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The Power of Reason and the Promise of Religious Freedom in Late Secular Liberalism

by

Kathryn Anne Heard

A dissertation submitted in partial satisfaction of the

requirements for the degree of

Doctor of Philosophy

in

Jurisprudence and Social Policy

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in

Critical Theory

in the

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of the

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Committee in charge:

Professor Sarah Song, Chair

Professor Kathryn Abrams

Professor Anton Kaes

Professor David Lieberman (late)

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Abstract

The Power of Reason and the Promise of Religious Freedom in Late Secular Liberalism

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University of California, Berkeley

Professor Sarah Song, Chair

Contrary to the intent of deeply entrenched secularist policies in liberal states, which mandate that the privatization of religion is necessary to secure certain constitutional freedoms and liberties for all individuals, the public life of religion has flourished. Faced with mounting empirical evidence attesting to the dynamism and diversity of religion's newfound presence in civil society, scholars have begun to question the continued efficacy of secularism as a method of political governance and as a tool for social organization. Scholarly responses to this phenomenon can be best described as divergent. Several scholars have suggested that, in order to preserve their constituents' socio-legal equality, liberal states must reaffirm their commitment to secularism by rigorously enforcing prohibitions on public displays of faith. However, other scholars have pushed for the near-total abandonment of secularism, as they see its insistence on the circumscription of religion from the public sphere as disproportionately and arbitrarily targeting faiths deemed incompatible with "traditional" western values. Finally, still others have argued for a vision of liberal governance that venerates the participation of religious voices in matters of law and policy, so long as secularism's institutional provisions for the separation between church and state can be preserved.

In recent years, this final approach to regulating the public life of religion in ostensibly secular liberal states has gained traction among political philosophers and legal academics alike. Yet as these scholars strive to make liberal states more responsive to the values-based needs and concerns of their devout constituents, a common refrain has emerged: that the "public use of reason" must serve as a bulwark against the excessive intrusion of religion into political and legal life. Under a regime of public reason, so the arguments go, devout citizens will be obliged to translate the religious content of their politically- and legally-motivated speech into secular language that can be readily comprehended by persons of other (or of no) faiths. This mode of governance endeavors to accommodate the vitality and complexity of religious values as well as preserve the agnosticism of the liberal state towards competing conceptions of the good – but, as my dissertation suggests, accomplishes neither.

In this dissertation, I interrogate the seeming ease with which contemporary scholars appeal to discourses of reason to regulate the public life of religion in late liberal states. I argue that such language, first, compromises the capacity of devout citizens to contribute meaningfully to the law- and policy-making apparatuses in democratic governments and, second, undermines the value ascribed to demonstrations of personal piety by certain religions and their practitioners. More specifically, I

determine that the processes by which devout citizens are granted membership in and access to the liberal state are deeply subjectifying. That is to say, by holding political representation and positive social accommodation hostage to secular standards of reason, the liberal state requires religious individuals to suppress or alter their relationships to their faiths in exchange for a stake in crafting the laws that shape the material and metaphysical conditions of their daily lives. This process ultimately strips religious values from faith-based public conduct and speech in service of the liberal state's continued socio-legal stability.

This dissertation asks: First, how (and to what extent) do discourses of reason and rationality produce secular subjects in religiously plural liberal states? Second, if subject formation can be understood as an object or affect of secular liberal governance, how (if at all) can political or ethical agency be recovered for devout citizens? In crafting answers to these questions, I seek to bridge the ideological divide between critical theory and normative legal scholarship and, in doing so, I aim to provide an interdisciplinary account of how the complicated history of reason can be marshaled as a means for the inclusion of a broader range of ideological and cultural values within the liberal state.

The first two substantive chapters of this dissertation endeavor to understand precisely what constitutes the concept of "reason" in relation to "religion." These chapters work in tandem to elucidate not only how the secular state emerged conterminously with the political constitution of the rational citizen, but also how reason – nearly four centuries after the creation of the liberal state – still retains the latent power to affect the practice of religion in contemporary civil society, oftentimes adversely. Indeed, following an Introduction in which I situate this dissertation within contemporary literature on the public life of religious belief, Chapter Two examines the use of reason by John Locke, a political philosopher understood to be one of the initial and foremost proponents of a secular divide between public life and private belief. This chapter argues that as Locke sought to quell the religious warfare of the mid-seventeenth century, he advanced a vision of political life predicated on a deeply Protestant understanding of faith; properly practiced religion, on his account, was intended to be publicly circumspect and reverently oriented towards developing an inward spiritual connection with God. In this context, religious individuals emerged as rationalized citizens through the process of recognizing, and subsequently internalizing, the benefits that privatized religious belief bestowed upon the members of liberal states. Locke's use of reason, in other words, performed constitutive and productive work on religious values.

In a similar vein, Chapter Three suggests that when contemporary scholars like Jürgen Habermas, John Rawls, and Robert Audi call upon the public use of reason to revamp the much-beleaguered policies of secularism in late liberal states, they uncritically reproduce the deeply Protestant vision of rationally practiced religion. Although these scholars strive to carve out a valued place for religious practice in civil society – a place that is both immune from state inference and respected for its moral or ethical perspectives – they nonetheless proscribe the full participation of devout citizens in the law- and policy-making apparatuses of the liberal state. They do so by mandating that religiously-motivated speech be "cooperatively translated" to align with secular notions of the public good. This process of translation, this chapter argues, represents a powerful discursive phenomenon that entails the willful forgetting – and then the latent reproduction – of the coercion and subjectification that marked much of the rise of secular liberalism.

The next two chapters demonstrate how the theoretical tensions elucidated in the first two chapters play out in contemporary religious practices, but also how these practices – particularly with respect to their interactions with the law – can be fraught sites for resisting secular constructions of reason

and rehabilitating religious values. Chapter Four interrogates Justice Antonin Scalia's assertion in *Employment Division v. Smith* that the law must uphold the belief-action distinction in order to preserve democratic norms and, second, the affect that this distinction had on Alfred Smith's relationship with his faith. I argue that as Smith responded to the law's repeated requests for justification as to why his religious convictions ought to exempt him from the criminal regulation of peyote, he experienced a profound sense of legal, political, and spiritual disempowerment. – a disempowerment compounded by the erasure of the complexities of his faith in both the decision and aftermath of *Smith*. I argue that one way for religious individuals to challenge the affective power of reason is to practice what I call testimonial resistance, in that discursive appeals can be made to histories that are powerful and subject-forming, as a way to illuminate how reason is complicit in these histories.

Chapter Five argues that, if *Employment Division v. Smith* provided a path forward from the affective quality of reason, contemporary religious freedom cases, like *Masterpiece Cakeshop*, demonstrate the manner in which the law, in its discursive use of reason, can retain and reconstitute its power. Serving both a generative and cumulative purpose, this chapter draws from the elements of this dissertation's preceding chapters in order to argue that contemporary religious freedom cases – even in their uses of testimonial resistance – are conditioned by the slippery and discursive nature of reason. Even if cases like *Masterpiece Cakeshop*, and those that will follow in its footsteps, appear to secure greater religious freedom for its subject, the inner logic of the law nonetheless serves to reconstitute, reformulate, and re-entrench the project of Lockean secularism for all who come before it.

Table of Contents

Acknowledgments.....	iii
<i>Chapter 1: Introduction</i>	1
1. Defining Discourse.....	7
2. The State of the Field: Secular Anxieties, Post-Secular Remedies.....	14
3. Generating a Theory of Lived Experience.....	19
4. Chapter Overview.....	20
Part I: The Power of Public Reason	
<i>Chapter 2: John Locke's Reason</i>	23
1. Enlightenments(s), Secularism(s), and Liberalism(s).....	26
2. The Tolerance of John Locke.....	35
3. Reason and the Regulation of Conduct.....	42
4. The Power of (Post) Secular (Public) Reason.....	46
<i>Chapter 3: Jürgen Habermas and the 'Remainders' of Public Reason</i>	48
1. The Role of Reason in the Public Sphere.....	51
2. The Decline of Secularism and the Rise of Post-Secularism.....	56
3. The Power of Post-Secular Public Reason, Revisited.....	60
4. The Specter of Locke and the Phenomenology of Post-Secular Religious Life.....	66
Part II: The Promise of Religious Freedom	
<i>Chapter 4: Theorizing Employment Division v. Smith</i>	71
1. A Methodology of Lived Experience: Towards Testimony.....	75
2. "To Reach the Full-Blooded Indian, Send Him a Full-Blooded Christian".....	82
3. Scalia's Belief-Action Distinction, Smith's Asymmetrical Burden.....	91
4. Testimonies of Emancipation.....	98
<i>Chapter 5: Tolerance after Masterpiece Cakeshop v. Colorado</i>	99
1. A Narrow Decision? Approaches to <i>Masterpiece Cakeshop</i>	103
2. The Regulatory Life of Cakes: A Return to <i>Smith</i>	106
3. Testimonies of Tolerance.....	108
4. The Future of Religious Freedom.....	110
Afterword.....	112
Bibliography.....	113

*For my parents (Fred and Martha), my sister (Rebecca),
and, of course, my dog (Bailey)*

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The Power of Reason

The well-springs of imagination, of course, lie less in logic than in the realm of human experience — the realm in which law ultimately operates and has meaning. Sensitivity to one's intuitive and passionate responses, and awareness of the range of human experience, is therefore not only an inevitable but desirable part of the judicial process, an aspect more to be nurtured than feared. [...] We cannot delude ourselves that the Constitution takes the form of a theorem whose axioms need mere logical deduction.
— Justice William J. Brennan, Jr.,
“Reason, Passion, and ‘the Progress of the Law’”¹

We have been steeped in a love of reasoned legal principle and a fear of passion, not noticing, perhaps, that love of constitutional reason itself is a passion toward which a bit of introspection and skepticism might be warranted.
— Robin West,
“Law’s Emotions”²

Consider the following example.

