

Whose Crisis? Secular Liberalism, the Theocratic State and the Political Consequences of Privileging Religion for Multi-Religious States

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Abstract: Religion has returned to the secular state; does crisis result? Conflating "godless communism" of the 20th century with the Westphalia state that sought to avoid sectarian conflict by separating the institutional state from the apparatus of religion, modern critics have long problematized the role of religion in modern "secular" states. This paper considers the issue of the "return" of religion from a comparative constitutional perspective. Its central premise is that where institutional religion is both protected and engaged in political life through which it seeks to harmonize institutional state and religious government, it tends to advantage a privileged religion in political life over its political rivals. It looks to the ways that blasphemy and apostasy laws and the incorporation of religious values skew the nature and application of the rule of law, the nature and limits of direct democracy, the relationship between apostasy and treason, the language of interpretation and the power to participate in that dialogue, and the role of the foreign or minority. The effect is especially pronounced in states formally organized on global secular liberal principles of neutral and tolerant process and values neutrality. It suggests a context for the insight, at the center of secular liberalism's solicitude for religion, that where the apparatus of institutional religion seeks to enter into the political life of a state its religious beliefs ought not to be accorded any particular deference. It will suggest the nature of the shocks to the constitutional settlement of the U.S. constitution and its now misunderstood model of secularism, which touches on the It will conclude that for secular liberalism the price of preserving the privileging of the practices and autonomy of religion by the state is the disbarring of institutional religion (though not religious values) from organized political life. The alternative, privileging (institutional) religion and permitting it a broad institutional right to participate in politics, is very much in evidence abroad.

I. Introduction.

Once upon a time the relationship between religion and politics easy and well settled. While the religious establishment was formally distinct from the political apparatus of government, each organized according to its own logic, it was undisputed that every political unity was expected to have and could be legitimated only through an official religious establishment. But all that changed with the great wars of religion in Europe and accelerated with the establishment of the United States and Republican France in the late 18th century. "The result of this disestablishment is a deep and enduring deprivileging of Religion as a normative basis for decision making. Religion is relegated to object. As such, it is inconceivable to think of Religion as part of the grammar of law. "If an unspoken and irregular but nonetheless powerful prohibition excluding religion from public and especially legal discourse has been in effect for some time, then those of us who are interested in 'law and religion' need to pay attention to that phenomenon.""² Today, Western style democratic republics pride themselves on a normative structure for political organization grounded in the formal disestablishment of religion and protection of religious belief, practices, sensibilities and institutions within these democratic polities. In one form or another, this forms the basic template for national and international human rights, whether in national constitutions³ or in international instruments.⁴

Yet the disestablishment-privileging project of secular liberalism is breaking down. There has been tremendous efforts over the last half century to re-privilege religion and religious values as an integral part of democratic discourse, while privileging the institutions of religions and religious belief within the organization of the state and its political life. Conflating "godless communism" of the 20th century with the Westphalia state that sought to avoid sectarian conflict by separating the institutional state from the

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² Larry Catá Backer, *Religion as Object and the Grammar of Law*, 81 MARQUETTE LAW REVIEW 229, 229-30 (1998) (citing in part Steven D. Smith, *Legal Discourse and the De Facto Disestablishment*, 81 Marq. L. Rev. 203, 227 (1998)).

³ See, e.g., German Basic Law Arts 1-20.

⁴ See, e.g., Universal Declaration of Human Rights.

apparatus of religion, modern critics have long problematized the role of religion in modern "secular" states. In addition, even as the last half millennium has seen the progressive detachment of religion from politics, it has also seen the rise of democratic states (and non-democratic theocracies) in which the core political and substantive values are grounded in the religious beliefs and practices of religion—that is of a dominant religion, and a growing movement to permit active participation of institutional religion in politics. Simultaneously, in both democratic Western style states and theocratic democracies, an equally strong movement has emerged that means to extend the traditional protection of religion against attack, even when religious institutions directly participate in political debate. Grounded in the West on the horrors of religious persecution of Jews in Europe, it has now become an instrument to protect usually majority religions in the political activities in many states. In the West it has been used more and more to insulate religion from criticism even as it more aggressively participates in political life as religion.

And thus a version of the existential crisis of secular liberalism, its angst, and the emergence of transitions away from the model. On the one hand Western elites continue to cultivate a broad solicitude for religion—not merely as individual belief but as an organized force with institutional life. On the other, it is increasingly willing to admit (or unable to prevent) the participation of religion in political life—but protected by the privilege of religion against broad in the give and take of political contests. At the international level this is evidenced in the continuing efforts to develop a consensus among the community of states that would constitutionalize religious solicitude in the form of prohibitions against insulting or blaspheming religion and its sacred objects and habits. At the domestic level, it is evidenced by a greater willingness to permit the secular state to be organized within frameworks of religious values.

This paper considers the issue of the "return" of religion from a comparative constitutional perspective. Its central premise is that where institutional religion is both protected and engaged in political life through which it seeks to harmonize institutional state and religious government, it tends to advantage a privileged religion in political life over its political rivals. It looks to the ways that blasphemy and apostasy laws and the incorporation of religious values skew the nature and application of the rule of law, the nature and limits of direct democracy, the relationship between apostasy and treason, the language of interpretation and the power to participate in that dialogue, and the role of the foreign or minority. The effect is especially pronounced in states formally organized on global secular liberal principles of neutral and tolerant process and values neutrality. It suggests a context for the insight, at the center of secular liberalism's solicitude for religion, that where the apparatus of institutional religion seeks to enter into the political life of a state its religious beliefs ought not to be accorded any particular deference.

The interactions of blasphemy, democracy, hierarchy and religion, then, are the subjects of this essay. They serve as expressions of functional effects of privilege, especially in states formally constituted under global constitutionalist principles. At the center is the organized institutional expression of religion rather than individual expressions of religious belief autonomously applied to political participation and on the privilege accorded not to individual belief but to religious belief institutionalized within organized religious communities. Its object is to frame the existential dilemma of secular liberalism within the international normative house it has created by knitting together a series of related vignettes, each of which is meant to serve as a starting point for understanding the way that specific sorts of privilege tend to substantially change the political dynamics between religion and its rivals in a state's political spaces. These are meant to frame issues rather than suggest answers. Part II considers the effect on rule of law when religion is privileged through the protections of blasphemy laws. The context is Pakistan and the highly controversial efforts to condemn a Christian peasant woman for insulting Islam and its Prophet. Part III then considers the effects of privilege on democratic foundations of Pakistan. Again the context is the blasphemy law and the assassination of a government minister who sought to reduce their privileging effects in Pakistan. Part IV then considers the similar privileging on the relationship between direct political action, the state and foreigners. Now the context moves to the Sudan and its interrelations with foreigners. Part V then considers the way that religious privileging may change the framework within which inclusion and exclusion from a political community is understood by examining the effects of privileging on the relationship between apostasy and treason. The context is Afghanistan and the efforts to condemn a man for conversion to Christianity. This is particularly significant because the Afghani constitution is in part a

product of the Western intervention that replaced the Taliban regime with something else. Part VI moves to an examination of the effect of privilege on the ways in which constitutional and legal texts are interpreted and the constraints on those within the polity now legitimately able to engage in such interpretive projects. The context is Iran. Part VII brings the analysis back home to the West by considering the ways in which these privileging mechanics may be finding their way into the debates over the extent of religious privileging and the use of that privilege by religion when it engages in direct political activity. That, of course, is the context in which one can better understand the crisis of secular liberalism and the contests over the relationship between religion and the state—the discourse moves from the original one, the way in which the state could protect religion from itself and from other religions, to one in that considers the extent to which religion may keep its privilege and protection against attack even as it inserts itself, as religion, in the political contests central to the operation of Western democracy. Though the focus is on developments in Muslim majority states for the most part, it should be emphasized that this is not a situation unique to Islam. Indeed, other large well organized and dominant religious institutions, institutional Christianity⁵ and Buddhism,⁶ for example, have also begun to move in similar directions.

I end where I began, with the existential crisis of the West: “we are stuck on the horns of a dilemma of our own creation. We conceived of the separation of Church and State, of the treatment of formal Religion and its values as *res* at a time when religious consensus made these religious sentiments an unconscious and almost inextricable part of the legal dialogue. We have entered an age when this unconscious acceptance of underlying religious Christian norms is contested. . . . I suggest that this is a dangerous enterprise.”⁷ At the international level, it portends the dawn of a new normative framework to succeed that on which the American Republic was founded in the 18th century.

II. Rule of Law and Religion--Blasphemy Law in Pakistan⁸

Rule of law ideology masks the possibility of inversion inherent in the law-state and law-norm framework on which the “rule of law” reality has been built--*social will through law*. This inversion is better revealed when religion is thrown in the mix, that is where rule of law is understood through the prism of a constitutional system in which religion is privileged. If law is used in the service of the dignity of religion against others, then the “rule” of law is that of the religion whose dignity is the object of the domestic legal order. The form of a secular rule of law system, then, masks its functional objective to protect the privilege of a dominant religious group. Theocracy can, then, adapt the structural forms of rule of law systems in its own service.

It has long been supposed that law--understood as binding pronouncements from some apparatus of state legitimately vested with the power to make such pronouncements, and enforce them--is successfully implemented only with the collusion of the population that is the object of its command. Theories of non-violent revolution are grounded on this insight. The study of the management of the legitimacy of law, and its relationship to the management of the legitimacy of the state apparatus has long been popular among political and legal theorists. That, in part, might be a function of the popularity, in turn, of the instrumentalist view of law, and the insistence on a connection, sometimes an exclusive connection, between law and the state apparatus.

Yet the collusive element of law remains under-appreciated. Part of the difficulty may lie in the connection between popular collusion and customary norm structures. As laudable as the Enlightenment idea of progress may be--and it remains a potentially valuable insight for human organization and development--

⁵ Larry Catá Backer, *Law: Benedict XVI and the Constitution of Political States Law at the End of the Day*, June 30, 2007. Available <http://lbackerblog.blogspot.com/2007/06/law.html>.

⁶ Larry Catá Backer, *Theocratic Constitutionalism: Buddhist Constitutionalism in Sri Lanka, Law at the End of the Day*, June 1, 2008. Available <http://lbackerblog.blogspot.com/2008/06/theocratic-constitutionalism-buddhist.html>.

⁷ *Id.*, 254.

⁸ Originally, *Ruminations 35: Blaspheming Law, Law at the End of the Day*, December 4, 2010. Available <http://lbackerblog.blogspot.com/2010/12/ruminations-xxxv-blaspheming-law.html>

those who embrace progress tend to be embarrassed by their origins. Much like the well educated and conventionally successful children of working class parents in mid-twentieth century England, Enlightenment grounded law theorists view custom as primitive and unscientific. Customary systems of law are the sort of state organization that progress impels society to grow out of. Organic and reflective, customary law systems cannot serve the instrumental and managerial purposes necessary to the appropriate functioning of the scientifically structured law-state. It is not for nothing that even purported traditionalists like the American Supreme Court Justice Antonin Scalia could declare that Common Law has no place within the legal structures of the American Republic.

The collusive element of law is also problematic because it suggests that law cannot live up to its own conceptual framing. The idea of the law standing alone as a positive instrument of the state apparatus deployed for the management of the masses (under whatever political theory that management is understood) is deeply embedded in the political construction of law. Law is understood as self referencing, as sufficient of itself to suggest its own meaning and the obligations imposed by its command. Law expresses both authority and its operation. Law both constitutes the state and the legitimating form through which the state acts. Outside of law there is nothing but behaviors, habits, morals, and other systems that may be potential objects of management through law. Not law, these rule systems are not privileged--unless they are superior to law, in which case, law is ruled thereby and must reflect its premises and substantive framework.

Yet that simplistic view, as complex and nuanced as its various theoretical expositions have become over the course of the last two centuries) masks the possibility of inversion inherent in the law-state and law-norm framework on which the "rule of law" reality has been built. Even conceding that law can be understood in its positivist and instrumentalist form, it is also possible to understand that, perhaps more often than not the reverse is also true: rule of law might as usefully be understood as social will through law, providing the formal structure within which customary law can be embedded and practiced within and beneath the law-state. Law serves as a formal construction through which the customary framework of social organization can be furthered. Law is a veil that provides a sometimes thin cover over, and protection for, the implementation of social norms.

