note 42, at 49, 49; *see also* ZYGMUNT BAUMAN, *INTIMATIONS OF POSTMODERNITY* (1992); ZYGMUNT BAUMAN, *THE LEGISLATORS AND INTERPRETERS: ON MODERNITY, POST-MODERNITY, AND INTELLECTUALS* (1987).

105. The Buddhist idea of change does include the concept of enlightenment, which has been understood by some Buddhist schools as progressive change (rarely instantaneous) toward a goal. Without delving into the complexities of Buddhist philosophy, I think that my statement holds true in general for the Buddhist view of time.