On January 20, 2015, the Supreme Court of the United States issued a rare unanimous decision in *Holt v. Hobbs*.³ Gregory Holt, also known as Abdul Maalik Muhammad, had sought an injunction and temporary relief from the enforcement of the Arkansas Department of Corrections’ grooming policy.⁴ In his brief to the Court, Holt argued that this policy, which permitted inmates to sport trimmed mustaches and quarter-inch beards solely as treatment for diagnosed dermatological conditions, substantially burdened his practice of the Islamic faith. By compelling him to remain clean-shaven, Holt continued, Arkansas was infringing upon his First Amendment right to the free exercise of religion.⁵ Although Holt believed his faith required him to refrain from trimming his

¹ Brennan, William J. Jr. “Reason, Passion, and ‘the Progress of the Law’” in *Cardozo Law Review* 10 (1988-1989), pp. 10, 16.

² West, Robin. “Law’s Emotions” in *Richmond Public Interest Law Review* 19 (2015), p. 346.

³ *Holt v. Hobbs* (574 US 859 (2015)).

⁴ Prior to the decision in *Holt*, the Arkansas Department of Correction’s grooming policy stated: “No inmates will be permitted to wear facial hair other than a neatly trimmed mustache that does not extend beyond the corner of the mouth or over the lip. Medical staff may prescribe that inmates with a diagnosed dermatological problem may wear facial hair no longer than one quarter of an inch. Failure to abide by the grooming standards is grounds for disciplinary action.” *Holt* at 4.

⁵ The First Amendment to the Constitution of the United States reads: “Congress shall make *no law respecting an establishment of religion, or prohibiting the free exercise thereof*; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the government for a redress of grievances.” Emphasis added.

beard,⁶ his argument to the Court nevertheless acknowledged that prohibitions against beards in penitentiaries furthered a “compelling security interest,”⁷ in that they ensured that harmful contraband could be readily identified and confiscated. As a result, Holt proposed⁸ to grow his beard to the length of one-half inch, a compromise he felt would demonstrate his submission to not only the dictates of his faith, but also to the correctional system of Arkansas. The Court, to a Justice, agreed: “We find it hard to take seriously the argument put forth by the State. It is preposterous to think that Holt could ever hide contraband in such a short beard.”⁹

However, the Court’s rejection of the arguments articulated by the Arkansas Department of Corrections was not an unqualified endorsement of Holt’s proposed compromise. To wit, in a heated courtroom exchange, the Court repeatedly pressed Holt’s lawyer – Douglas Laycock¹⁰ – for justification as to why an observant Islamic inmate would voluntarily restrict his beard to a mere half-inch in length. After affirming that Holt believed his “religion to require a full, untrimmed beard,” Laycock stated: “Half an inch, religiously speaking, is better than nothing. He is in a very difficult situation and I do not think he should be penalized for being reasonable.”¹¹ Seizing upon Laycock’s

⁶ Scholars of the Islamic faith divided on the matter of what constitutes an “appropriate” beard length. Although the Qur’an articulates no rules or laws regarding facial hair, different sects and practitioners have interpreted the *hadith* (speeches) of the Prophet Mohammad to mandate different lengths of beards: closely-cropped, fist-length, or untrimmed. In his handwritten petition for a writ of certiorari to the Supreme Court, Holt wrote: “Petitioner is a devout Salafi Muslim that follows the Sunnah of the Prophet Mohammad and the Salaf of the righteous predecessors. As part of this belief and practice, Petitioner believes that every Muslim male is to wear a *libyat* (beard) by ‘clipping the mustaches short and leaving the beard *as it is*’ [Sahih Al-Bukhari, Volume 7, *Hadith* 5893]” (p. 12, emphasis in original). Holt’s full petition can be viewed here: <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/02/Muhammad-Cert-Petition.pdf>. Last accessed July 5, 2017.

⁷ *Holt* at 6.

⁸ Holt was a *pro se* petitioner, meaning that – for much of the legal battle over the length of his beard – he acted as his own lawyer. Given that his initial appeal to the legal system included the half-inch compromise, and thus became part of the established record of fact, the Supreme Court was procedurally bound to address the issue in its final decision.

⁹ *Holt* at 10. Although the decision in *Holt* was unanimous, the Justices filed three separate opinions: a majority opinion written by Justice Samuel Alito, Jr. and joined by Justice Ruth Bader Ginsburg, a concurring opinion crafted by Justice Ginsburg and joined by Justice Sonia Sotomayor, and a second concurring opinion authored by Justice Sotomayor. In articulating the majority decision, Justice Alito relied on an interpretation the legal mandates set by *Burnell v Hobby Lobby* and the Religious Land Use and Institutionalized Persons Act (RLUIPA), which prohibit the state from imposing substantial burdens on the free exercise of religion absent a compelling interest. Here, Justice Alito is echoing the words of a Magistrate Judge, who – despite conceding that no contraband could be concealed within a half-inch beard – recommended that Holt remain clean-shaven. This recommendation was subsequently upheld by both the District Court and the Court of Appeals.

¹⁰ Douglas Laycock is the Robert E. Scott Distinguished Professor of Law at the University of Virginia. Laycock was assigned as legal advisor to Holt once the case reached the level of the Supreme Court (for more, see *supra* note 8). His reflections on arguing this case before the Supreme Court can be viewed here:

<https://www.youtube.com/watch?v=rs2a4nJibmY>. Last accessed May 28, 2017.

¹¹ Oral Argument in *Holt v. Hobbs*, October 7, 2014. A full transcript of the proceedings can be viewed here: <https://www.oyez.org/cases/2014/13-6827>. Last accessed May 28, 2017.

use of the word “reasonable,” Justice Antonin Scalia exclaimed: “Religious beliefs are not reasonable! It is what God tells you. God be reasonable! God would tell you that you are supposed to have a full beard.”¹² Shortly thereafter, Chief Justice John Roberts declared that Holt’s “reasonableness” regarding his religious practices would make the Court’s decision “too easy,” while Justice Elena Kagan suggested that Holt’s willing departure from a strict interpretation of Islam’s beard mandate was demonstrative of an argument that relied primarily on “felt intuitions” rather than substantive religious convictions.¹³ From the perspective of the Court, its ultimate decision – namely, to reaffirm the statutory rights of religious prisoners over and above the deference normally afforded correctional institutions on matters of inmate security – was wrested from the “preposterous”¹⁴ arguments put forth by the respondent and the unreasonably reasonable claims of the religious petitioner. This move, Roberts argued, was intended to absolve the Court from adjudicating similar free exercise claims on an “inch-by-inch basis.”¹⁵

Despite the Court’s determination to delineate the just boundaries between the mandates of the Islamic faith and the requirements of secular penitence,¹⁶ a near-facsimile of *Holt* began wending its way through the legal system moments after the Court announced its decision. This case, known as *Nance v. Miser*, concerned Keith Nance, an Arizona prisoner who had recently converted to Islam and sought the right to wear a fist-length beard in accordance with his interpretation of the teachings of the Prophet Mohammad.¹⁷ Nance argued that *Holt* relied upon “flawed religious reasoning,” flaws that, in turn, compelled the unjust enforcement of blasphemous grooming policies within Arizona’s penitentiaries.¹⁸ When *Nance* came before the United States Court of Appeals for the Ninth Circuit in early May 2017, Judge Alex Kozinski grew increasingly incredulous as representatives for Arizona endeavored to counter Nance’s religious claims by relying on *Holt*.¹⁹ In an unprecedented and unguarded moment, Kozinski interrupted oral argumentation, first, to declare that prohibitions against

¹² Oral Argument in *Holt*.

¹³ Oral Argument in *Holt*.

¹⁴ *Supra* note 9.

¹⁵ Oral Argument in *Holt*.

¹⁶ I use the phrase “secular penitence” to denote that both Holt and Nance were sentenced to prison for crimes unrelated to their religious practices – their atonement, in other words, was due to the state (rather than their god). In recent years, however, academics have increasingly begun to engage critically with the religious, and primarily Evangelical, quality of prison-based rehabilitation programs. This mode of study was presaged by Gustave de Beaumont and Alexis de Tocqueville’s anthropological commentary on the American prison system when they noted: “The prisoner in the United States breathes in the penitentiary a religious atmosphere that surrounds him on all sides.” As cited in: Beaumont, Gustave de and Alexis de Tocqueville. *On the Penitentiary System in the United States and its Application in France* (Carbondale: Southern Illinois University Press, 1964 [1833]), 122. For excellent contemporary treatments of this phenomenon, please see: Sullivan, Winnifred Fallers. *Prison Religion: Faith-Based Reform and the Constitution* (Princeton: Princeton University Press, 2009); and Modern, Jonathan Lardas. “Ghosts of Sing Sing, or the Metaphysics of Secularism” in *Journal of the American Academy of Religion* 75 (2007), pp. 615-650.

¹⁷ For more detail on acceptable beard lengths for Islamic men, please see *supra* note 6.

¹⁸ Oral Argument in *Nance v. Miser*, No. 16-15321, D.C. No. 2:14-cv-00500-SMM (9th Cir. June 29, 2017).