The secular liberal framework, grounded in protection of/from religion in pluri-religious states and founded on rule rule of law principles, stands on a fragile foundation were social will is not committed to neutrality and where one political stakeholder—a dominant institutionalized religious community—participates in political action on a par with non religious political parties. This is especially apparent when applied in a state with a single large religious majority the protection of the sensibilities of which are protected by law. "The law creates this legal infrastructure which is then used in various informal ways to intimidate, coerce, harass and persecute."⁹ A recent episode from Pakistan serves as a useful illustration of this point, one lost on the reporters and actors who have been playing important roles in the progress of events. The specific context is blasphemy, but the insight is broader.

Pakistan is a country that occupies a dynamic space somewhere between transnational theocratic constitutionalism and the formal structures of secular liberal transnational substantive constitutionalism.¹⁰ Pakistan appears to incorporate the best of both worlds; yet it has also embraced some of their excesses. It is a state whose political order is derived from a divine source, to be exercised within limits prescribed by God, as understood by Muslims, it is organized to observe "principles of democracy, freedom, equality, tolerance and social justice."¹¹ Pakistan is meant to constitute itself as a territorially defined political space within which "the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah" but also

⁹ Ali Dayan Hasan, senior South Asia researcher for Human Rights Watch, quoted in Karin Brulliard, "[Both Sides in Blasphemy Case Pressure Zardari](#)," *The Washington Post*, Nov. 26, 2010 at A6.

¹⁰ See, Larry Catá Backer, *Theocratic Constitutionalism: An Introduction to a New Legal Global Ordering*, 16(1) INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 85-172 (2009)..

¹¹ [Pakistan Constitution, Preamble](#).

where "adequate provision shall be made for the minorities freely to profess and practise their religions and develop their cultures."¹² These sentiments provide the foundation for the law structure of the Pakistani state apparatus. Islam is the state religion.¹³ Simultaneously, "the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan."¹⁴ The protection of rights to practice, profess and propagate religion are broad,¹⁵ "[s]ubject to law, public order and morality."¹⁶

The nature of that limitation is made clearer within the criminal law of Pakistan, a legislative edifice that is formally neutral yet also focused with particularity on the concerns of Sunni Islam. Pakistan's criminal code, with relevant portions enacted well before independence and the constitution of the modern Pakistani state, provides a law basis for the management of this law-state structure. Chapter 295 of the Penal Code of Pakistan, Chapter XV, criminalizes injuring or defiling places of worship or sacred objects of any religion with the intent of insulting religion. More interesting, the crime extends to those who are imputed to have knowledge that that any class of persons "is likely to consider" such destruction or defilement an insult.¹⁷ Section 295-A is grounded in the sensibilities of Islam; it criminalizes deliberate and malicious acts intended to outrage religious feeling by insulting religion or religious beliefs "either spoken or written, or by visible representations."¹⁸ Sections 295-B and 295-C makes what is implicit in Section 295-A explicit, the first criminalizes specifically any defilement of the Qur'an,¹⁹ and the second the defilement of Mohamad.²⁰ Section 296 extends these interdictions to religious assemblies²¹ and Section 297 further extends them to burial places.²² Lastly Section 298 extends criminal liability for a number of distinct speech acts: uttering words or making gestures that wound religious feelings,²³ engaging in any speech acts that defiles the name of the wife or family members of Mohamad, the so-called righteous Caliphs or

¹² Id.

¹³ [Pakistan Constitution, art. 2.](#)

¹⁴ Id., art. 4(1).

¹⁵ Pakistan Constitution Art. 20)

¹⁶ Id.

¹⁷ Pakistan Criminal Code, Chapter XV, Section 295 ("Whoever destroys, damages or defiles any place of worship, or any object held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction damage or defilement as an insult to their religion. shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.").

¹⁸ Id., Section 295-A ("Whoever, with deliberate and malicious intention of outraging the 'religious feelings of any class of the citizens of Pakistan, by words, either spoken or written, or by visible representations insults the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.").

¹⁹ Id., Section 295-B ("Whoever willfully defiles, damages or desecrates a copy of the Holy Qur'an or of an extract therefrom or uses it in any derogatory manner or for any unlawful purpose shall be punishable with imprisonment for life.").

²⁰ Id., Section 295-C ("Whoever by words, either spoken or written, or by visible representation or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine.").

²¹ Id., Section 296 ("Whoever voluntarily causes disturbance to any assembly lawfully engaged in the performance of religious worship, or religious ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.").

²² Id., Section 297 ("Whoever, with the intention of wounding the feelings of any person, or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby, commits any trespass in any place of worship or on any place of sculpture, or any place set apart for the performance of funeral rites or as a, depository for the remains of the dead, or offers any indignity to any human corpse or causes disturbance to any persons assembled for the performance of funeral ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.").

²³ Id., Section 298 ("Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year or with fine, or with both.").

Mohamad's companions;²⁴ misusing epithets titles of descriptions of certain holy personages;²⁵ and in the case of Qadianai or Ahmadi Muslims, engaging in any proselytizing activities of making any suggestion that these individuals are Muslim.²⁶

Whatever one thinks of the merit of provisions like these, it appears clear that the structure of these prohibitions provide a privileged context within which inter-religious conflict can be mediated—not constitutional, but only through the criminal law. It serves the traditional purposes of law as positive and instrumental. Beyond its proscriptions, the state would appear to have an obligation to protect all parties. But the reality of "law" in Pakistan appears to paint a different picture, one in which the law of the Penal Code is merely the first layer of a multilayer system of law for which the penal code provides the context and language but neither its substance nor its limit. The collusive element of the blasphemy law provides both its extraordinary popular support and shapes the "rule" by which the "law" is constructed and implemented.

And thus the story of Asia Bibi: a story in which rule of law formalism hides a customary norm framework that changes the structures of protection. As related by [Shabaz Bhatti](#), a member of the Roman Catholic faith community and Pakistan's Minister of Minorities Affairs, religion and the criminal law served as a means for ordering the organization and operation of a small rural community.

He said that according to his investigation, Bibi drew the ire of fellow farmhands after a dispute in June 2009, when they refused to drink water she collected and she refused their demands that she convert to Islam.

The women reported the incident to a cleric, who concluded that Bibi had committed blasphemy and then gathered a crowd that forced her to the police station, Bhatti said. He said that the police did not investigate and that a court, without hearing Bibi's full account, handed down a death sentence four months later. Bhatti said he has concluded that Bibi, a mother of five who has been in prison 17 months, never criticized Islam and is innocent. . . .

Bibi's husband and children are now in hiding, Bhatti said. "We are frightened," Bibi's husband, Ashiq Masih, a brickmaker, told reporters in Islamabad on Wednesday. "We are receiving threats, especially from clerics."²⁷

But even the mediation of law does not suggest the process of law in the case of blasphemy. Rather, the law-state framework provides the structure within which customary norms are given space to be applied. "People accused of blasphemy are frequently so threatened that they must leave their towns, and several convicted blasphemers have been killed in jail, said Ali Dayan Hasan, a researcher for Human Rights Watch."²⁸ And, indeed, the process of law moves rapidly from the sophisticated structures of 20th century law-state sensibilities to other forms. "Though police are supposed to investigate cases, lawyers say that in practice, accusers must do little more than gather an intimidating group to lodge an allegation

²⁴ Id., Section 298-A ("Whoever by words, either spoken or written, or by visible representation, or by any imputation, innuendo or insinuation, directly or indirectly, defiles the sacred name of any wife (Ummul Mumineen), or members of the family (Ahle-bait), of the Holy Prophet (peace be upon him), or any of the righteous Caliphs (Khulafa-e-Rashideen) or companions (Sahaaba) of the Holy Prophet (peace be upon him) shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.").

²⁵ Id., Section 298-B

²⁶ Id., Section 298-C ("Any person of the Qadiani group or the Lahori group (who call themselves 'Ahmadis' or by any other name), who directly or indirectly, poses himself as a Muslim, or calls, or refers to, his faith as Islam, or preaches or propagates his faith, or invites others to accept his faith, by words, either spoken or written, or by visible representations, or in any manner whatsoever outrages the religious feelings of Muslims shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.").

²⁷ Karin Brulliard, ["Both Sides in Blasphemy Case Pressure Zardari,"](#) *The Washington Post*, Nov. 26, 2010 at A6

²⁸ Id.

with police, who typically make an arrest to avert an uprising.²⁹ Moreover, procedural protections themselves become subject to the blasphemy laws. In the case of a 17 year old charged with blasphemy for statements made on a school exam, it was noted that the “police have said that they cannot report exactly what was written in the exam paper as doing so would also amount to blasphemy.”³⁰ Thus, process itself is subordinated to the normative sensibilities of the privileged religion.

That privilege moves inter-religious relations, and the resolution of their conflict, to expression in and through the language and structures of law. One gets a better sense of this from another version of the story reported in the Western press:

Asia Bibi was convicted of insulting Islam's prophet, Mohammed, while working in a field with several Muslim women in a village southwest of Lahore. She told them the Quran was "fake" and made comments about one of Mohammed's wives and about his health in his final days, the police complaint against her said. She said that "the Quran is fake and your prophet remained in bed for one month before his death because he had worms in his ears and mouth. He married Khadija just for money and after looting her kicked her out of the house," local police official Muhammad Ilyas told CNN.

The initial complaint against Bibi was filed on June 14, 2009, by a Muslim cleric, Ilyas said. Police say the Muslim women reported the incident to Qari Muhammad Salim, who later filed the police report. The cleric claims Bibi confessed to him and apologized.³¹

The story is interesting as much for what was not done as well as for what was. The story focuses on the issue of Bibi's criminal activity—centering against Islam by a non-believer. Completely ignored, of course, was the criminal offense of the Muslim women under Criminal Code Section 295A and Section 298. Blasphemy is as much an instrument of majority will—and the disciplining of minority behaviors in the face of the religious hegemon, as it is meant to be some sort of Western style means to setting grounds rules of keeping the peace among religious equals. As reported by the Telegraph, "The court heard she had been working as a farmhand in fields with other women, when she was asked to fetch drinking water. Some of the other women – all Muslims – refused to drink the water as it had been brought by a Christian and was therefore "unclean", according to Mrs Bibi's evidence, sparking a row."³² The insult of uncleanness has old roots among ethnic majorities within the *dar al Islam*. It was known, for example, in the Ottoman Empire, for local communities to demand that Jewish residents stay indoors when it rained for fear that their uncleanness would wash onto Muslims. The comments of the farm women were meant deliberately to insult the religious sensibilities of Ms. Bibi³³ --an easy prejudice expressed in the grossest way. These Muslim women also insulted " the religion or the religious beliefs" of Ms. Bibi.³⁴ Yet none of that mattered. It is the social norms of the community, not the legal norms of the law-state, that found expression through the apparatus of state.

Where, then, within this complex, can one find the law-state? It, like, like the formal structures of law, are firmly anchored within national political and juridical institutions. But political power is not entirely embedded within the state constitution, and indeed appears to function more as gateway to normative law structures which are then applied through the formal (but empty) structures of law. Pakistan appears as a

²⁹ *Id.*

³⁰ Pakistan: Drop Blasphemy Charge Against 17-Year Old: Students Case Underscores Urgent Need to Repeal Abusive Law, Human Rights Watch, Feb. 2, 2011. Available <http://www.hrw.org/news/2011/02/02/pakistan-drop-blasphemy-charges-against-17-year-old>.

³¹ Reza Sayah and Nasir Habib, [Christian woman sentenced to death for blasphemy in Pakistan](#), CNN, Nov. 11, 2010

³² Rob Crilly and Aoun Sahi, [Christian Woman Sentenced to Death in Pakistan for 'Blasphemy.'](#) The Telegraph (U.K.) Nov. 9, 2010.

³³ The comments were made, if proven, with deliberate intent to wound religious feelings, and knowing that they would wound. See Secs. 295; 298 Penal Code.