¹⁹ A video of the oral argumentation can be seen here:

https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000011568. Last accessed May 29, 2017.

full, religiously-mandated beards had no basis in “legitimate reason”²⁰ and, second, to issue a preemptive ruling to Arizona’s stunned counsel; following the conclusion of that day’s arguments, Kozinski stated, the penitentiary warden was to be directed to permit the unchecked growth of Nance’s beard. Kozinski then addressed the shocked courtroom: “Well, what did you want Nance to say? That he is going to hell if he remains clean-shaven? There is no rationale in the law; there is nothing there. It’s getting hot in here, no?”²¹ Lawyers, clerks, and lay persons alike left the courtroom that day wondering whether Kozinski would issue a formal ruling in *Nance* and, if he declined to do so, whether *Holt* could ever again be fully enforced. Two months later, the Ninth Circuit issued a non-precedential, unpublished opinion²² that simply stated that Nance had sufficiently demonstrated that his right to the free exercise of his religion had been burdened by Arizona’s criminal justice system.

Reactions to *Holt* and *Nance* were swift and unequivocal. Academics declared that, taken together, these decisions redoubled the American commitment to “robust judicial protection for religious freedom and individual rights.”²³ Similarly, legal analysts determined that the decisions “heralded a new period of rigorous federal civil rights statutes concerning the protection of religious practices,”²⁴ while popular political commentators suggested that the arguments advanced by both the Supreme Court and the Ninth Circuit “allayed suspicions that they are only interested in the free exercise rights of Christians.”²⁵ These reactions are not without merit.²⁶ Following on the heels of *Burwell v. Hobby Lobby*,²⁷ in which the Supreme Court ruled that Christian owners of closely-held corporations could decline to provide health insurance coverage for certain forms of birth control, *Holt* and *Nance* appeared to signal that the contemporary jurisprudence of religious freedom – correctly cultivated – must be both expansive and inclusive. The opinions in *Holt* and *Nance* support this conclusion. For instance, in writing for the majority in *Holt*, Justice Samuel Alito argued that the “petitioner’s beliefs regarding beard length are by no means idiosyncratic [...] but, even if they were, the protection of the Free Exercise Clause is not limited to beliefs which are shared by all members

²⁰ Oral Argument in *Nance*.

²¹ Oral Argument in *Nance*.

²² *Nance* at 8. Unpublished opinions are opinions that a court has designated as having non-binding precedential effect. They are written as resolutions to specific cases, prepared exclusively for the involved parties, and they are intended to have no effect on future cases. The text of such opinions is usually sparse, containing only a minimal recitation of the facts and a limited description of the law.

²³ Sidhu, Dawinder. “Holt v. Hobbs: Does a Muslim Prisoner’s Case Foreshadow the End of Affirmative Action?” in *Religion & Politics: A Project of the John C. Danforth Center on Religion and Politics* (January 28, 2015): <http://religionandpolitics.org/2015/01/28/holt-v-hobbs-does-a-muslim-prisoners-case-foreshadow-the-end-of-affirmative-action/>. Last accessed July 20, 2018.

²⁴ Eric Rassbach as quoted in: Volokh, Eugene. “From Eric Rassbach (Becket Fund) on What *Holt v. Hobbs* Means for Religious Liberty” in *The Washington Post* (January 20, 2015): <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/20/from-eric-rassbach-becket-fund-on-what-holt-v-hobbs-means-for-religious-liberty/>. Last accessed July 20, 2018.

²⁵ Greenhouse, Linda. “Reading Hobby Lobby in Context” in *The New York Times* (July 9, 2014): <https://www.nytimes.com/2014/07/10/opinion/linda-greenhouse-reading-hobby-lobby-in-context.html>. Last accessed July 20, 2018.

²⁶ Indeed, less than four years later, the Supreme Court would issue an opinion upholding an Alabama decision to allow an Islamic death row inmate access to his imam in the execution chamber. More will be said about this specific case in the conclusion to this dissertation. See: *Jefferson S. Dunn, Commissioner, Alabama Department of Corrections v. Domineque Hakim Marcelle Ray* (586 US ____ (2019)).

²⁷ *Burwell v. Hobby Lobby* (573 US ____ (2014))

of a religious sect.”²⁸ Alito’s written interpretation of the First Amendment, combined with the popular narratives regarding the transformative potential of *Holt* as well as *Nance*, fosters a vision of religious freedom that both permits and encourages diversity in the practice of discrete faiths – and, in doing so, mandates institutional support for the fulfillment of any such practices.

Yet even as *Holt* and *Nance* were received as welcome additions to the contemporary jurisprudence of religious freedom, little attention was paid to the discourse deployed by the courts as they parsed whether the petitioners’ claims triggered the free exercise protections guaranteed by the First Amendment. More precisely, in both popular and academic reactions to the decisions, no mention was made of the repeated reliance of both the Supreme Court and the Ninth Circuit on the language of reason – a verbal reliance that endeavored to push the petitioners towards orthodox acts of faith within the courtroom, even as the subsequent written decisions celebrated heterodoxy. To wit, at crucial moments during oral argumentation, reason operated as a conduit through which competing – and, at times, complementary – understandings of religious mandates and legal obligations could flow. Reason facilitated the invalidation of existing sets of prison-based policies, the addition of nuance to previously recorded religious testimony, and the justification of future courses of legal action, but, as deliberations within each court progressed, its constitutive role solidified: it became an ideal to which legal actors could appeal such that, in order to be recognized as devout, Islamic inmates would be required to adhere to the strictest interpretations of Mohammedan texts. To do otherwise, so the narratives went, would be to belie the steadfastness of their beliefs. Read in this manner, *Holt* and *Nance* prevailed in their petitions not because the courts recognized the strength of their commitment to acts of “unreasonable” faith, a commitment that would necessitate the unchecked growth of their beards, but rather because the legal rationales underlying the Arkansan and Arizonan prohibitions on inmate beards were themselves “preposterous.”²⁹

The discourse found in *Holt* and *Nance* suggests a larger story waiting to be told about the role of reason in the laws and politics of religious freedom.³⁰ Emanating from legal actors as well as lay individuals, reason-based discourse constructs a powerful narrative that connects local, state, and federal courtrooms in the effort to settle the just boundaries of public – and, in some instances, private – religious life. A cursory survey of contemporary religious freedom jurisprudence indicates that *Holt* and *Nance* are not isolated discursive moments. In the last half-century alone, appeals to reason have determined whether: Baptist florists may refuse to create wedding arrangements for same-sex couples;³¹ Amish children should attend public schools beyond the eighth grade;³² Evangelical nurses can decline to participate in emergency surgeries that endanger the fetuses of pregnant women;³³ Islamic women may wear headscarves, contrary to company dress codes;³⁴ Seventh Day Adventists should be available to work on Saturdays in order to be eligible for unemployment benefits;³⁵

²⁸ *Holt* at 8, citing to *Thomas v. Review Board of Indiana Employment Security Division* (450 US 707, 715-716 (1981)).

²⁹ *Supra* note 9.

³⁰ The sentiment expressed here owes a debt to: Hurd, Elizabeth Shakmun. *Beyond Religious Freedom: The New Global Politics of Religion* (Princeton: Princeton University Press, 2015). My thanks to Beth for her feedback on an earlier draft of this chapter at the annual meeting of the American Political Science Association in September 2017.

³¹ *Washington v. Arlene’s Flowers, Inc.* (389 P.3d 543 (2017))

³² *Wisconsin v. Yoder* (406 US 205 (1972))

³³ *Shelton v. University of Medicine and Dentistry of New Jersey* (223 F.3d 220 (2000))

³⁴ *Equal Employment Opportunity Commission v. Abercrombie and Fitch Stores, Inc.* (575 US ____ (2015))

³⁵ *Sherbert v. Verner* (374 US 398 (1963))

Indigenous spiritualists may consume federally-regulated hallucinogenic drugs;³⁶ Santeríaans should intend to consume the animals they ritually sacrifice;³⁷ members of the Ku Klux Klan can claim that the swastika as a religious symbol;³⁸ Jewish families may erect Stars of David as gravestone markers in privately-owned, non-denominational cemeteries;³⁹ and much more.

The prominent role played by reason in the adjudication of free exercise claims spurs several questions. Why do religious individuals and legal actors reach for the language of reason in response to faith-motivated requests for accommodation? What work is reason believed to undertake, such that the communal, democratic well-being of all persons – religious and non-religious alike – can be secured? What are the social and political consequences of the law’s juxtaposition of the possession of reason with the outward practice of or adherence to religion? How does reason shape not only the development of religious freedom jurisprudence, but also the continued relationship of religious individuals to their faiths? And finally, if appeals to reason are found to adversely impact what Pamela Slotte calls “the space in which people are given the opportunity to live out their faith,”⁴⁰ what alternatives to or rehabilitations of its use exist?

In this dissertation, I endeavor to answer the questions posed above. Taking the presence of reason-based discourse in the legal evaluation of faith-motivated accommodation claims as my point of departure, I examine the impact that such discourse has on the ability of the law to secure religious freedom in the everyday lives of individuals. I historicize, contextualize, and theorize the impulse of the law and its interlocutors to draw on the language of reason in order to illuminate the affect it has on the material and metaphysical well-being of religious individuals, particularly those who claim in court that their right to the free exercise of their religion has been unjustly abridged.⁴¹ By exploring

³⁶ *Employment Division, Department of Human Resources of Oregon v. Smith* (494 US 872 (1990))

³⁷ *Church of the Lukumi Babalu Aye v. City of Hialeah* (508 US 520 (1993))

³⁸ *Swartzentruber v. Gunit Corp* (99 F.Supp.2d 976 (2000))

³⁹ *Warner v. Boca Raton* (64 F.Supp.2d 1272 (1999))

⁴⁰ Slotte, Pamela. “The Religious and the Secular in European Human Rights Discourse” in *Finnish Yearbook of International Law* 21 (2010), p. 54.