³⁴ A criminal offence under Section 295A.

bifurcated state. At the local level social norm systems take precedence, even if they are now forced to express their structures through the language of the law codes. This is the realm of custom, of the precedence of religion, religious law and institutions. It is the space where custom prevails, however expressed. At the national level law systems are well maintained--at least as a formal matter. Functionally the Pakistani law-state must exist in a constant state of compromise with the social norm state atop which it sits. It is for that reason that Ms. Bibi may be pardoned but never vindicated. And it is even more likely that her fate will be tied to her willingness to accept exile than that of her neighbors to accept her. But that is precisely the thrust of the social norms within which she fell. It is likewise for that reason that the Muslim women who insulted Ms. Bibi's religion will never feel the sting of the Pakistani Criminal Code.

Indeed, this is not a new development in Pakistan, nor one whose double purpose is unknown. The very minister who was then reviewing the Asia Bibi affair rose to power in part on the basis of opposition to the double use of the blasphemy law. "Shahbaz Bhatti founded the Christian-inspired APMA movement in 1985. One of his first battles was against the law on blasphemy, introduced in 1986 and used to repress religious minorities in the country, with particular focus on the Christian community, the one hardest hit by the new norm." [Shahbaz Bhatti, a Catholic, is the new minister for the defense of minorities](#), Asia News, April 11, 2008. But as the incarnation of a portion of the Pakistani law-state, Bhatti's fidelity is to the formal structures of the law-state. And that requires a mediation between the law-state and the social-norm state of Pakistan.

The Federal Minister stated that Quaid-i-Azam Muhammad Ali Jinnah had given a clear vision for a democratic, moderate and progressive Pakistan, where minority and majority would live in harmony, equality and peaceful co-existence under the one green and white national flag. "Minorities are sons of the soil, Pakistan belongs to them and they belong to Pakistan, they have made sacrifices and shed their blood for the creation and development of Pakistan," Shahbaz Bhatti further said that the white in the Pakistani flag represents the minorities and to protect the life and property of the minorities is the constitutional obligation of the Government and therefore we cannot remain silent spectators on the problems of religious minorities.³⁵ Yet, the logic of privileging may necessarily lead to a different result.

He may decry the application of norm-state values, especially to members of his own faith community, but he will serve as the instrument of its application in his role as representative of the state and thus indirectly of the substantive norms of the majority community expressed through Pakistan's formal law strictures, even as he seeks to use the ultimate power of the law-state to militate the effects of the application of the social-norm State of Pakistan through the power of the law-state of Pakistan. For even as the law-state seeks to manage its population through its own system, the norm-state will apply its own rules, rules consonant with the norm system to which even the State has agreed to submit. The bifurcated Pakistani state is much in evidence in the efforts in the state apparatus to control the norm state. "Minister for Minorities Mr Shahbaz Bhatti has strongly condemned the announcement of reward for the killing of Asia Bibi by a Cleric in Peshawar. The Minister said the announcement made is unethical, immoral, unjust, and irresponsible which should be condemned in the strongest possible manner, as no one had the right to issue the degree of killing against anyone, he further stated that this is not a jungle and we will not allow jungle rule."³⁶ Which of the states of Pakistan will prevail remains to be seen.

But the point is still quite powerfully made through the dual centered law regime of blasphemy on Pakistan--the ideology of rule-of-law-states belies the reality of its embedding within norm systems that exist within the state and in the form of religion and ethnic communities, across national borders. To understand Blasphemy within rule of law state systems, one must understand the way in which multiple systems of law-norms co-exist, sometimes unpleasantly within any territorially constituted political unit. Yet it is important to understand that this phenomenon is not merely a function of the operation of Islam through law-states in Asia, or the problem of mediating religion and ethnic disputes through the state system. Rather, blasphemy provides a window on a larger phenomenon: law is neither the beginning nor

³⁵ ([Federal Minister for Minorities condemns Announcement of Reward to Kill Asia Bibi](#), Online).

³⁶ Id.

the end of regulatory mechanisms within governance systems. Even within states, governance operates through multiple systems that assert authority in a variety of ways. The ability to identify and mediate between them, to harmonize their operation, to the extent possible, will mark the frontiers of "rule of law" in this century. Pakistan reminds us that law and justice, not autonomous from religion, can create a safe space for the hegemonic faith, but an altogether different reality for those faiths either tolerated or suppressed. Law, formally secular, effectively religious, tends to move the center of constitutional legitimacy and the substantive norms it protects from one centered on the individual, to one centered on the protection of the institution of religion and its adherents.³⁷ It is to that contradiction, one with substantial lessons for the religiously infused experimentation by overenthusiastic religionists in the United States, that this essay considers next.

III. Popular Democracy and Religion—Pakistan³⁸

Beyond the rule of law, the privileging and engagement of religion and the scope of that privilege also shapes the nature of direct democracy and democratic rights. Democracy has been much in the air lately. People living in developed states and their representative has been talking about direct democracy, usually well managed affairs through which segments of the masses may be mobilized by well organized groups, to initiate a process of law making that is heavily regulated and constrained by the states within which these efforts are directed, and subject to overall constitutional and normative constraints executed by the governments outside of the processes of which direct democracy is supposed to operate.³⁹ The people ought to speak authoritatively and government officials ought to listen. That, of course is the essence of direct accountability that supplements the indirect accountability of elections.

But direct democracy might also manage the form and operation of government itself. Others have been acting in the name of this concept to overthrow the governmental apparatus under which they have been ruled.⁴⁰ At the start of the second decade of the 21st century, global society is embracing with renewed energy the notion of [vox populi](#), of popular democracy, and of the power of the people, when appropriately massed and successfully engaged, to directly affect the form of governments under which they might consent to be ruled, and the values which that governmental apparatus must apply. Egypt and Tunisia show us the potentially transformative face of modern mass democratic movements at its triumphant moment, or perhaps on the verge of that triumphant moment. Everyone applauds, and American elites seek to engage the machinery of state to advance their own agendas abroad and perhaps bring the lessons of that engagement back home.⁴¹ The essence of secular liberal state system, after all, is democracy and popular engagement for accountability. Well, perhaps not everyone agrees.⁴²

³⁷ See, Larry Catá Backer, *Theocratic Constitutionalism: An Introduction to a New Legal Global Ordering*, 16(1) INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 85-172 (2009).

³⁸ Originally, Democracy Part XXII--Vox Populi in Pakistan and Substantive Values in Constitutionalism, Law at the End of the Day, January 31, 2011. Available <http://lbackerblog.blogspot.com/2011/01/democracy-part-xxii-vox-populi-in.html>

³⁹ Cf. Arthur Lupia and John G. Matsusaka, "[Direct Democracy: New Approaches to Old Questions](#)," Annual Review of Political Science 7: 463-482 (2004); Commission of the European Communities, [Green Paper on a European Citizens' Initiative](#), COM(2009) 622 final (Nov. 11, 2009).

⁴⁰ Elaine Ganley, [Dictatorship to democracy? Tunisia's risky venture](#), MSNBC, Jan. 29, 2011.

⁴¹ [Monique el-Faizy, Obama Disengaged Over Succession in Egypt](#), Bikyamasr, Oct. 26, 2010 ("With the issue of succession looming over the Egyptian political landscape and the Obama administration seemingly disengaged, a bipartisan group of American academics and former government officials has been diligently working behind the scenes to focus the attention of decision makers here in the U.S.").

⁴² See, [Color revolutions will not bring about real democracy](#), Global Times, Jan. 30, 2011 ("In general, democracy has a strong appeal because of the successful models in the West. But whether the system is applicable in other countries is in question, as more and more unsuccessful examples arise. In the West, democracy is not only a political system, but a way of life. Yet some emerging democracies in Asia and Africa are taking hit after hit from street-level clamor. Democracy is still far away for Tunisia and Egypt. The success of a democracy takes concrete foundations in economy, education and social issues. As a general concept, democracy has been accepted by most people. But when it comes to

Whatever the merits of transformational mass democratic mobilization, there is another face to mass democratic movements and the mobilization through which it exercises its sovereign authority. Pakistan, perhaps, shows us the face of popular democracy triumphant, the "day after." The recent popular execution of former Punjab governor Salman Taseer,⁴³ a high government official opposed to the severe application of the blasphemy laws in the Islamic Republic generally and against its specific application against a Christian peasant woman who was said to have offended the sensibilities of Islam⁴⁴ reminds us that popular democracy, and the will of the people, again raises fundamental issues of sovereign will and universal values with respect to which no consensus appears likely.⁴⁵

The repercussions have been severe and overtaken by the mass democratic mobilizations that have emerged around both the blasphemy law, and governmental suggestions that it might be softened for infractions against Islam (no one speaks of the effects of blaspheming or insulting Christianity, Baha'i, Hinduism, Buddhism, Judaism or the like), and popular action against government officials who support this change in the blasphemy laws (or defend the Christian peasant women condemned to death for insulting Islam). "The blasphemy laws have been in the spotlight since the murder last week of Salmaan Taseer, governor of Punjab province and a critic of the laws, who was shot by a member of his security detail. The shooter, Mumtaz Qadri, later said he killed Mr. Taseer because of the politician's opposition to the laws. Mr. Taseer was a member of the Pakistan People's Party, which runs the governing coalition, and was close to President Asif Ali Zardari."⁴⁶

The democratic aspects of this conversation about the blasphemy laws, the condemnation of the Christian peasant under its terms and the execution of a political figure opposed to the law that led to that condemnation is well in evidence in Pakistan, following a pattern of popular demonstration widely and positively regarded recently when effected against the governments of Egypt and Tunisia.⁴⁷ The democratic process has been invoked to ensure that while religion can participate in politics, it is insulated from attack, ostensibly on religious grounds.

Participation and privilege invert mass democracy *from object to method*. This was much in evidence in the use of the techniques of direct democracy to protect religion from the democratic engagement which is the tools of that effort. About 40,000 people rallied in Pakistan's eastern city of Lahore on Sunday in the latest protest against proposed reforms of a controversial blasphemy law, police said.

Religious groups have held protests in several Pakistani cities since former Punjab governor Salman Taseer vowed to amend the law, that was recently used to sentence a Christian woman to death. Taseer's stance enraged the country's increasingly conservative religious base and he was assassinated on January 4 by his own security guard, who has said he killed the governor over his support for reform.

Under intense pressure from religious parties, Pakistan's government has since said it had no intentions to amend the law.

political systems, the Western model is only one of a few options. It takes time and effort to apply democracy to different countries, and to do so without the turmoil of revolution." Id.).

⁴³ Pamela Constable, [Mumtaz Qadri pleads guilty to Pakistan slaying of Salman Taseer](#), Washington Post, Jan.10, 2011 ("Salman Taseer, the razor-tongued governor of Punjab province, was killed Tuesday in Islamabad. Thousands of Pakistanis braved high security to attend his funeral Wednesday); Salman Taseer murder: Mumtaz Qadri sentenced to death, BBC News Online, Oct. 1, 2011, available <http://www.bbc.co.uk/news/world-south-asia-15135502> ("The assassination divided Pakistan, with many hailing Qadri as a hero. Qadri was part of Mr Taseer's protection team but opened fire on the governor as he was about to get into his car in the capital, Islamabad, on 4 January.")

⁴⁴ Discussed supra Part II.

⁴⁵ Mohammed Hanif, [Pakistan viewpoint: Who is to blame for Taseer's death?](#), BBC News Online, Jan. 6, 2011 (describing foundational structures that produced the murder).

⁴⁶ From [Zahid Hussain](#), Islamists Rally for Pakistan's Blasphemy Laws, Wall Street Journal Asia, Jan. 10, 2011

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Demonstrators from religious parties Jamaat-e-Islami, Jamiat Ulema-e-Pakistan and Jamaat-ud-Dawa, a charity linked with 2008 Mumbai terrorist attacks, held banners in support of Mumtaz Qadri -- the police commando who shot dead Taseer.