⁴¹ Although more will be said about this in the sections below and in future chapters, it is important to pause briefly in order to specify what I mean when I use the language of *affect*. Intimately tied to the critical study of disciplinary and discursive power à la Michel Foucault, affect, which is also often used in its adjectival form as *affective*, indicates experience of and reaction to the world. Affect encompasses not only the powerful delimitation of choices, attachments, and large-scale social, political, and legal change, but also the emotional experience that accompanies the recognition of one’s subjectivity. In this dissertation, to speak of affect or affective power is to acknowledge that discourse shapes how religious individuals view the possibility of achieving lived religious freedom and how they narrate their efforts to challenge such power. Furthermore, as will be seen in the section on discourse below, first-person narration – as an expression of affect – can be harnessed as a means to challenge, resist, and rehabilitate the discursive character of reason. For more, see: Gould, Deborah. *Moving Politics: Emotion and ACT UP’s Fight against AIDS* (Chicago, IL: The University of Chicago Press, 2009). See also: Connolly, William. *Neuropolitics: Thinking, Culture, Speed* (Minneapolis, MN: University of Minnesota Press, 2002), esp. pp. 10, 44. Clough, Patricia Ticineto and Jean Halley (eds). *The Affective Turn* (Durham, NC: Duke University Press, 2007). Krause, Sharon. *Civil Passions: Moral Sentiment and Democratic Deliberations* (Princeton, NJ: Princeton University Press, 2008). Leys, Ruth. “The Turn to Affect: A Critique” in *Critical Inquiry* 37 (2011), pp. 434-472. Markell, Patchen. “Making Affect Safe for Democracy? On Constitutional Patriotism” in *Political Theory* 28 (2000), pp. 38-63. Massumi, Brian. *Parables for the Virtual: Movement, Affect, Sensation* (Durham, NC: Duke University Press, 2002). Shouse,

the ways in which a discourse of reason has been, and continues to be, required of those who both enforce and seek access to the rights and liberties promised by the American constitution, I excavate and analyze the tensions that emerge between the “forms of religion that are produced and governed”⁴² by the law’s discursive reliance on reason and the broader fields of religious practice the law is required to support.

To further elucidate the central argumentative project of my dissertation, this introduction proceeds in four sections. The first section clarifies what constitutes discourse and its affective power. The second section maps the existing terrain of scholarship on matters of modern religious practice. I investigate how scholars from across the disciplines – such as law, sociology, philosophy, and political science – have relied upon reason to mitigate the impact of what some have called “the western world’s religious renewal”⁴³ on the law- and policy-making apparatuses of secular liberal democratic states. I trace how the term has migrated from historical doctrines to contemporary theoretical discourses, even as few have attended to why the term emerged in the context it did and how its use reinforces certain norms and ideals at odds with religious free exercise. The third section responds to the scholarly lacunae identified in the preceding section by articulating the methodological approaches present in and the contributions emerging from this dissertation. I argue that attempts to render contemporary religious practice sensible for law- and policy-makers often elide the lived experiences of religious individuals. While much academic and legal energy has been devoted to insulating the institutions of secular liberal democracies from the influence of religious belief, comparatively little energy has been expended on understanding how these efforts constrain, alter, or otherwise impact the ability of religious individuals to not only carry out the mandates of their faiths in their day-to-day lives, but also feel as though they are respected members of a democratic community. Through an engagement with what I call an “archive of legal discourse” comprised of depositions, court transcripts, and community-based interviews with religious plaintiffs, my dissertation illuminates how contemporary scholarship at once underestimates the affective powers of reason on religious practice and overestimates the ease with which religious individuals can separate their deeply entrenched beliefs from their public conduct. This schism, I further suggest, sustains legal inequalities and political injuries within the daily lives of religious individuals. The fourth and final section of this introduction provides an overview of the remaining chapters of this dissertation. Taken together, these chapters advocate for the rehabilitation of reason within the adjudication of religious freedom claims – a rehabilitation that ameliorates the legal, political, and spiritual harms done by traditional “modes” of reasoned discourse and charts a pathway towards recognizing the plural and multifaceted values expressed by and through faith-based practice.

I. Defining Discourse

In the example of *Holt* and *Nance* recounted above, reason functioned as a fulcrum around which a series of complex discussions on matters of private faith and public law revolved. Almost cypher-like in its capacity to convey multiple meanings to a variety of individuals, reason defied definition: with

Eric. “Feeling, Emotion, Affect” in *Journal of Media and Culture* 8 (2005), pp. 1-15. Weber, Max. *Economy and Society: An Outline of Interpretive Sociology* (Berkeley, CA: University of California Press, 1978).

⁴² Hurd, *Beyond Religious Freedom*, p. 2.

⁴³ Habermas, Jürgen. “Religion in the Public Sphere” in *European Journal of Philosophy* 14 (2006), p. 2. See also: Berger, Peter L. *The Desecularization of the World* (Washington DC: Ethics and Public Policy Center, 1999); and Audi, Robert. *Democratic Authority and the Separation of Church and State* (Oxford: Oxford University Press, 2011).

each new invocation and interlocutor, its elasticity – its ability to be deployed as a means to assuage persistent policy concerns, respond to legal oversights, or convey or contradict deeply held personal convictions – increased. I intimated earlier that reason’s slippery-yet-constitutive presence in *Holt* and *Nance* lent itself to being understood as a discursive phenomenon, one that not only persisted through the adjudication of religious cases both past and present, but also compelled an investigation into its affective influence on the law and its subjects. But what does it mean to treat the law’s reliance on reason as a discourse, rather than an oft-repeated linguistic tic? Below, I posit a working definition of discourse that will act as a lodestar throughout the remainder of this dissertation, drawing both from the foundational theories of Michel Foucault and contemporary reformulations of and engagements with such theories by scholars like Lida Maxwell, Elisabeth Anker, and Sonali Chakravarti. For while Foucault attends to how the repeated stylization of language possesses the power to shape the everyday lives of individuals, he does so in a manner that does not fully account for, first, how contemporary law- and policy-making institutions can reproduce non-hierarchical, circulative power and, second, how such power can be resisted – two concepts central to this dissertation.

In the opening pages of *Sex and Secularism*, Joan Scott argues that the collected works of Foucault, the foremost theorist of language and power,⁴⁴ can illuminate new pathways for the study of religious life in the contemporary moment. She suggests that as academics work to identify how best to accommodate public acts of faith into ostensibly secular polities – an incorporation that I will discuss below and further explore in Chapters Two and Three – they too often accept unquestioned the language used to structure political or legal institutions. By leaving unexamined concepts like “secularism” or “liberalism,” Scott notes, it is possible that such scholars will perpetuate forms of accommodation or governance that are hostile to the full realization of religious freedom. To counter any such possibilities, Scott proposes that, following Foucault, persistent concepts in the study of religion be examined as discourse or, in its adjectival form, as discursive. By doing so, these concepts will be recognized as “operations whose generative effects need to be studied in their historical contexts,”⁴⁵ a move that will provide a framework for determining how words, statements, and beliefs possess an inherent power that shapes political and legal institutions as well as the experiences of those who live within said institutions. Yet crucially for Scott, Foucault’s vision of power emerges not as the display of sovereign force commonly found in historical accounts of the state,⁴⁶ but rather as

something which circulates, or rather as something which only functions in the form of a chain. It is never localized here or there, never in anybody’s hands, never appropriated as a commodity or a piece of wealth. Power is employed and exercised through net-like organization. And not only do individuals circulate between threads; they are always in the position of simultaneously undergoing or exercising this power.⁴⁷

Foucault posits that power does not necessarily assume a monolithic form, but instead coexists alongside, and can even come into conflict with, other forms of power. Power operates in a subtle, yet deeply cunning, fashion: it alters and reconstitutes itself on an individual level, alternatively tightening and loosening its threads when confronted by efforts to be free from its grip. Foucault further argues, through an historically-inflected analysis of modernity’s treatment of prisons, sexuality,

⁴⁴ Mills, Sara. *Discourse* (New York: Routledge, 1997), pp. 14-15.

⁴⁵ Scott, Joan W. *Sex and Secularism* (Princeton: Princeton University Press, 2018), p. 4.

⁴⁶ See, for instance: Austin, John. *The Providence of Jurisprudence Determined* (Indianapolis: Hackett Publishing Company, 1998 [1832]). Hobbes, Thomas. *Leviathan* (New York: Penguin Classics, 1982). Weber, Max. *The Vocation Lectures* (Indianapolis: Hackett Publishing Company, 2004).

⁴⁷ Foucault, Michel. *Power/Knowledge: Selected Interviews & Other Writings, 1972-1977* (New York: Pantheon Books, 1977), p. 98.

and mental illness, that the ultimate purpose of power is to “discipline” individuals by coaxing them to willingly cultivate, and then submit to, a normalized standard that can be monitored and controlled by other individuals or institutions.⁴⁸ It is this disciplinary tendency that Scott concludes is the most pertinent aspect of Foucauldian power: it renders individuals “subject to” forms of discourse that simultaneously restrict and reveal acceptable avenues for conduct and speech.⁴⁹ Accordingly, under this rubric, academic and legal attempts to identify “proper” forms of accommodation that rest on historical terms or ideals may reproduce and reinforce certain normalized standards of religious conduct.