Participants chanted slogans including "Free Mumtaz Qadri", "We are ready to sacrifice our lives for the honour of Prophet Mohammad" and "Changes in blasphemy law not accepted." An AFP reporter saw activists carrying effigies of Pope Benedict XVI and Pakistani minorities affairs minister Shahbaz Bhatti shouting slogans "Allah-o-Akbar."⁴⁸

The popular mobilizations of sovereign will suggest at least two issues. The first touches on the nature of constitutional democracy and the role of the popular sovereign. Westerners, and especially Americans, tend to view popular sovereignty in a peculiar way. It is that great spark that when roused extinguishes one set of government and imposes on itself another. Thereafter, and until it acts again, it is constrained by the government it has created, and acts only indirectly--in the election of individuals who represent the popular will. Sometimes both the popular sovereign and its representatives are constrained by substantive norms that are beyond their power to overcome. Slavery, for example, could not be re-instituted in the United States, the central value of human dignity could not be overcome in Germany, and socialist values could not be rejected in China, even in the face of popular desire to effect those changes, without destroying the constitutional order itself.

But an older constitutional tradition does not recognize constraints on popular will other than those self-imposed. In that case, either the people, through plebiscite or through their legislature, could effect any normative change as long as effected lawfully, that is through a process that legitimated the method used to make those changes. In that case, democratic mass mobilization on the streets, or reflected in pressure on representatives (acting as the proxy for the popular will) could impose whatever substantive regime reflects the current will of the masses. In that case, the popular will could impose anything from the political disability of inhabitants because of religion (France under the Vichy regime), and their segregation and extermination (Nationalist Socialist Germany) as long as the process was lawful and reflected the majority will.⁴⁹

Pakistan suggests this older face of democratic constitutionalism, one in which process merely directs the mechanics of the expression of mass democratic will without constraint. Describing the participation of an Islamic group, the Sunni Ittehad Council, in support of the assassin of Mr. Taseer:

Barelvis, who are dominant in Punjab, did not support the holy war against Soviet rule in Afghanistan. As terrorist attacks have surged in Pakistan, several prominent Barelvis have issued decrees condemning suicide bombing and other violence. Islamist insurgents have responded with major bombings at Sufi shrines and mosques.

Over the past two years, the sect has formed an alliance that, leaders say, intends to field candidates for political office to promote peaceful Islam and the authority of the state. The group, the Sunni Ittehad Council, is staunchly anti-American, but also fervently anti-Taliban, on grounds that killing innocents cannot be justified under Islam.

"This is a very basic concept. If you kill an innocent person, it means you are killing all humanity," said Mohammed Ziaul Haq, a council spokesman and author whose new book is titled "WikiLeaks: America's Horrendous Face." "Islam is a religion of peace and love, and it asks its followers to restrain themselves."

But killing in response to blasphemy is another matter, he said, making it "totally different from terrorism." The government had done nothing to silence Taseer's criticism of the blasphemy ban, he said, or his support for a Christian woman sentenced to death for the law, which he said had

⁴⁸ From [Thousands rally in Pakistan over blasphemy law](#), sifynews.com, Jan. 30, 2011

⁴⁹ Larry Catá Backer, *God(s) Over Constitutions: International and Religious Transnational Constitutionalism in the 21st Century*, 27 MISSISSIPPI COLLEGE LAW REVIEW 11-65 (2008).

made Taseer an "indirect" blasphemer himself. "Ninety percent of people in Pakistan think Mumtaz Qadri is a hero,"⁵⁰

There is an echo here of the sentiments supporting a greater role for direct popular democratic action in the United States as well, though of course from a vastly different substantive and structural perspective. Conventional wisdom now holds that Article V is the only way to amend the Constitution. Article V is how the government amends the Constitution, not how the people do it. If the people had to use Article V to amend the Constitution they would need permission from two-thirds of the Congress and three-fourths of the state legislatures. This would mean that the creator of our government, the people, would have to get permission from their elected representatives, the creates of the people, to amend the Constitution. This logic is ludicrous if power remains in the people. The constituent power of the people—the source of all political power—cannot be subject to the power of its creation. James Madison had it right when he said that the people could just do it.⁵¹ This approach suggests an older form of constitutionalism, one in which the popular will, manifested either through mass mobilization, the monarch, ruling elite or legislature, is unconstrained in the scope of power to impose political rules, as long as it is done through a legitimating process. Substantive values are supplied by the common traditions of the people or from some other source.

The second issue implicated in mass mobilization in a privileged context focuses on social will—preserving customary systems against even the limits and constraints of rule of law based substantive limits. It might be possible to suggest an alternative analytical approach. The second issue that the Pakistani mobilization suggests is not so much mass democratic instincts run riot, but the critical role of the masses in guarding the most fundamental normative structures of the constitutional systems under which it has consented to be governed. "Speakers at the Karachi rally sought to justify Mr. Taseer's assassination, saying the killer fulfilled his obligation as a Muslim."⁵² The people of Pakistan have declared the fundamental Muslim character of the state and its institutions.

That is not merely an incantation fetish but a shorthand for a set of substantive values and approaches to law, governance and relationships among people grounded in the normative rules of Islam.⁵³ Jayshree Bajoria notes: "Establishing Islam as the state ideology was a device aimed at defining a Pakistani identity) during the country's formative years, wrote Haqqani."⁵⁴ It is true that it may be the Islam understood as a true expression of that faith held by believers in Pakistan (and that may vary from views held by believers in other places inside or outside the dar al Islam), but that makes it no less the governing set of substantive values that constrain both state and democratic action. "And we are so frightened of crossing the line that would render us faithless that we are ready to sacrifice anyone and draw blood to feed our faith. What if we do not have the stomach to wield the knife ourselves? We can still goad the butchers on from the fences. For those of us who call ourselves liberal Muslims there is always the option of turning away and holding our noses."⁵⁵ If Islam defines the normative parameters of the state, and its social, cultural and political values, then it suggests that popular mobilizations in its defense are both legitimate and necessary for the state to remain true to and subject to its own normative constitutional constraints.⁵⁶

⁵⁰ Ziaul Haq said. "If it's a democracy, the government should think about that." Karin Brulliard, "[For Moderate Majority, A Hard Line](#)" The Washington Post, Jan. 30, 2011, at A-8).

⁵¹ From Mike Gravel, [The National Initiative for Democracy, A Populist Concept of Democracy](#); ("Let the People Decide")

⁵² (From [Zahid Hussain](#), Islamists Rally for Pakistan's Blasphemy Laws, Wall Street Journal Asia, Jan. 10, 2011).

⁵³ See, Larry Catá Backer, Theocratic Constitutionalism, supra.

⁵⁴ [Jayshree Bajoria](#), [Pakistan's Fragile Foundations](#), Council on Foreign Relations, March 12, 2009 (referencing Husain Haqqani, "[The Role of Islam in Pakistan's Future](#)", The Washington Quarterly 28(1): 85-96 (2004-05)) available <http://www.cfr.org/pakistan/pakistans-fragile-foundations/p18749#p7>.

⁵⁵ From Mohammed Hanif, [Pakistan viewpoint: Who is to blame for Taseer's death?](#), BBC News Online, Jan. 6, 2011

⁵⁶ To generalize the point, consider the essays in [Democratizing Democracy: Beyond the Liberal Democratic Canon \(Reinventing Social Emancipation\)](#) ([Boaventura de Sousa Santos](#), ed., Verso, 2008).

But it also suggests a wide variation between the shape of those values—at least in some respects, this one in particular—and the set of normative constitutional values emerging from the organs of international organizations and recognized, to some extent in international law. But that conflict does not suggest the arbitrariness of the actions so much as the somewhat large abyss separating the normative values of constitutional societies within and outside of Pakistan (or at least some of them). Looking at the popular mobilizations in this respect, one can see them as a force for the protection of the organizing values on which the state is founded against the efforts to undermine that normative framework by the importation of values and sensibilities that are alien to and may threaten the normative structure of Islamic Pakistan, at least as the masses mobilized understand that. And if popular democracy means anything, it is the importance of the expressions of mass will for defining the belief system of the popular sovereign of a territory. For westerners and those looking to expand the reach and normative primacy of systems grounded in international consensus of values, the result is disheartening. The internationalists' masters' tools are being used to dismantle the masters' house and rebuild it in another image. Alternatively, it suggests the necessity to theorize a limit to the legitimacy of popular and mass mobilizations. But any movement toward the management and constraining of popular democracy would undermine or redirect the political movement and trajectory of political development now well over two centuries old.

The greater (or at least more immediate) issue, though, is that a common language divides us.⁵⁷ Using the terms democracy, democratic values, vox populi, substantive values as a necessary means of managing the excesses of the masses and the like is no longer necessarily an indicator that the speakers either understand or hear each other. People will be using the same words and mean quite different things. The West's obsession with the use of the right words—like a catechism to be memorized and recited but not thought about too deeply (that task to be left to the mediating class of judges, lawyers, priests, imams and the like)—will provide it the satisfaction of appearances and the frustrations of the defeat of its ultimate purpose. As a consequence, Westerners are told to understand the manifestations of popular will in Pakistan as evidence of the weakness of Pakistan's democracy.⁵⁸ Ironically, the analysis suggested here might lead one to the opposite conclusion: it might be just as valid to suggest that the popular mobilizations are a sign of the strength of Pakistan's direct democracy—but that the values represented by that democratic movement may not be compatible with our own in the west. "The notion of a moderate but silent Pakistani majority has also been undermined by the stance taken by the nation's young black-suited lawyers, who three years ago led massive pro-democracy strikes but this month [showered rose petals on Mumtaz Qadri](#), the killer of [Punjab governor Salman Taseer](#). Civilian and military officials have responded with little more than tepid disapproval to the killing."⁵⁹ That raises political, moral, religious and other issues that may be more difficult to face. The existential crisis for secular liberalism is here exposed at its zenith state-- And the only way that these contradictions are tolerated is by a combination of wishful thinking and the embrace of a substantiveless formalism. But this embrace of formalism produces irremediable contradiction when Islam, on the one hand, is understood as the major political stakeholder in the state, the state is committed to democratic expression, and the state protects religious political players through the blasphemy and other religion-privileging law, which at the local level is used to reinforce religious hierarchy.⁶⁰

IV: Popular Democracy and Religion—Sudan⁶¹

⁵⁷ Larry Catá Backer, [From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems](#) (September 22, 2008). Penn State Law Review, Vol. 113, No. 3, 2009.

⁵⁸ See, Ali Dayan Hasan, Opinion: [An Assassination in Pakistan](#), The New York Times, Jan. 6, 2011 ("In this tense, hate-filled atmosphere, the political courage to stand up for Asia Bibi — and Pakistan's fragile democracy — is short supply. ").

⁵⁹ Karin Brulliard, ["For Moderate Majority, A Hard Line"](#) The Washington Post, Jan. 30, 2011, at A-8).

⁶⁰ Cf [Jayshree Bajoria, Pakistan's Fragile Foundations](#), supra ("The political use of Islam by the state "promotes an [aggressive competition](#) for official patronage between and within the many variations of Sunni and Shia Islam, with the clerical elites of major sects and subsects striving to build up their political parties, raise jihadi militias, [and] expand [madrassa] networks," said a 2005 International Crisis Group report.").

⁶¹ Originally Democracy Part IV: Managing Popular Expression and the Democratic Impulse in Sudan, Law at the End of the Day, November 25, 2007. Available <http://lbackerblog.blogspot.com/2007/11/democracy-part-iv.html>.

Mass democracy and popular expression present an even more complex stress points for secular liberal ideals when it is pointed toward the stranger or toward the minority resident who cannot form part of the religiously and politically privileged majority. Governance elites like to point to happy (unhappy and even indifferent) citizens voting as the essence of democratic organization.⁶² One of the other critical hallmarks of democratic governance is public expression—public assembly for the expression of the popular will. That expression is meant to pointedly pressure the apparatus of state to more closely align its actions to the will of the people. And this, we are instructed in the West, is good. Why, just recall those glorious days of the orange revolution in the Ukraine, where the courageous citizenry was able to mass and by massing cause an unresponsive government to bend its will to accord with that of the people.⁶³ But this sort of expression also has its martyrs. The West continues to lionize the throng that was dispersed by elements of the state apparatus in Tiananmen Square in 1989.⁶⁴ It reserves more space in the hallowed ground of martyrs of democratic expression to those citizens of Eastern Europe who had the courage to assemble in defiance of state conduct not in accordance with their collective wishes—for example in Hungary in 1956 or in what was then Czechoslovakia in 1968.⁶⁵

But that sort of public expression need not be asserted in broad, revolutionary, strokes. Protests against any action by any institution created to serve the masses in accordance with their terms ought to be fair game. And the members of these institutions each ought to be sensitive to the expressed will of those they serve. The public has been encouraged to assert their individual rights to expression collectively. And in this way collectively expressed, such expression may be targeted to influence their representatives, or the apparatus of state (whether or not representative). Individuals, thus, vote as a principal expression of their participation in democratic states in which their power is essentially passive. But individuals also may express their will collectively in a most primal manner—by taking to the streets. Of course, individuals may always join together to form political parties to other collectives—civil society. But it is in the raw expression of power that rule of law constitutional states must reconcile the order of their institutional arrangements for the assertion of political power with the expressed reality that such power is permanently lodged in individuals who collectively are the state.