While Scott’s invocation is helpful in sketching the power implicit in discourse, and in forging new avenues for the study of religious exercise, it does not fully articulate what constitutes discourse itself – a task for which a return to Foucault is necessary. For Foucault, discourse represents something *more* than ordinary language; that is to say, it is something whose components exceed stable and objective definitions. Cast as a “prodigious machinery” comprised of grammar, fragments of speech (like words or statements), and social practices, discourse engages in a relentless cycle of concealment and, like the power it ultimately produces, it occurs at both the level of the individual and institution.⁵⁰ Foucault argues that, over time, these individuals and institutions will isolate fragments of speech and attempt to redeploy them in a manner that appears “utterly afresh and innocent, reborn in all [their] vigor.”⁵¹ With each new articulation within each new epoch, fragments of speech will seemingly acquire – and then seemingly shed – knowledge, meaning, and experience. This process, Foucault determines, undergirds discourse and its attendant power. He writes:

The problem of discourse that presents itself is to determine what form of relation may be legitimately described between these different series; what vertical system they are capable of forming; what interplay of correlation and dominance exists between them; what may be the effect of shifts, different temporalities, and various rehandlings; in what distinct totalities certain elements may figure simultaneously; in short, not only what series, but also what ‘series of series’ – or, in other words, what ‘tables’ it is possible to draw up.⁵²

The spoken or written word, when understood as an element of discourse, acts as a repository of historical meaning that resists the attempts made by individuals and institutions to “shed” its past. New articulations of speech or prose, Foucault determines, retain the components of their previous iterations, such that they are able to be called forth – without conscious intent – as a means to discipline.⁵³ In this manner, discourse works to constitute novel objects or experiences as conventional or neutral, concealing its power by relying on historical repositories to condition the range of responses that can emerge from unprecedented conversations. Individuals, on this reading,

⁴⁸ Foucault’s articulation of disciplinary power emerges over the course of his lifetime, but crucial markers in its development can be seen in the following works: Foucault, Michel. *Discipline and Punish: The Birth of the Modern Prison* (New York: Vintage Books, 1995). Foucault, Michel. *The History of Sexuality, Volume 1: An Introduction* (New York: Vintage Books, 1990). Foucault, Michel. *Madness and Civilization: A History of Insanity in the Age of Reason* (New York: Vintage Books, 1988).

⁴⁹ Scott, *Sex and Secularism*, p. 11. Foucault, *Power/Knowledge*, p. 93.

⁵⁰ Foucault, Michel. *The Archaeology of Knowledge and the Discourse on Language* (New York: Vintage Books, 2010), p. 220.

⁵¹ Foucault, *The Archaeology of Knowledge*, p. 221.

⁵² Foucault, *The Archaeology of Knowledge*, p. 10.

⁵³ Foucault, *The Archaeology of Knowledge*, p. 14.

are reconfigured as governed subjects: that is to say, their lives and the choices they make are structured by the disciplinary discursive techniques of political and social institutions.⁵⁴

But what might Foucault's theory of discursive power illuminate when extended to the realm of the law? Despite the extensive nature of Foucault's body of work, he does not articulate a positive theory of jurisprudence⁵⁵ and, when he does mention law directly, it is often treated as a vestige of sovereign-backed, hierarchical demonstrations of force.⁵⁶ Scholars of the law frequently echo this characterization as a critique of legal practice. Robert Cover, for example, argues that legal actors are often complicit in the visitation of violence upon vulnerable bodies. He notes that, even if a judge does not physically punish an alleged criminal within her court, the words she speaks in interpreting the mandates of the law nonetheless possess the potential for "pain, death, and [...] violent domination."⁵⁷ Austin Sarat and Thomas Kearns likewise craft a vision of contemporary legal practice that, much like Hobbes's Leviathan, is "intent on (and is largely successful at) threatening violence."⁵⁸ This violence, Sarat and Kearns continue, is "inflicted wherever legal will is imposed on the world, wherever a legal edict, a judicial decision, or a legislative act cuts, wrenches, or excises life" and can be identified "at the level of interpretation, in the cerebral effort to give voice to law and to make rules work."⁵⁹ On such accounts, the violence inhering in operations of justice is so all-encompassing that it cannot be separated from even the most mundane efforts made to decipher statutes, legislative acts, or precedents. To engage with the law is to thus participate within a process "designed to cut,"⁶⁰ one that forcibly renders the bodies before the bar subject to sovereign power – and undermines the law's ability to be understood solely as a vehicle for discursive, net-like discipline.

Yet even as Foucault and a cadre of his interlocutors envision the law as a vehicle for hierarchical demonstrations of state power, a growing community of legal and political theorists have

⁵⁴ Foucault, Michel. *Security, Territory, and Population: Lectures at the Collège de France, 1977-78* (New York: Palgrave Macmillan, 2009).

⁵⁵ Tadros, Victor. "Between Governance and Discipline: The Law and Michel Foucault" in *Oxford Journal of Legal Studies* 18 (1998), pp. 75-103.

⁵⁶ Foucault often refers to "juridical power" over the course of his works, but this should not be taken as synonymous with the law; it is instead the arrangement and representation of power associated with a sovereign-backed, punishment-oriented understanding of the legal system. Foucault's concept of juridical power makes some sense, given that the prevailing treatments of the law at the time of his writings were largely beholden to John L. Austin and H.L.A. Hart's respective visions of positivistic jurisprudence. Although Austin's scholarship relied more heavily on a system of sovereignty and sanctions than Hart's did, there is nonetheless a palpable and hierarchical order present within both works. For Foucault, then, juridical power could not fully capture the "threads" of modern power. For a nuanced understanding of Foucault's troubled relationship with positive law, see: Constable, Marianne. *Just Silences: The Limits and Possibilities of Modern Law* (Princeton: Princeton University Press, 2005). For more on positive conceptions of law, see: Austin, *The Providence of Jurisprudence Determined* (supra note 43) and Hart, H.L.A. *The Concept of Law* (Oxford: Oxford University Press, 2012).

⁵⁷ Cover, Robert. "Violence and the Word" in *Yale Law Journal* 95 (1995), pp. 1602, 1604.

⁵⁸ Sarat, Austin and Thomas R. Kearns. "A Journey Through Forgetting: Toward a Jurisprudence of Violence" in Sarat and Kearns, eds. *The Fate of the Law* (Ann Arbor: University of Michigan Press, 1991), p. 209.

⁵⁹ Sarat and Kearns, "A Journey Through Forgetting," p. 210.

⁶⁰ Derrida, Jacques. "Force of Law: The 'Mystical Foundation of Authority'" in *Cardozo Law Review* 11 (1990), pp. 961-62. See also: Minow, Martha. "Words and the Door to the Land of Change: Law, Language, and Family Violence" in *Vanderbilt Law Review* 43 (1990), p. 1665.

adopted and subsequently adapted Foucault's methodology to illuminate the "meaning and function of the law's varying modes of formal expression."⁶¹ Although they acknowledge the law's punitive character, so too do they turn to the everyday processes of the law to uncover concealed repositories of meaning and discipline.⁶² Net-like power, they argue, emerges when an individual articulates a grievance against his peers or the state. In order for this grievance to be comprehensible, and for a remedy to be identified, it must cohere with already-existing procedures and policies; the very possibility of offering a remedy to an experienced harm, in other words, is conditioned by the normalizing posture of the law.⁶³ If the grievance falls outside the spectrum of recognized harms and their remedies, fragments of discursive speech – evident when a plaintiff sits for a deposition or a lawyer presents evidence before empaneled judges – will either realign the plaintiff's claim to fit within an acceptable matrix of meaning or categorize the plaintiff and his claim as "outside acceptable legal order."⁶⁴ This latter move represents a significant extension of not only Foucault's theory, but also his understanding of the law. Rather than be caught up in the disciplinary net of discursive power, an individual's claim is rendered incomprehensible – a move that can deny to him even the veneer that constitutional ideals like freedom and equality are attainable through the law's procedural channels. This denial can indeed be experienced as a forceful punishment, but unlike earlier examples, it does not necessarily possess a physical or "cutting" character; it instead possesses a psychic or metaphysical quality of political and legal disempowerment or disenfranchisement. Legal discourse, on this reading, integrates palpable juridical force with the subtler, power-laden operations of language.

Recognizing the hybrid character of the law illuminates potential avenues for both resisting its power and ushering in concrete political, legal, and social change. In recent years, communal spaces that deal directly with the regulations of the law – spaces such as the courtroom or the public sphere – have captured the attention of political and legal theorists. Such theorists work alongside as well as against Foucault,⁶⁵ taking seriously the critiques that have often been leveled against his scholarship, which suggest that his construction of discourse and disciplinary power is too totalizing.⁶⁶ Free will

⁶¹ Ewald, François. "Norms, Discipline, and Law" in *Representations* 30 (1990), pp. 138-161, at p. 139.

⁶² See, for instance: Hunt, Alan and Gary Wickham. *Foucault and Law: Towards a Sociology of Law as Governance* (Chicago: Pluto Press, 1994). De Sousa Santos, Boaventura. *Toward a New Common Sense: Law, Science, and Politics in Paradigmatic Transition* (Dayton, OH: LexisNexis, 2002). Golder, Ben and Peter Fitzpatrick. *Foucault and the Law* (New York: Routledge, 2009). Baxter, Hugh. "Bringing Foucault into the Law" in *Stanford Law Review* 48 (1996), pp. 449-473.