This problem of democratic states is not unanticipated. The West has even produced documents on which such activity might be grounded. For Americans, the recipe for such assembly might be found in the lawyer's brief that is the American Declaration of Independence, whose revolutionary was then reworked to manageable levels in the guarantees of the Federal Constitution.⁶⁶ Westerners gauge the aftermath of large popular expressions of will in terms of their fidelity to the original values of the massed popular expression.⁶⁷

But most political elites understand that the value of such expression is best managed if it is not to have revolutionary or transformative effect.⁶⁸ They hope to manage the process of expression rather than permit

⁶² [Larry Catá Backer, Democracy Part II](#), LAW AT THE END OF THE DAY, Nov. 16, 2007. And not just citizens of Anglo-European style democratic constitutional states. See [Fidel Castro Ruz, Reflexiones del Comandante en Jefe, The Elections](#), Oct. 19, 2007 (“Having more than 90 per cent of all citizens voting in the elections and school children guarding the ballots is an unheard of experience; it’s hard to believe that this occurs in one of the “dark corners of this world”, a harassed and blockaded country named Cuba. That is how we exercise the vigorous muscles of our political awareness.”) (in the original Spanish as “[Las elecciones](#)”).

⁶³ Adrian Karatnycky, *On Independence Square*, 74(2) AMERICAN SCHOLAR 6 (2005).

⁶⁴ See, e.g., [Tiananmen Revisited, 1989-2001](#), CNN.com, (June 4, 2001).

⁶⁵ GRZEGORZ EKIERT, *THE STATE AGAINST SOCIETY: POLITICAL CRISES AND THEIR AFTERMATH IN EAST CENTRAL EUROPE* (Princeton, NJ: Princeton University Press, 1996).

⁶⁶ See [Larry Catá Backer, Some Thoughts On The American Declaration Of Independence And Its Irish/European Connections At Century's End](#), LAW AT THE END OF THE DAY, July 4, 2006.

⁶⁷ See, e.g., Adam Alexi Solomon, *Changing Colors: Ukraine's Orange Revolution*, 27(4) HARVARD INTERNATIONAL REVIEW 11 (2006).

⁶⁸ See Jo Durden-Smith, *No More People Power: Fuelled by E-Mails and Western Cash, Ukraine's Orange Revolution Was a New Kind of Upheaval. Other Ex-Soviet States Don't Want It Happening Again*. 134 NEW STATESMAN 28 (October 3, 2005).

a more free expression. Thus, most modern constitutions also now preserve a managed space for the staging of acts of popular will for the edification of their representatives. Thus, for example, South Africa defines political rights under its constitution precisely: to make political choices, to free and fair elections and to vote in elections and stand for office.⁶⁹ Assembly is managed within a rule of law normative framework: “Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.”⁷⁰

Still, since 1945 and the creation of the global informal governance system of the “community of nations,” the West and global political elites (not the least of which among their numbers the lawyers and judges) have sought to naturalize these tropes of manifestations of popular will as central to the construction of legitimate democratic constitutional orders (if only as a sort of managed expression within “rule of law” constraints). Within less democratic regimes, such expression might also serve less restrained as a manifestation of revolutionary will to move the nation to a system of ordered, well managed, democratic constitutional rule of law structures of governance. It is thus for those reasons, that the international community was so eager to stand behind the lawyers and judges who protested (at least) against the arbitrary actions of the President (and until November 2007 General) Musharraf of Pakistan (whose actions they appeared to tolerate better before their own respective oxen were gored).⁷¹ And regional human rights instruments also echo this popular notion. We are thus relieved to note that the exercise of this power of popular expression has been spreading rapidly to other parts of the world.

It was with these thoughts in mind that I read stories of a recent series of events that have been occurring in the Sudan. It seems that a kindly woman, Gillian Gibbons, a citizen of the United Kingdom, took it into her head to travel to the Sudan to do good as she saw it. There she sought to teach children at a Sudanese primary school, appropriately named the Unity High School. It was in the course of that instruction that the events that prompted this reverie on democratic expression took place: “In September, Mrs Gibbons allowed her class of primary school pupils to name the teddy bear Muhammad as part of a study of animals and their habitats. The court heard that she was arrested on Sunday after another member of staff at Unity High School complained to the Ministry of Education.”⁷² She was ultimately convicted of the generic catch all charge—insulting religion (that is Islam, since it does not appear that the provision extends beyond that construction of the offense in fact if not in law). “It is seen as an insult to Islam to attempt to make an image of the Prophet Muhammad.”⁷³ Here one moves from the protection of religious sensibility to the appropriation of the mechanisms of government to enforce privilege not only within the polity but not to outsiders as well.

She was lucky, we are told. She might have been charged and convicted of graver offenses—inciting hatred (of Islam) or showing contempt (of Islam). Justice was swift in accordance with its own internal logic in that place. And it helped that she was able to show the proper humility and deference to her hosts and their interpretation/application of their religion as translated into rules of law. “The BBC’s Adam Mynott, in Khartoum, said Mrs Gibbons apologised to the court for any offence she may have caused.” *Id.* Gratitude for the kindness of the court abounded. “The school’s director, Robert Boulos, told the AP news agency: ‘It’s a very fair verdict, she could have had six months and lashes and a fine, and she only got 15 days and deportation.’”⁷⁴

The English, of course, evidenced the appropriate concern. Their foreign ministry people wrung their hands effectively in public.⁷⁵ And their foreign office personnel did their duty in private.⁷⁶ But more than that, the British facilitated the intermediation of appropriately situated persons on its behalf. And who better than a

⁶⁹ [Constitution of South Africa, Ch. 2 art. 19.](#)

⁷⁰ *Id.*, at art. 17.

⁷¹ See [Lawyers Protest Against Musharraf, BBC News](#), March 12, 2007.

⁷² [UK Teacher Jailed Over Teddy Row, BBC News](#), Nov. 30, 2007.

⁷³ [Pupil Defends Sudan Row Teacher, BBC News, Nov. 28, 2007.](#)

⁷⁴ [UK Teacher Jailed Over Teddy Row, BBC News](#), Nov. 30, 2007.

⁷⁵ *Id.* (“Foreign Secretary David Miliband has expressed “in the strongest terms” the UK’s concern at her detention.”)

⁷⁶ *Id.*

couple of peers (class privilege) who are Muslim (religious privileging) to deal with their counterparts (the connection of extra-national community based on class and religion) to mediate difficulties in relations among the political communities.⁷⁷ And in this fashion the English have also tolerated the Sudanese President's own insult to religion, mercifully not a criminal or civil offense in the United Kingdom. "Sources close to Sudanese President Omar al-Bashir believe there will be more chance of securing Mrs Gibbons release through a Muslim-led delegation than through the Foreign Office's diplomacy efforts."⁷⁸

Indeed, throughout, the proper deference was shown to the sensibilities of the native population, especially by the condemned. We are told that "John Gibbons, 27, from Liverpool, told Associated Press his mother was "holding up quite well" and did not want the situation to spark "resentment" towards Muslims or the Sudanese people."⁷⁹ And it appears the UK has little choice but to play to the Sudanese tune. "Sudan's leaders are rather used to the sound of western outrage - and have come to realise that, for them, it rarely amounts to much."⁸⁰ An impotent rage it seems.

But no matter. The fate of Ms. Gibbons, and the issue of the use and misuse of efforts to privilege religion through the use of the state apparatus serves merely as a foundation for the more important focus of this essay. For whatever one might think of these goings on outside of Sudan, the Sudanese apparently felt that justice had been done. Fearful that the Sudanese President would overturn the judgment of the courts and grant Ms. Gibbons a pardon, people took to the streets to protest. For good measure they expressed their disapproval of Ms. Gibbons and her insensitivity to their sensitivities. "As witnessed during Friday's protest, there is a minority who are baying for her blood. Some chanted threats against the 54-year-old primary school teacher from Liverpool. A group of men shouted: "She must be killed by the sword."⁸¹ Newspaper pictures of Mrs Gibbons were burned on a makeshift stage at the heart of Martyrs Square." Those marching believe themselves at the forefront of the efforts to protect the rule of law in Sudan. One would think that the West would cheer these events. Yet, the mass protests trouble rather than uplift. We are reassured that the Sudanese masses protest on the basis of the same sentiments that perhaps Ukrainians or Americans might take to the streets. Thus, we are told, "this kind of sentiment seems to be coming from a small group of hotheads."⁸²

And so a series of ironies play out here that are worth noting. First, it appears that Ms. Gibbons might serve a symbolic role. She is a vehicle through which Sudanese society becomes more accustomed to individual political expression leading to the development of democratic engagement with the state. There is very little that separates this sort of mass mobilization for the rule of law with that in European states or the United States for the same purpose. Not cowed, the people of Sudan are an integral part of its development as a theocratic rule of law state, in which Muslims are privileged and all others are tolerated to the extent they conform to majority norms. For the American analogue, there is Justice Scalia's reminder of one version of the nature of American democracy in *Employment Division v. Smith*.⁸³

Second, this expression of political will is grounded on an expression of a rule of law system. Of course, the system appears, in its elaboration and application, substantially inconsistent with that of rule of law systems based on a normative framework other than Islam (at least the form of Islam understood in Sudan, applied by its courts and on that basis authoritative there as both religion and law). A higher law might suggest that this expression of law in Sudan is not legitimate on a number of grounds. But that notion might be viewed as anti democratic (imposing different normative systems on the Sudanese).

Third, as a political matter, the treatment (fair) of Ms. Gibbons, ought not to be subject to the intermeddling of foreign powers, especially of one whose history of direct intermeddling in Sudanese affairs is still

⁷⁷ See, [UK Peers Visit Teddy Row Teacher, BBC News](#), Dec. 1, 2007.

⁷⁸ *Id.*

⁷⁹ [UK Peers Visit Teddy Row Teacher, BBC News](#), Dec. 1, 2007.

⁸⁰ ." [Sudan Leaders Court Western Rage, BBC News](#), Dec. 1, 2007.

⁸¹ [Amber Henshaw, Sudanese Views Differ in Teddy Row](#), BBC News, Dec. 2, 2007.

⁸² *Id.*

⁸³ 494 U.S. 872 (1990).

somewhat notorious. Thus, the spectacle of the UK's interference in the rule of law system in Sudan might appear to be the product of a colonial reflex. But worse, it might appear to return us to those days when it was accepted by the civilized nations of the world that in the absence of the acceptance of the world ordering norms of Anglo-American European ideals, systems were neither authentic nor legitimate nor subject to deference. And so it comes as no surprise that expressions of Sudanese political will, of democratic values and the defense of the rule of law in its judicial proceedings, should spill out to the streets.

Fourth, the Gibbons affair makes clear to anyone willing to look that there is a managerialism inherent in the deployment of popular expression, even in its transnational context. Just as constitutions tend to contain and manage the internal expression of popular will, so transnational "etiquette" tends to contain and manage the effectiveness of national popular expression. People are managed. Democratic expression is managed. The vote is managed. Everyone must behave. And thus, the great source of discomfort as democracy plays itself out between systems of management that play by incompatible rules (internally). From this emerges transnational constitutionalism—a means of imposing some level of compatibility in the norm systems of internal governance. But what is also deepened is also language of normative discourse on a global scale that permits a discourse between the Sudan and the UK, rather than a discussion at the point of a gun. For this, democratic expression is tamed; its holders cede authority upward to small groups invested with authority to stand in for the ultimate power holders, and global groups of political managers develop systems for regularizing their intercourse. This is a curious rule of law—the rule of law for a global nomenclatura, constructed in the name of peace.