⁶³ Golder and Fitzpatrick, *Foucault and the Law*, p. 129. See also: Sharpe, Andrew. *Foucault's Monsters and the Challenges of Law* (New York: Routledge, 2010).

⁶⁴ Sharpe, *Foucault's Monsters*, 14.

⁶⁵ Given the expansive nature of Foucault's work, it is difficult to work consistently with or against his theories. Foucault himself acknowledges and appreciates this difficulty, encouraging his interlocutors to identify a productive and useful vein of inquiry to follow. He writes: "All my books [...] are little tool boxes [...] if people want to open them, to use this sentence or that idea as a screwdriver or spanner to short-circuit, discredit or smash systems of power, including eventually those from which my books have emerged [...] so much the better." As cited in: Mills, *Discourse*, p. 15.

⁶⁶ See, for example, the essays collected in: Kelly, Michael, ed. *Critique and Power: Recasting the Foucault/Habermas Debate* (Cambridge: The MIT Press, 1994). There is, however, some controversy and confusion over whether or not Foucault views his concept of power as totalizing. Kelly notes that, at a memorable conference, Foucault surprised attendees by declaring that the liberal state could, over time, be perfected and emancipated from the affects of power. This contribution runs, as Kelly

and liberty of choice, so the critiques go, can never be fully realized or fully exercised within the realm of Foucauldian interpretations of discourse; on this account, even if an individual were to challenge directly the operations of the state through the channels provided by the law, her actions would be deradicalized and disempowered through the normalizing effects of discourse.⁶⁷ Yet for contemporary scholars like Maxwell, Anker, and Chakravarti, shared spaces permit expressions of fear, pain, or outrage that reveal the subtle, yet palpable, harm that often accompanies discourse. This revelation, they argue, possesses the potential to challenge successfully and then subsequently remedy the punitive impulses of political and legal discourse. Through an engagement with “lost cause” public trials,⁶⁸ melodramatic outcries of vulnerability and discontent,⁶⁹ and practices of listening in moments of judgment,⁷⁰ these scholars highlight how practices of storytelling recover individual agency by disrupting the efforts of legal discourse to discipline its subjects. First-person narrations of emotional experiences, in other words, demonstrate how the enforcement of laws or the interpretations of statutes can have lived consequences for individuals – they demonstrate how what was once assumed to be “mere” bodily harm can induce psychic trauma. As Chakravarti explains, the confines of a courtroom compel legal actors to “listen to anger [and] to be open to difficult content conveyed in an unsettling tone,” a praxis that can rehabilitate the “process of justice and its guarantees for democratic inclusion.”⁷¹ Storytelling, also known as testimony, thus cultivates an “intimate relationship [and] an attentiveness to the subtleties of language”⁷² that subverts the compulsion of legal discourse to place incomprehensible claims outside the realm of its normalized order and, in doing so, recognize and validate the voices of those who are often marginalized.⁷³

How might the foregoing components and complications of discourse be marshalled into a definition that can be applied for the purposes of this dissertation? To answer this question, a brief return to *Holt* and *Nance* can clarify not only how reason operates as a discourse in multiple ways, but also how it possesses the potential to expand the current limits of religious freedom jurisprudence. In its clearest iteration, reason operated as a form of hierarchical, juridical force in that it emanated from those in positions of power (the Justices and judges) to those with less power (the petitioners); it imbued the courts’ respective legal actors with the ability to imprison its subjects without accommodation for their beards – a denial that would have left a palpable imprint on not only their bodies, but also their souls. Yet in these moments, reason also operated as a repository of meaning. In oral argumentation, reason articulated new and concealed past iterations of itself, such that it was able to delimit the acceptable boundaries of religious expression, adjudicate the sincerity of the plaintiffs’ beliefs, and categorize the legal remedies available to the courts. Reason, in other words, served to apprehend the claims made by Holt and Nance, interpret them in consultation with already-

states, contrary to the argument Foucault himself advances in *Discipline and Punish* and *The History of Sexuality (Part 1)*.

⁶⁷ Brown, Wendy. *States of Injury: Power and Freedom in Late Modernity* (Princeton: Princeton University Press, 1995), p. 66.

⁶⁸ Maxwell, Lida. *Public Trials: Burke, Zola, Arendt, and the Politics of Lost Causes* (New York: Oxford University Press, 2015).

⁶⁹ Anker, Elisabeth R. *Orgies of Feeling: Melodrama and the Politics of Freedom* (Durham, NC: Duke University Press, 2014).

⁷⁰ Chakravarti, Sonali. *Sing the Rage: Listening to Anger after Mass Violence* (Chicago: The University of Chicago Press, 2014).

⁷¹ Chakravarti, *Sing the Rage*, pp. 4, 5.

⁷² Chakravarti, *Sing the Rage*, p. 173.

⁷³ *Supra* note 63.

existing norms, and render the resultant decisions a natural extension of precedent or policy. But more subtly, reason exhibited a productive and constitutive force: for while the fragments of speech sought to temper the “newness” of Holt and Nance’s grievances, the petitioners *themselves* limited the scope of their claims and desired remedies, a limitation that also narrowed the full expression of their faith and the full exercise of their public conduct.⁷⁴ In Foucauldian parlance, and in accordance with the hybridized interpretation of legal discourse, Holt and Nance produced their own subjectivity in accordance with the dictates of reason – that is, rather than risk having their petitions labeled as incomprehensible under the apparatus of the law, they proactively and preemptively limited their claims for religious freedom.

Interpreting *Holt* and *Nance* through the framework of discourse challenges the popular narrative that these cases usher in a new era of American religious freedom. Indeed, the combination of the different strands of discourse – its ability to operate through fragments of speech, its relationship to juridical force, its efforts to disempower those with whom it interacts – conspires to cast doubt upon whether Holt and Nance could have ever truly achieved religious freedom, simply because they had engaged with the law. This view of the law and individual agency, as Foucault’s critics noted above, is deeply totalizing. But what possibilities exist for reclaiming *lived* religious freedom alongside *legal* religious freedom? What possibilities, in other words, exist for the courts’ recognition of Holt and Nance’s faiths, within their reason-based framework and beyond the “preposterous” quality of Arkansan and Arizonan laws?⁷⁵ Although answering such questions motivates the latter half of this dissertation, it is nonetheless helpful to hint at reason’s potential here as it demonstrates how – even in the face of ostensibly successful court challenges – discursive power exists and can be rehabilitated. One of the clearest moments in which reason’s power was palpable in the above examples was Scalia’s incredulity at Holt’s voluntary narrowing of Islam’s beard mandate, specifically when he declared Holt’s actions to be “unreasonably reasonable.” In this moment, Scalia advanced an orthodox interpretation of Holt’s faith and declared him, simultaneously, unfit for his religion and unfit for the protection of the law. Yet imagine that Holt had had the space within the courtroom to detail, first, how his deep engagement with Islamic *hadith* had shown that devout men may wear varying beard lengths⁷⁶ and, second, that this engagement itself had been motivated by the significant fear that – should his claim be denied – he would be living a blasphemous life, adding spiritual punishment to his already-existing carceral punishment. Issuing such a declaration in such a space could have confronted not only the Court’s assumption that reason cannot exist alongside religious practice, but also how its current use of reason fails to comprehend what motivates religious freedom petitions. Through an engagement with Holt’s testimony, it would have been possible to issue a decision that loosened the net-like threads of reason’s discursive power, thereby carving out a legal pathway for the expansion of what counts as “appropriate” religious practice and validating Holt’s membership within and contributions to the polity.

⁷⁴ *Supra* note 7. There is also fruitful connection to be made here among Foucault’s treatment of prisons, the emergence of disciplinary power, and Holt and Nance’s residency within both. Although this beyond the immediate scope of this dissertation, suffice it to say that it could be argued that Holt and Nance were predisposed to constitute themselves as a subject to power *because* they were already conditioned to do so. However, I argue that *Holt* and *Nance* are not isolated instances of disciplinary power; as shall be seen shortly, this pattern persists across religions and locales. For more on Foucault’s treatment of prisons, see the citations *supra* note 46.

⁷⁵ *Supra* note 9.

⁷⁶ *Supra* note 6.

In the foregoing section, I have argued that discourse operates as an elastic, and deeply powerful, tool of the law. More precisely, I have argued that, through an initial analysis of two of the most recent religious freedom cases, courts have appealed to reason as a mode of discourse – appeals that have the potential to disempower and disenfranchise those who desire constitutional protection for their religious practices. Within this framework, however, I have also identified potential pathways to resist and rehabilitate reason: through the productive cultivation of an emotions-based form of testimonial storytelling. In doing so, in both my identification of and solution to the problem of discourse, I sought to highlight how the language deployed by courts and their interlocutors is a site rich for theoretical political and legal investigation. Yet within my efforts to delineate a working definition of discourse, a compelling question has fallen by the wayside: if scholars of religious life were to take up Scott’s earlier call to incorporate an examination of discourse into their work, what might this mean for the current and future state of the field? To answer this question is to undertake an examination into contemporary scholarship on religion and modernity. Across the disciplines, reason is understudied and omnipresent – a complicated status that, as I argue in the penultimate section to this Introduction, compels the use of a unique methodological approach.