And so the essence of democracy in Sudan. On the one hand, the West ought to cheer the expression of the power of people, spilling out into the street to express their solidarity with rule of law notions naturalized in their political community. Here is the sort of democratic expression that the West has encouraged, especially where it might deepen the popular participation in politics and engagement in governance. On the other hand, the rule of law system within which Ms. Gibbons found herself enmeshed is not necessarily compatible with core notions of fair play, justice, fairness and the like as developed. From her perspective, there is no rule of law, and what for the Sudanese is popular expression of democratic values, to her might appear to be mob rule, of the sort common in the Roman Republic in the days of Clodius and contributing in its own way to the managerialism of Roman Imperial rule.⁸⁴

Thus popular participation assumes the function and characteristics of the parks and forests of Rimbaud's Cities (II): "The parks represent primitive nature cultivated with supreme art." Yet, "The suburb, as elegant as a beautiful street of Paris, is favoured with air like light, the democratic element counts some hundred souls. There, too, the houses are detached; the suburb loses itself queerly in the country, the "Country," that fills the eternal West with forests and prodigious plantations where gentlemen savages hunt their news items by light that has been invented."⁸⁵

V: Apostasy, Treason, Political Community and Religion in Afghanistan⁸⁶

Id Sudan suggests the nature of the tensions with secular liberalism of a privileging model applied against foreigners, the issue of the political dimensions of apostasy suggests its internal dimensions. After its successful campaigns in Afghanistan and Iraq, the Americans, as leaders of a coalition of nations, also played a pivotal role in the making of new constitutions for Afghanistan and Iraq. The Afghani Constitution was adopted in 2004 after the convening of a traditional Loya Yurga, presided by the former Afghani King,

⁸⁴ See [Larry Catá Backer, Race, "The Race," and the Republic: Reconceiving Judicial Authority After Bush v. Gore, 51 CATHOLIC UNIVERSITY LAW REVIEW 1057 \(2002\).](#)

⁸⁵ Arthur Rimbaud, Cities (II), in *New Directions* (Louise Varèse, trans.) (from *Prose Poems*) reprinted in BAUDELAIRE, RIMBAUD, VERLAINE: SELECTED VERSE AND PROSE POEMS 214 (Joseph M. Bernstein, ed., Secaucus, NJ: Citadel Press, 1947).

⁸⁶ Originally Constitution and Apostasy in Afghamistan, Law at the End of the Day, March 28, 2006. Available <http://lbackerblog.blogspot.com/2006/03/constitution-and-apostasy-in.html>.

and a plebiscite on its adoption. The Iraqi Constitution was adopted October 15, 2005 after the conclusion of unsuccessful three way negotiations between the largest ethnic and religious groups in the country – the Sunnis, the Shi’as and the Kurds. The Sunnis had refused to accept the proposal as ultimately adopted. The constitution was submitted to a vote of the nation anyway on October 15, 2005, the legitimacy of which remains highly contested. On October 24, 2005, an announcement made of its approval by a majority voters plebiscite, the authority of which remains highly contested.

These constitutions were different, in important respects, from the great constitutions the Americans helped craft a half a century earlier for Germany and Japan. Like the German and Japanese Constitutions, both the Iraqi and Afghani constitutions are notable for a firm adherence to the ideal of constitutional legitimacy grounded in the rule of law as both process (state rule through law) and substance (state organization framed by fundamental substantive principles and values. Indeed, the Afghani constitution purports to incorporate the great principles of international human rights, providing in Chapter 1, Article 7 that the “state shall abide by the UN Charter, international treaties, international conventions that Afghanistan has signed and the Universal Declaration of Human Rights.”

But unlike the German and Japanese constitutions of the mid twentieth century, the new constitutions of Afghanistan and Iraq embraced a set of singular transcendent norms – those of Islam. The Afghan Constitution (Chapter 1, Article 3) also provides that “In Afghanistan, no law can be contrary to the beliefs and provisions of the sacred religion of Islam.” This constitution incorporates as the ultimate interpretive source of political authority an ancient universal system of governance developed within a global community of believers, whose moral and ethical norms, it is argued, should limit the power of states over their subjects, whether or not members of the community of believers.

In applying the law, the courts, including the Supreme Court, is obligated to apply the interpretations of a particular jurisprudential school of Islamic Shari’a to decide questions of law. Article 131 of the Afghani Constitution (Chapter 7, article 15) provides that “while processing the cases, the courts apply the provisions of this Constitution and other laws. When there is no provision in the Constitution or other laws regarding ruling on an issue, the courts’ decisions shall be within the limits of this Constitution in accord with the Hanafi jurisprudence[one of the traditional schools of Islamic jurisprudence] and in a way to serve justice in the best possible manner.” In addition, Article 131 further provides that “Courts shall apply Shia school of law in cases dealing with personal matters involving the followers of Shia Sect in accordance with the provisions of law. In other cases if no clarification by this constitution and other laws exist and both sides of the case are followers of the Shia Sect, courts will resolve the matter according to laws of this Sect.”

Within this framework, apostasy assumes its political character as treason—and precisely because religion is a trigger for political privilege, for belonging to the political class with the power to direct and develop the normative political values of the state. It should come as no surprise, then, that the secular authorities in Afghanistan sought to punish a citizen for the religious crime of apostasy. In a March 28, 2006 article published by the New York Times,⁸⁷ Sultan Munadi and Christine Hauser write that this saga began sadly but mundanely enough. When an Afghani man who had left the country and converted from Islam to Christianity returned to Afghanistan seeking custody of his daughters, the family told the authorities that he was an apostate. Though apostasy is not a subject of the Afghani civil law, it is a crime punishable by death under traditional Shari’a principles. Given the provisions of the Afghani constitution, it makes perfect sense for the state authorities to seek to enforce the religious law that serves as the foundation of state authority. Ironically, Afghanistan will not see this case through to execution. It seems that, bowing to pressure from Christian majority states, the Afghani courts will not see the case through to completion. Suggesting both procedural defects and the sense that only mental illness could explain apostasy (conversion from Islam to Christianity), the courts returned the case to prosecutors. This postpones but does not answer the question posed. It does, however, serve as a warning that theocratic democratic states will act in ways inconsistent with the norms of secular constitutional states in the West. While it may be possible to harmonize the

⁸⁷ Sultan Munadi and Christine Hauser, “Afghan Convert to Christianity is Released, Officials Say”, New York Times

results under different systems of constitution making, it is likely that the methodologies of constitutional interpretation and the basis on which similar results might be reached will be based on very different approaches to law. That stands to reason, of course, where harmonization is sought between systems whose foundational norm structures may be incompatible. In the case of an Islamic Republic, apostasy from Islam might be deemed the equivalent of a rejection of the fundamental ordering of the state, and as such, as a political and not a religious act. The approach might have more in common with understandings of class within Marxist systems than with the human rights foundationalism of secular international institutional law.

That this is result is both understood by and a deliberate product of American constitutional ingenuity, or at least of its sponsorship, should also come as no surprise. People who listened closely to President Bush's second inaugural address would have heard an American willingness to permit experiments in democracy. As I have written elsewhere:⁸⁸ Drawing from universal principles from the founding of the Republic, as well as the eternal "truths of Sinai, the Sermon on the Mount, the words of the Koran, and the varied faiths of our people" the rules of behavior between, among and within nations will be grounded in human freedom and democracy. Democracy and human dignity provide a framework limiting the power of any political community – nation, state, international organization, or the like – to organize its society. Every nation has the right to choose its own path to freedom and democracy, and every other state has the authority to help its neighbors achieve and maintain compliance with these standards. But no community outside of the nation should have the power to choose or govern the choices made by any nation within the broad framework of liberty and democracy. As President Bush suggested: "Freedom, by its nature, must be chosen, and defended by citizens, and sustained by the rule of law and the protection of minorities. And when the soul of a nation finally speaks, the institutions that arise may reflect customs and traditions very different from our own. America will not impose our own style of government on the unwilling. Our goal instead is to help others find their own voice, attain their own freedom, and make their own way."

The United States has helped create this constitution. Perhaps the United States is interested in testing the utility or limits of theocratic constitutionalism as a force for democratic constitutionalism. Perhaps Afghanistan provides a laboratory for a faith-based constitutionalism with implications for the future of constitutional interpretation in this country. Perhaps the United States was unprepared to advise a nation, heir to a complex and rich religiously based jurisprudence, on a means of blending those traditions with the modern traditions of international human rights norms limiting constitutional authority. Whatever the context, it will only be a matter of time before another Abdul Rahman commits apostasy, or another person commits an offense against Islam the punishment of which offends international notions of human rights. Stay tuned.

VI. The Interpretive Community in Theocratic States⁸⁹

Privileged participation has a further consequence, one hinted at in the apostasy case in Afghanistan—it tends to structure and constrain both the way in which legal interpretation may be undertaken and further constrain those legitimately vested with a legitimate voice to engage in those efforts. The English word pretext is said to derive from the Latin word *praetextum*--to disguise. But *praetextum* is the neuter past participle of an action word--*praetexere*--a word suggesting a weaving as an act of disguise. Pretext thus embraces a notion of altering reality, of weaving a framework reality for a particular purpose. That objective serves both as cloak that covers another reality and also serves as its substitute. Pretext is history in action. It is the ultimate effort of humans to become the managers of their own history. And it is invariably a sloppy and badly managed affair. It is thus the ultimate [hubris](#) (ὑβρις)--both pathetic and inevitable among a certain group of people hurtling toward their own destiny. But that is a lesson that human social, political, ethnic and religious communities tend to believe is the fate of others, and not

⁸⁸ (see my blog post April 1, 2006)

⁸⁹ Originally, Pretext and Piety in Iran, Law at the End of the Day, Dec. 11, 2009. Available <http://lbackerblog.blogspot.com/2009/12/pretext-and-impiety-in-iran.html>.

themselves. Each, in turn, weaves their own destiny (usually on the backs of their opponents) in the sure knowledge that they (unlike their predecessors) will "get it right."

But hubris also suggests an intimate connection between the managed disguising inherent in "pretext" and impiety. Where religious communities engage in pretext, it, and especially its leaders, engage in an arrogance that is also sin. There is a certain arrogance against the Divine order in pretext in this context. It serves as a manifestation of the idea that humans can substitute themselves for the Divine in the ordering of the affairs of the world. Pretext serves as a challenge to God, as understood in those communities, it is an acting out of a challenge to the Divine representation in those sects that screams: "I know better than God what is or shall be."

It is thus especially poignant when the leaders of religious communities manipulate the pious, in the name of their Divinity, through pretext to sin, to an insult to the community of believers and to the prophets whose words and lives they purport to uphold. The Iranian religious community had developed an interesting variation on constitutional government grounded in the religious principles of Shi'a Islam.⁹⁰ The Iranians are not unique. The Malays have also sought to weave impiety with corruption as the basic language of political discourse.⁹¹

But having spent three decades perfecting an alternative to the communal constitutionalism of the world community it is now in danger of losing power to factions of the religious and pious who owe the progeny of the founders no personal loyalty. That is the essence of democracy, even theocratic democracy. But it appears that this consequence of the constitutional state the religious elite created is now unacceptable to a portion of that very elite when deployed against its own grip on power. The result was an election the legitimacy of which remains highly contested, at least within Iran, that appeared to keep one faction in power.⁹² This has produced a crisis pitting factions within the ruling clerical community and their adherents outside of that community against each other.⁹³ But having constructed a constitutional state that incorporates the religious values which they purport to maintain, how to retain power without appearing to overturn the constitutional order on which the legitimacy of their political authority (and thus also to some extent their religious authority) rests?

Pretext and impiety provides the answer. Iran's Supreme Leader has accused the opposition of breaking the law by insulting the Islamic Republic's founder, Ayatollah Ruhollah Khomeini. Ayatollah Ali Khamenei urged opposition leaders to identify "those behind the insult to Imam Khomeini". The remarks centre on an alleged incident last Monday during which a poster of Imam Khomeini was torn up. Opposition leaders say the alleged incident - shown on state television - has been doctored. The opposition has been refusing to endorse the result of the presidential election in June which returned President Mahmoud Ahmadinejad to power for a second term. They allege the poll was widely rigged. The election dispute is now radicalising both sides, says the BBC's Tehran correspondent, Jon Leyne.⁹⁴

The religious elite is set to use impiety against their political opponents.⁹⁵ Legal and constitutional discourse is now possible only through religious discourse. The Pakistani blasphemy model is inverted; the

⁹⁰ See, Larry Catá Backer, *Theocratic Constitutionalism*, supra.