II. The State of the Field: Secular Anxieties, Post-Secular Remedies

This dissertation takes place within a scholarly field that is grappling with a vibrantly pluralistic and robust religious modernity, a field that stands in contrast to several centuries of academic writing that argues that the separation of the state and its various institutions – including the law – from religion achieves and preserves the guarantee of justice for all individuals.⁷⁷ Empirical and sociological data, mined from surveys as well as fieldwork, emphasize that rather than retreat from associative life, as theorists of secularism speculated it would do,⁷⁸ religion has taken on a new and deeply active form over the course of the last half century.⁷⁹ José Casanova, for instance, notes that the modern moment has been dominated by the appearance of “social movements that are religious in nature and have challenged in the name of religion the legitimacy and autonomy of secular spheres. [...] Religious individuals and institutions have refused to restrict themselves to the pastoral care of souls, instead

⁷⁷ Sullivan, Winnifred Fallers and Robert Yelle. *After Secular Law* (Stanford: Stanford University Press, 2011), p. 1.

⁷⁸ See, for instance: Berger, Peter L. *Sacred Canopy: Elements of a Sociological Theory of Religion* (Garden City, NY: Doubleday, 1967). Locke, John. *A Letter Concern Toleration* (Amherst, NY: Prometheus Books, 1990). Taylor, Charles. *A Secular Age* (Cambridge: Harvard University Press, 2007). Weber, Max. *The Protestant Ethic and the Spirit of Capitalism* (New York: Oxford University Press, 2009).

⁷⁹ The nature of this religious renewal will be explored in more depth in Chapter Two. Further academic characterizations of this phenomenon can be seen in: Bellah, Robert N. *Habits of the Heart: Individualism and Commitment in American Life* (Berkeley: University of California Press, 1996). Berger, Peter L. *The Desecularization of the World: Resurgent Religion and World Politics* (Washington DC: Ethics and Public Policy Center, 1999). Gorski, Philip S., Jonathan VanAntwerpen, et al., eds. *The Post-Secular in Question: Religion in Contemporary Society* (New York: New York University Press, 2012). Inglehart, Ronald and Pippa Norris. *Sacred and Secular: Religion and Politics Worldwide* (Cambridge: Cambridge University Press, 2004). For empirical survey data, consult: Harvard University’s *The Pluralism Project*: <http://pluralism.org>, last accessed June 5, 2019. Wuthnow, Robert. *America and the Challenges of Religious Diversity* (Princeton: Princeton University Press, 2005).

raising questions about the interconnections of private and public morality.”⁸⁰ The strength of this push to have one’s private beliefs cohere with one’s public presence has even compelled Rodney Stark and Roger Fink to remark that “after nearly three centuries of utterly failed prophecies, it seems time to carry this doctrine of secularism to the graveyard of failed theories, and there to whisper ‘*requiescat in pace*.’”⁸¹

The desire to declare secularism dead⁸² can be attributed, at least in part, to its status as a discourse. Following Foucault’s declaration that one of the most productive ways to think about discourse is to approach it not as a group of signs or a stretch of text, but rather as “practices that systematically form the objects of which they speak,”⁸³ scholars like Talal Asad and Jordan Alexander Stein point to the tendency of secularism to produce, categorize, and delimit the lives of its subjects as evidence of its discursive power. Challenging the claim that religion has experienced a renewal in modern moment, Asad argues that “religion has always been publicly present”⁸⁴ in the western world and that it is secularism’s ability to organize society into a series of “particular oppositions”⁸⁵ between the political and the religious, the public and the private, that has cultivated a veneer of institutional neutrality. This veneer, Asad further determines, encourages “certain behaviors and sensibilities” among citizens participating in associative life, even though secularism itself is “neither stable in its origin nor stable in its historical identity.”⁸⁶ Stein likewise notes that numerous studies have revealed “the persistence and importance of religion in the very countries [...] in which it was supposed to have disappeared,”⁸⁷ a persistence that suggests that “secularism is a story we told, not of a thing that happened.”⁸⁸ Asad and Stein are not alone in recognizing secularism’s discursive proclivities. Saba Mahmood, Tracy Fessenden, Toni Wall Jaudon, Kathryn Lofton, and Michael Warner have issued sustained and multi-dimensional critiques against the continued veracity and cohesiveness of secularism,⁸⁹ prompting Asad to assert that “if anything is agreed upon, it is that a straightforward narrative of progress from the religious to the secular is no longer acceptable.”⁹⁰ So thoroughly has secularism been declared both a failure (as in the preceding paragraph) and a fraud (as in this

⁸⁰ Casanova, José. *Public Religions in a Modern World* (Chicago: University of Chicago Press, 1994), pp. 5, 6.

⁸¹ Stark, Rodney and Roger Finke. *Acts of Faith: Explaining the Human Side of Religion* (Berkeley: University of California Press, 2000), p. 57.

⁸² Coviello, Peter and Jared Hickman. “Introduction: After the Postsecular” in *American Literature* 86 (2014), p. 645. The authors write: “Secularism is dead. There can be no doubt whatsoever about that.”

⁸³ Foucault, *Archaeology of Knowledge*, p. 49.

⁸⁴ Asad, Talal. *Formations of the Secular: Christianity, Islam, Modernity* (Stanford: Stanford University Press, 2003), p. 5.

⁸⁵ Asad, *Formations of the Secular*, p. 25. As cited in: Scott, *Sex and Secularism*, p. 6.

⁸⁶ Asad, *Formations of the Secular*, p. 25.

⁸⁷ Scott, *Sex and Secularism*, p. 9.

⁸⁸ Stein, Jordan Alexander. “Angels in (Mexican) America” in *American Literature* 86 (2014), p. 684.

⁸⁹ See: Fessenden, Tracy. “The Problem of the Post-Secular” in *American Literary History* 26 (2014), pp. 154-167. Jaudon, Toni Wall. “Obeah’s Sensations: Rethinking Religion at the Transnational Turn” in *American Literature* 84 (2012), pp. 715-41. Lofton, Kathryn. *Oprah: The Gospel of an Icon* (Berkeley: University of California Press, 2011). Mahmood, Saba. *The Politics of Piety: The Islamic Revival and the Feminist Subject* (Princeton: Princeton University Press, 2011). Modern, Johnathan Lardas. *Secularism in Antebellum America* (Chicago: University of Chicago Press, 2011). Scott, *Sex and Secularism*.

⁹⁰ Asad, *Formations of the Secular*, p. 1.

paragraph), that some scholars have turned their attention to crafting a new form of political and legal governance – a form of governance that has been designated “post-secular.”

Broadly construed, post-secularism aims to craft a liberal democratic state that takes seriously the requests for religious accommodation made by individuals like Holt and Nance, even as it preserves the institutional structures that guarantee to all persons the values of freedom and equality. Attempts to create such a state can be best described as divergent. For scholars like Cécile Laborde and Amy Gutmann, secularism is a fraught institution that “arbitrarily produces and shapes [the practice of] religion” and, in the process of doing so, “inevitably marginalizes religious minorities.”⁹¹ Yet rather than dismiss entirely the “framework of justice within which all citizens can pursue their conception of what makes life good,”⁹² they determine that post-secular states should reaffirm their commitment to secularism’s original distinctions between private faith and public conduct.⁹³ Indeed, by recognizing the tendency of secularism to operate adversely as a discourse, institutions can consciously rid themselves of any laws or policies that either privilege one religious group over another or fail to secure the just boundaries between matters of state and matters of faith. However, for scholars like William Connolly and Stephen Smith, efforts to reform secularism will ultimately reproduce its political, legal, and social ills. In a post-secular world, they argue,⁹⁴ it is imperative to dismantle the “conceits of secularism” such that “an ethos of engagement between multiple constituencies honoring a variety of moral sources and metaphysical orientations” can emerge.⁹⁵ Through the creation of “productive tensions”⁹⁶ between institutions of the government and the populations they serve, the values inhering in the liberal democratic state can be collaboratively suspended and analyzed, thereby creating a space within which “no single God, primordial contract, fixed conception of rationality, settled conception of self-interest, unified principle of justice, or

⁹¹ Laborde, Cécile. *Liberalism’s Religion* (Cambridge: Harvard University Press, 2017), p. 4.

⁹² Laborde, *Liberalism’s Religion*, p. 4.

⁹³ See: Carter, Stephen L. *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (New York: Basic Books, 1993). Gutmann, Amy. *Identity in Democracy* (Princeton: Princeton University Press, 2003). Gutmann, Amy. “Religion and State in the United States: A Defense of Two-Way Protection” in Rosenblum, Nancy, ed. *Obligations of Citizenship and the Demands of Faith* (Princeton: Princeton University Press, 2000), pp. 127-164. McConnell, Michael. “Believers as Equal Citizens” in Rosenblum, Nancy, ed. *Obligations of Citizenship and the Demands of Faith* (Princeton: Princeton University Press, 2000), pp. 90-111. Sandel, Michael. “Religious Liberty: Freedom of Choice or Freedom of Conscience?” in Bhargava, Rajeev, ed. *Secularism and its Critics* (Oxford: Oxford University Press, 1998). Quong, Jonathan. *Liberalism without Perfection* (New York: Oxford University Press, 2011).

⁹⁴ See: Asad, Talal. *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (Baltimore: Johns Hopkins University Press, 1993). Bender, Courtney and Pamela Klassen, eds. *After Pluralism: Reimagining Religious Engagement* (New York: Columbia University Press, 2010). Cavanaugh, William T. *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict* (New York: Cambridge University Press, 2009). Connolly, William. *Why I am Not a Secularist* (Minneapolis: University of Minnesota Press, 1999). Mahmood, Saba. “Religious Reason and Secular Affect” in *Critical Inquiry* 35 (2009), pp. 836-762. Mahmood, Saba and Danchin, Peter. “Immunity or Regulation? Antinomies of Religious Freedom” in *South Atlantic Quarterly* 113 (2014), pp. 129-158. Smith, Stephen D. *The Disenchantment of Secular Discourse* (Cambridge: Harvard University Press, 2010). Sullivan and Yelle, *After Secular Law*.