⁹¹ See Larry Catá Backer, *Emasculating Males* cite

⁹² Paul Reynolds, [Iran: Where Did All the Votes Come From?](#), BBC News Online, June 23, 2009.

⁹³ [Iran Opposition Protesters Clash with Security Forces](#), BBC News Online, Dec. 7, 2009.

⁹⁴ Jon Leyne. Iran opposition accused of insulting founder Khomeini, BBC News Online, Dec. 13, 2009. Available http://news.bbc.co.uk/2/hi/middle_east/8410558.stm.

⁹⁵ And not just in Iran. Consider the situation in Indonesia, which also adopted a blasphemy law overseen by an Islamist Board, Bakor Pakem, that sits in the Attorney General's office in the course of investigations of religious offenses. "In February 2006, 40 Sunni clerics and four police officers signed a public statement, declaring that Shia Islam was heretical. The statement mentioned two meetings with Shia clerics, in which the Shia were told to return to "real Islam" but refused to do so. The statement also asked law enforcement agencies to enforce the blasphemy law against Tajul Muluk." Indonesia: Shia Cleric Convicted of Blasphemy: Amend Blasphemy Laws, Abolish Islamist Legal Board, Human Rights Watch, July 12, 2012. Available <http://www.hrw.org/news/2012/07/12/indonesia-shia->

priest has become the judge. Within Iran these religious judges, now presiding over legal discourse, would use a televised image of a ripped poster with the image of a man serve as the pretext for substantial misapplication of the constitutional structure they purported to create. They appear driven to rip the Constitutional fabric of the Islamic Republic in the same way they ripped the image of the late Ayatollah. They mean to preserve their earthly power even as they weaken the theological underpinning of the Republic created a generation ago. The Ayatollah Khamenei appears set to substitute the rule of individuals for the divine mandate he is purportedly charged with protecting. "In his remarks, broadcast on state TV on Sunday, Iran's Supreme Leader said: 'Some people created riots and encouraged people to stand against the system... paving the way for our hopeless enemies to undermine the Islamic revolution.' He urged opposition leaders to return to 'the right path'. His warning on the alleged insult to the republic's founder was echoed by a statement issued by the Revolutionary Guards." Id. He will tear the constitutional state in pieces to mirror the torn image of the late Ayatollah. There is irony here as well as impiety. This is captured nicely by Grand Ayatollah Montazeri, an opponent of the ruling religious clique, when he suggested that "The current decisions, which are being taken by the minority faction that is in power, are mainly against the interests of the country, and are not in keeping with Islamic principles and values"⁹⁶ But more importantly, it suggests that a legitimately constitutional theocratic state may not be possible, even on its own terms.

The torn image of the face of the late Ayatollah Khomeini suggests pretext, hubris, impiety and blasphemy. But whose? As the Iranian state appears ready to turn its apparatus against its own, it continues down a path that deepens the crisis of legitimacy of a 30 year old experiment in religiously based constitutional orders. And so the Iranian clerical class practices pretext, weaving together action and symbol, processed through law, to disguise a less worthy set of objectives behind a facade of lawfulness. With this *praetextum*, certain elements of the Iranian ruling caste have taken their destinies in their own hands. As the Greeks remind us, the hubris implicit in political pretext can only bad badly. Those who seek to control destiny through this weaving will find themselves woven into a greater design whose parameters are both beyond their control and in which their fates are in part determined by their pretexts.

VII. Echoes of Religious Privilege in Pluralist States: The Contradiction's of Privilege and Participation⁹⁷

We return to the West: where the forms and mechanics of religious political engagement evidences the tendencies described in the prior sections, but which are expressed within the forms and traditions of secular liberalism. And thus, the core of the existential crisis for secular liberalism reduces itself to one of privilege and participation. Two recent events, appearing to be completely unrelated, suggest the way in which law, culture, politics and religion have begun to interact in ways that are producing significant changes in the socio-cultural foundations of Europe and the United States. Each involves cultural objects. Both cultural objects are highly regarded by the social elites in the states in which they appear. In both cases, the objects are important representations of the production of high culture in the West. In neither case was this disputed. Each event, however, involves the intersection of religious sensibilities with these important cultural objects. And in both cases, highly important (and in one case almost venerated) cultural objects were abandoned or rejected in favor of another set of values.

[cleric-convicted-blasphemy](#). Tajul Muluk a Shia cleric was thereafter sentenced to two years in prison for blasphemy and the "Ministry of Religious Affairs in Sampang also declared they will "supervise" hundreds of Shia to learn Sunni Islam." Id. Atheists are not spared. "In Dharmasraya, West Sumatra, Bakor Pakem led the prosecution of Alexander An, an administrator of the "Minang Atheist" Facebook group. He was eventually acquitted of blasphemy but in June 2012 the Sijunjung court sentenced him to two-and-a-half years in prison and a fine of IDR100 million (around US\$11,000), for inciting public unrest via his Facebook account." Id.

⁹⁶ Edward Stourton, [Ahmadinejad's Theological Foes](#), BBC News Online, October 19, 2009.

⁹⁷ Originally, [Offending Religion, Law at the End of the Day](#), Sept. 30, 2006, available <http://lbackerblog.blogspot.com/2006/09/offending-religion.html>; and Robert C. Blitt on Tunisia: Springtime for Defamation of Religion, [Law at the End of the Day](#), August 17, 2012, available <http://lbackerblog.blogspot.com/2012/08/robert-crobert-blitt-on-tunisia.html>.

The first event occurred in Germany. On September 25, 2006, the Deutsche Oper, one of the most respected opera houses in the Western world, announced that it was eliminating performances of the opera *Idomeneo* from its repertoire for the season and replacing it with two other operas “over concerns they could enrage Muslims and pose a security risk.”⁹⁸ This is no ordinary work of popular culture. The opera, written by Wolfgang Amadeus Mozart in the 1780s, is considered one of the finest examples of its kind ever to have been written. It has been performed all over the world. It is one of the foundational works of Western culture music. But what is culture today when the stakes of cultural production have changed? The reason the opera was cancelled was simple. “The decision was taken after Berlin security officials warned that putting on the opera as planned would present an ‘incalculable security risk’ for the establishment.”⁹⁹ It seems that “In the production, directed by Hans Neuenfels, King *Idomeneo* is shown staggering on stage next to the severed heads of Buddha, Jesus, Poseidon and the Prophet Mohammad, which sit on chairs.”¹⁰⁰ The basis of the determination of a sufficient threat “was prompted by an anonymous phone call in June,”¹⁰¹ though the police had “no evidence of a specific threat.”¹⁰² Though a number of prominent politicians condemned the decision, it is unlikely that Mozart’s *Idomeneo* will grace the stage of the opera house in Berlin this year. “‘Has it come so far that we must limit artistic expression?’ [deputy Parliamentary Speaker Wolfgang Thierse] told Reuters. ‘What will be next?’”¹⁰³

Surprisingly, the answer comes from Dallas, Texas. There, a “popular art teacher with 28 years in the classroom is out of a job after leading her fifth grade classes last April [2006] through the Dallas Museum of Art.”¹⁰⁴ The Dallas Museum of Art does not have a reputation for exhibiting works of low culture. Indeed, it prides itself as one of the premiere showcases of the best artistic work of Western culture. “The Dallas Museum of Art recently celebrated one hundred years of connecting art and people. Established in 1903, the Museum features an outstanding collection of more than 23,000 works of art from around the world, from ancient to modern times.”¹⁰⁵ Moreover, the Dallas Museum is supported not only by private donations but is intimately tied to local government. “The Dallas Museum of Art is supported in part by the generosity of Museum members and donors and by the citizens of Dallas through the City of Dallas/Office of Cultural Affairs and the Texas Commission on the Arts.”¹⁰⁶ “Over the past decade, more than half a million students. . . have toured the museum’s collection.” Blumenthal, *supra*. But all of this meant nothing in the face of parental outrage. And what was the source of this outrage? The suspension letter to the teacher stated that “During a study trip that you planned for fifth graders, students were exposed to nude statues and other nude art representations.” Blumenthal, *supra*. And, indeed, they may well have been exposed to the “marble torso of a Greek youth from a funerary relief, circa 330 B.C.”¹⁰⁷

In both cases, important institutional actors took extreme action (and suspending a teacher or canceling an opera production falls into that category in the context in which those decisions were made) on the basis of a single complaint or a single threat, based on offense. In both cases, high culture falls to single expressions of offense, or threats of violence based on such offense. In both cases important institutional actors may disavow the importance of culture in the face of offense. In a sense there is an inversion here. Where once there was a socially approved offense in the face of cultural boorishness, now the reverse seems to be true—there is a move to a socially approved sense of offense in the face of the “arrogance” of high culture to reflect something other than the boorish tastes of the least educated, or of cultural strangers. Where culture becomes inverted, will law not quickly follow? We might find it galling sometimes to be led from

⁹⁸ [Noah Barkin, “Politicians Slam Berlin Opera for Canceling *Idomeneo*,” Reuters, Tuesday, September 26, 2006, available at Scotsman News.](#)

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Ralph Blumenthal, “Museum Field Trip Deemed Too Revealing: Texas Art Teacher Suspended After a Parent Complains,” *New York Times*, September 30, 2006, at A-9.

¹⁰⁵ [Dr. John R. Lane, Director’s Welcome, Dallas Museum of Art,](#)

¹⁰⁶ Dallas Museum of Art, Homepage, available http://www.dallasmuseumofart.org/Dallas_Museum_of_Art/index.htm.

¹⁰⁷ *Id.*

the top, but consider the effects of being led from the bottom. We may not like where we wind up. And indeed, such an inversion portends decadence more than cultural vigor.

When a political community abandons its own culture, when it ceases to affirm its own ideals expressed through cultural symbols--pictures, speech, music and the like--it begins to express an altogether different value--a desire for self-destruction. The events I relate above do not appear connected, yet they are the product of the same set of impulses. That impulse was nicely summarized recently in a criticism of the Western response to the violence that accompanied the so-called Danish cartoon controversy. Professor Hassen is critical in an interesting way:

The real hypocrites in the debate were liberal intellectuals, too many to name, who spent years denouncing Christian fundamentalist demands for prayer and the teaching of evolution, in schools, the censorship of books and films, and limits on abortion, only to cave to fundamentalist Muslim demands for the introduction of Shari'a law, for separate swimming classes for boys and girls, and—in the Danish case—for the respect of religious rules not only by members of the religious group but by the society at large. . . . That liberal intellectuals could be so absolutist in their dismissal of demands made by Christian fundamentalists but so apologist and relativist in their indulgence of those made by Muslim fundamentalists beggars belief.¹⁰⁸

Clearly Professor Hassen suggests another wrinkle in the crisis of liberal secularism, one evidenced by the quite distinct treatment of non-Western religions from Christianity and Judaism. Beyond the underlying racism, is both a fear of violence that cannot be controlled effectively, and a perverse multi cultural sensibility in which “foreign” or “exotic” religions are privileged to a far greater extent than indigenous religion. This form of what he characterizes as liberal hypocrisy may also be shared by a substantial portion of the political and media elites in the West. The point is easily extended to the decision of the Berlin opera and its unfortunate decision to cancel a performance of a venerable Mozart opera. But it applies with equal force to the self censorship and fear that is generated by domestic fundamentalists who would undo centuries of cultural development, development on which their political, social, moral, and (yes even) religious privilege rests. The same decadence that drives the director of the Berlin opera to cancel an operatic performance also drives a school administration to essentially forbid the viewing of representational art (spanning millennia) by students. In the one case, the West denies itself a continued renewal of its cultural ties to music and expression, and on the other the West forbids the education of its children in its own cultural fundamentals. A society that rejects its own cultural basis for existence, a community that forbids its children an education in its own past, is one that is an easy prey for other political and cultural communities with a greater attachment to their own identity. The West understood this well in the twentieth century, and to our benefit. We seem to be forgetting it quickly in the 21st.

As important, it is worth considering whether the conceptual solicitude for religion in pluralist societies creates an impossible situation, one grounded in the conflation between the political sanctity of belief and its protection, with the freedom of institutional actors, including religious institutional actors, to participate freely in the political life of the state. Where an institutional actor, and its adherents, may participate in the political life of the state for the purpose of transposing and protecting its religious views, practices, beliefs and the like, but may also take advantage of legal protection based precisely on the religious beliefs, practices etc. that are the subject of their political agenda, then the existential crisis is complete.¹⁰⁹ The secular liberalism that produced this contradiction will necessarily collapse into the politics of religious privilege within the apparatus of the state. One get a sense of this from the visit of then Pope Benedict XVI to Latin America in 2007.¹¹⁰

¹⁰⁸ Randall Hassen, “The Danish Cartoon Controversy: A Defense of Liberal Freedom,” *EUSA Review Forum*, *EUSA (European Union Studies Association) Review* 19(2):1, 5 (Spring 2006) (“Portraying the prophet may be prohibited for Muslims, but it is not and cannot be for anyone else. Muslims may ask that others respect their religious precepts, but they cannot demand it any more than observant Jews can demand that their fellow citizens not shop on Saturdays or Christians can demand that non-believers respect their sexual mores.”).

¹⁰⁹ Larry Catá Backer, *Religion as Object and the Grammar of Law*, 81 *MARQUETTE LAW REVIEW* 229-254 (1998).

¹¹⁰ Originally Larry Catá Backer, *Law: Benedict XVI and the Constitution of Political States*, *Law at the End of the Day*, June 7, 2007. Available <http://lcbackerblog.blogspot.com/2007/06/law.html>.

On May 10 2007, Pope Benedict XVI started his visit to Brazil.¹¹¹ The visit was a homecoming of sorts for the Pope. Not in the usual sense, though. The Pope had not visited Brazil before in person. But in an intellectual sense. His visit provided an opportunity to tour the site of Benedict's greatest triumph as Cardinal Ratzinger about 30 years earlier—a triumph that might well have secured him his future at the Vatican.

For Brazil had been a hotbed of liberation theology, a form of engagement between Catholicism, social action and the state, that had energized many parts of Latin America in the 1970s and 1980s. In some parts of Latin America it caused its adherents, priests and well as lay Catholics, to challenge not only the secular leadership of the state, but the leadership of the Church itself. Benedict's contribution to the dissipation of that movement within Catholicism, at least as an intellectually vibrant aspect of Catholic social thought, and the suppression of its foundational norms as heretical, is well known.¹¹² The basis of Ratzinger's attack was that liberation theology was unacceptable not because of its inherent totalitarianism but because of its essentially Godless totalitarianism. "The message of the Gospel cannot be reduced to politics. Nevertheless, the Gospel has certainly political consequences," the Cardinal explained. These efforts helped cement his ties with the youngish new Pope John Paul II (himself on a crusade against the godless totalitarianism in Poland and the rest of the Stalinist Soviet Bloc) and ultimately played a role in securing for him the bishopric of Rome.

But the attack on Liberation Theology was also grounded in more positive aspects. Principally these touched on issues of solidarity within the communion of the faithful. The meaning, exercise, and obligations of that communion, and the penalties for rejection of faith, of living in solidarity with the faithful, were points well developed in Ratzinger's attack. The success of these attacks can be seen today in Brazil. "In Brazil, though, liberation theology is far from dead. These days, instead of preaching class struggle and defying dictators, many veterans of the movement have adapted their rhetoric and role to the times. They work to promote environmental conservation or women's rights; they help the homeless and AIDS patients."¹¹³ Liberation Theology has been tamed.

This background is critically important when one attempts to understand Benedict's trip to Brazil, and the statements he carefully chose to make there. It was not just to gloat about the transformation of the force of liberation theology that Benedict chose Brazil, but also to refine the points he made so effectively against Liberation Theology (and where better than in the place of its greatest potency). And that begin point can be described simply as: solidarity. Benedict used his visit to Brazil to emphasize the contours of the behavior necessary to show solidarity with the Church—what is the minimum requirements for being" Catholic.

Though felt in a particular way within Catholicism, the ideas of solidarity in the management of the integrity of communities and its self conception, provides important lessons to all governance communities in a transnational world. That solidarity focuses on the nature of the community—evangelization—and its *Zorganization*—hierarchical and demanding a certain amount of fidelity and obedience. "All priests, religious, and lay people who hear this call for justice and who want to work for evangelization and the advancement of mankind, will do so in communion with their bishop and with the Church, each in accord

¹¹¹ See [Papa apóia excomunhão de políticos pró aborto, O Globo](http://g1.globo.com/Noticias/PapanoBrasil/0,,MUL33664-8524,00.html), May 10, 2007 at 1. <http://g1.globo.com/Noticias/PapanoBrasil/0,,MUL33664-8524,00.html>. See also [Ministro diz não temer excomunhão, O Globo](http://oglobo.globo.com/pais/noblat/posts/2007/05/09/ministro-diz-nao-temer-excomunhao-57512.asp), May 9, 2007. Available <http://oglobo.globo.com/pais/noblat/posts/2007/05/09/ministro-diz-nao-temer-excomunhao-57512.asp>.

¹¹² See [Instruction on Certain Aspects of the Theology of Liberation](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19840806_theology-liberation_en.html), given at Rome, at the Sacred Congregation for the Doctrine of the Faith, on August 6, 1984, the Feast of the Transfiguration of Our Lord. Joseph Cardinal Ratzinger, Prefect. Available http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19840806_theology-liberation_en.html.

¹¹³ [Monte Reel, An Abiding Faith in Liberation Theology: Since the Vatican's Condemnation, Movement Veterans in Brazil Have Adapted to the Times, The Washington Post](http://www.washingtonpost.com/archive/local/2005/05/02/local/2005-05-02/), May 2, 2005 at A12.

with his or her own specific ecclesial vocation. . . . Aware of the ecclesial character of their vocation, theologians will collaborate loyally and with a spirit of dialogue with the Magisterium of the Church. They will be able to recognize in the Magisterium a gift of Christ to His Church and will welcome its word and its directives with filial respect.”¹¹⁴ “It has to do with a challenge to the 'sacramental and hierarchical structure' of the Church, which was willed by the Lord Himself.”¹¹⁵

And contrary to the usual course for Benedict, he chose praxis over theological discourse to emphasize his points. “In this sense, it is necessary to affirm that one becomes more aware of certain aspects of truth by starting with 'praxis', if by that one means pastoral 'praxis' and social work which keeps its evangelical inspiration.” [Instruction on Certain Aspects of the Theology of Liberation](#), Id., at Part XI (Orientations)—Paragraph 13. Thus, it should have come as no surprise that Benedict issued a statement, even as he was flying into Brazil that he supported the position of the Mexican bishops who has threatened to excommunicate Mexican politicians who voted in favor of the legalization of abortion within Mexico City. When the Brazilian Health Minister, himself a Catholic, was asked about the threat of excommunication for officials that acted contrary to the will of the Magisterium of the Church, he responded “a fé não pode ser excomungada” (faith cannot be excommunicated). Id., [O Globo](#).

It seems that Benedict has the better of this dialogue with the Health Minister. No community can retain of autonomy without both a sense of those characteristics that make it different from others, and the willingness to enforce communal boundaries. If it means anything to be a Catholic, it means to be a Catholic through practiced faith, that is, through faith “on the ground.” There can be no higher calling in a system in which God sits at the top of a system guarded by its disciples. Disobedience must be disciplined, and a serious disobedience might well merit expulsion from the body of the faithful. In matters of faith, political officials in Mexico must pay heed to Rome even as they act as representatives of the people of a variety of faith communities. Benedict has thus been right to suggest that he would rather have a smaller community of truly faithful than a larger community of faithless. Certainly the Jews have proven the lasting power of such choices for grounding communal solidarity—and the risks.

In effect, Benedict rejects the notion of a "soft Catholicism" in the same way that many in the Muslim world have rejected a version of "soft Islam." Benedict suggests, and from his perspective not incorrectly, that faith is the paramount community, and that the obligation of the faithful must seamlessly conform to its requisites in all of the individual's actions—both personal and representational. One can only represent others in a political system by being true to the tenets of one's faith obligations. Thus, an individual cannot wear multiple hats, as individual and as representative of the people, and remain true to his faith. And in this faith, of course, the nature of both personal and representational obligations is subject to the mandatory guidance of the Church's Magisterium. For Benedict, this represents no conflict, and no conflict with democratic values. In that respect he mirrors the theological perspective of so-called political Islam, both of which would marginalize secular or multi-normative systems.¹¹⁶ Yet perspective matters. And from the perspective of those who must share a democratic political system with the faith of "hard" religion, the loss of representational power might be deeply felt, especially when the values of the Magisterium become translated into mandatory obligations in secular law.

But in the absence of a complete monopoly of the faithful, and the corresponding power to control conformity with its obligations, and in the context of the current system tending toward universal tolerance

¹¹⁴ [Instruction on Certain Aspects of the Theology of Liberation](#), given at Rome, at the Sacred Congregation for the Doctrine of the Faith, on August 6, 1984, the Feast of the Transfiguration of Our Lord. Joseph Cardinal Ratzinger, Prefect, at Part XI (Orientations)—Paragraph 3-4 (dictates of other communities (including political communities) to which the member of the Catholic communion belongs).

¹¹⁵ [Instruction on Certain Aspects of the Theology of Liberation](#), Id., at Part IX (The Theological Application of this Core) Paragraph 13.

¹¹⁶ See [Omayma Abdel Latif, Harmonising Immutable Values and Ever-Changing Mechanisms, Al-Ahram Weekly](#), 11 - 17 November 2004, Issue No. 716 (Focus) (interview with Ahmet Davutoglu, chief advisor to the Turkish AK Party, and referencing Mr. Davutoglu's book democratic political theory).

of faith communities (and the right to choose among them) , any "victory" of hard political religion, such as that suggested by Benedict, is perverse. For in the absence of a complete correlation between the community of Catholics and other faith communities, and in the absence of viable faith alternatives for individuals, the reality of enforcement of faith boundaries through expulsion cannot have the effect it might have 1000 years ago. In this sense, "faith" cannot be excommunicated—excommunication is separation from the body of believers. But faith extends beyond the body of believers. And faith to the precepts of other communities may require obedience every bit as strong as that to the body of the faithful. Thus, faithfulness to the political community may require faithlessness to the community of the faithful—at least to the extent that faith communities seeks to universalize its mores over the body of different believers. Benedict reminds us of the binding power of solidarity to the constitution o community, as well as to its viability. The Health Minister reminds us that in a world of multiple global communities of faith, solidarity has its limits. As long as a variety of communities of faith, political and economic communities compete more or less on an equal plane, the individual may chose freely from among them for the satisfaction of his earthly and otherworldly needs. But he also reveals the risks—authority and legitimacy mat be adversely affected by the migration from one to another group. In a transnational world, the multiple pull of solidarity will add a certain level of complexity to governance.

VII. Conclusion.

The existential crisis for secular liberalism in Western states, one of its own making. It is produced by an unhealthy conflation of solicitude for religion and a willingness to allow institutional religion a role in the political life of the state. The resulting contradiction is unavoidable and creates the sort of instability experienced in varying degrees in different states that seek to harmonize a plural regime while privileging religion. The problem is particularly acute in democratic states built around sharp political contests. Individual belief, and its protection is not the problem—institutional systems built around beliefs complicate governance. The effects are most acute in states that are substantially religiously homogenous or with few groups, and the consequences are most in evidence outside the West. The nature of the shocks to the constitutional settlement of the U.S. constitution and its now misunderstood model of secularism, which touches on the nature and application of the rule of law, the nature and limits of direct democracy, the relationship between apostasy and treason, the language of interpretation and the power to participate in that dialogue, and the role of the foreign or minority. For secular liberalism the price of preserving the privileging of the practices and autonomy of religion by the state is the disbaring of institutional religion (though not religious values) from organized political life. The alternative, privileging (institutional) religion and permitting it a broad institutional right to participate in politics, is very much in evidence abroad.