⁹⁵ Connolly, *Why I am Not a Secularist*, pp. 19, 39.

⁹⁶ Connolly, *Why I am Not a Secularist*, p. 154.

practice of communicative consensus”⁹⁷ dominates. The operations of the liberal democratic state thus come to reflect the multitude of religious identities and moral differences that persist within its constituencies; under this latter rubric, in other words, post-secular governance excises secular discourse by being wildly, unapologetically religious in character.

Between these two visions for post-secular governance, however, a third vision has emerged: one that venerates the participation of religious voices in matters of law and policy, so long as secularism’s institutional provisions for the separation of church and state can be preserved. For scholars like Jürgen Habermas and John Rawls, liberal democratic states should be responsive to the needs and concerns of their devout constituents – and to the best of their ability, accommodate their religious lives within the public sphere – but so too should such states build an epistemic bulwark against the excessive intrusion of religion into political and legal life. “The public use of reason,” they argue,⁹⁸ encourages devout citizens to “translate the religious content”⁹⁹ of their politically- and legally-motivated speech into secular language that can be readily comprehended by persons of other (or of no) faiths. This mode of governance aims to accommodate the vitality and complexity of public religious expression as well as preserve the agnosticism of the liberal state towards competing conceptions of the good. Public reason, for Habermas and Rawls, thus serves to insulate the law- and policy making apparatuses of the contemporary state from the vagaries of religious belief, even as it makes those same institutions accessible for and amenable to faith-motivated speech and conduct – a hybridity that they determine overcomes secularism’s discursive impulse to depoliticize religious commitments.

In recent years, this third approach to regulating the public life of religion in liberal democratic states has gained significant traction among political theorists and legal academics alike and, much like the Foucauldian inspired scholars of legal discourse and testimony I engaged with in the previous section, it is both alongside and against this body of scholarship that my dissertation works. Understood in its most idealized form, the post-secular state envisioned by Habermas – more so than Rawls – is intended to overcome the potentially disenfranchising and disempowering forces found in secular polities. Indeed, for Habermas, the articulations of secular governance that emerge from historical works by the likes of John Locke fail to respond adequately to the diverse needs and desires of contemporary religious individuals; to realize the full promise of liberal democracy, he argues, new institutional mechanisms are needed in order to ensure that each individual understands herself to be represented and recognized by the political and legal systems that govern her life. On this reading, Habermas intends for his theory of public reason to be deeply practical:¹⁰⁰ it is meant to be used by political officials and legal actors alike when confronted with requests for religious accommodation.

⁹⁷ Connolly, *Why I am Not a Secularist*, p. 154.

⁹⁸ See: Audi, Robert. *Rationality and Religious Commitment* (New York: Oxford University Press, 2011). Audi, Robert. *Democratic Authority and the Separation of Church and State* (New York: Oxford University Press, 2011). Greenawalt, Kent. *Religious Convictions and Political Choice* (New York: Oxford University Press, 2011). Habermas, Jürgen. *The Philosophical Discourse of Modernity* (Malden, MA: Polity Press, 1985). Habermas, Jürgen. *Religion and Rationality* (Cambridge: The MIT Press, 2002). Habermas, Jürgen. *Between Naturalism and Religion* (Malden, MA: Polity Press, 2008). Rawls, John. *Political Liberalism* (New York: Columbia University Press, 2005). Weithman, Paul. *Religion and the Obligations of Citizenship* (New York: Cambridge University Press, 2001).

⁹⁹ Habermas, *Between Naturalism and Religion*, p. 119.

¹⁰⁰ As will be discussed in further detail in Chapter Three, Habermas’s creation of a “practical theory,” rather than an “ideal theory,” distinguishes much of his contributions to post-secular literature from the contributions made by Rawls.

It is meant, in other words, to endow religious individuals with a sense of agency in petitioning for the inclusion of their faith-based conduct or speech in the operations of government, so long as they can identify – in consultation with others – a correlative secular justification for doing so.

For Habermas, the law functions as an ideal setting for the public use of reason.¹⁰¹ A blend of procedural duties, in which decisions issued create binding obligations on the community at large, and deliberative duties, in which individuals must participate in a discussion over the relative weight of certain values or morals, the law constructs and then legitimates a state in which all persons understand themselves to be equal and democratic citizens.¹⁰² Within the space of the courtroom, a law-making body, or the public square, each individual is understood to possess similar rational capacities, such that any binding decision that emerges from their deliberations is received by the broader community as “co-original,”¹⁰³ that is to say, the community will receive the decision as if they themselves had been the authors of the laws that secure their rights. In the context of disputes over the boundaries of religious conduct and expression, reason thus operates not only as that which identifies a possible “secular kernel of truth”¹⁰⁴ within faith-based speech, but also that which binds individuals and the broader democratic community to the law’s findings. From the perspective of Habermas, then, *Holt* and *Nance* were perfect examples of the public use of reason: the petitioners demonstrated how their voluntarily restricted beards respected the demands of institutional and inmate safety even as the courts’ legal actors recognized the unfair burden placed on religious inmates in penitentiaries, resulting in a decision that was warmly welcomed as evidence of the state’s commitment to democratic inclusion.

In this dissertation, I argue that even as post-secular scholars like Habermas aim to solve the problem of secularism, their solutions fail to account for the discursive power of reason. For while

¹⁰¹ Although Habermas regards deliberations over the law, and submission to it, as the highest form of individual and institutional reason, it is difficult to delineate what, precisely, can be identified as his definition of “the law.” Neither a descriptive account of the commands handed down by a sovereign empowered by threats or sanctions, nor a normative account of the law as a tool for the achievement of justice writ large, Habermas argues that the law must be “post-metaphysical in character” in that it must be legitimized independently of a particular worldview. Accordingly, the law emerges as a process – found in courtrooms, legislatures, and public squares – by which a diverse group of individuals can discuss collaboratively the requirements needed for valid laws and policies. To speak of “the law,” for Habermas, is thus to speak of a communicative procedure regulated by the dictates of reason, a procedure that results in tangible outcomes that can be widely promulgated. Participants in this process can “internal” or “external,” thereby encompassing judges, politicians, legislators, citizens, academics, and others, each with their own competing perspectives on the law’s role in democratic states. For more, see: Habermas, Jürgen. *Between Facts and Norms* (Cambridge: The MIT Press, 1996), p. xxxix. Modak-Truran, Mark. “Habermas’s Discourse Theory of Law and the Relationship Between Law and Religion” in *Capital University Law Review* 26 (1997), pp. 461-82. Baxter, Hugh. “System and Lifeworld in Habermas’s Theory of Law” in *Cardozo Law Review* 23 (2002), pp. 473-615. My thanks to Mark for his feedback on earlier iterations of Chapter Three, where I discuss Habermas’s theory of the law in more detail.

¹⁰² Habermas, Jürgen and William Rehg. “Constitutional Democracy: A Paradoxical Union of Contradictory Principles” in *Political Theory* 29 (2001), p. 779.

¹⁰³ Habermas, *Between Facts and Norms*.

¹⁰⁴ Habermas, Jürgen. “‘The Political’: The Rational Meaning of a Questionable Inheritance of Political Theology” in Mendieta, Eduardo and Jonathan VanAntwerpen, eds. *The Power of Religion in the Public Sphere* (New York: Columbia University Press, 2011), p. 23.

Habermas and his post-secular interlocutors work to craft a practical theory that adapts to the religious reality of the modern moment, they do not account for how the very language they use – that of reason – undergirds the establishment of the secular state. By drawing from the very sources that scholars of religion and post-secularism identify as the origins of the institutional drive to separate private belief from public conduct, such as Locke’s *A Letter Concerning Toleration*, I demonstrate how appeals to reason were instrumental in the attempts to safeguard the neutrality and agnosticism of the liberal democratic state, historically understood. Understood discursively, reason articulates and conceals itself across time, carrying with it a power that can be replicated and re-entrenched in spaces that are believed to be free from the confines of secularism – especially as it is taken up by the procedural and deliberative posture of the law. On my account, many of the foregoing critiques of secularism are thus red herrings: it is reason, rather than solely secularism, that reinforces a “foundational and mutually exclusive binary opposition” that mandates religious individuals choose between “divine obligations and civil obligations, between thought and action, and between mind and the body.”¹⁰⁵ To both understand and challenge the discursive power present in the operations of the law and its reliance on reason – that is to say, power that is “exercised through and reproduced in our feelings, choices, and actions”¹⁰⁶ – I look to how religious petitioners narrate their experiences of advocating for the accommodation of their beliefs. I look to, in other words, how individuals like Holt and Nance not only attempt to practice testimonial storytelling within courts of law, but also how the relative success of those attempts impacts their relationships to their faiths as well as their democratic communities.

III. Generating a Theory of Lived Experience

In *Beyond Religious Freedom*, Elizabeth Shakmun Hurd writes that “a complex and unstable relation [exists] between ‘the religion’ that is authorized for legal and political purposes and the broader, messier world of religious belonging, belief, and practice.” For reasons of “secular legal and political management,” Hurd continues, discrete religious traditions are “inevitably singled out for privilege and consecration.” This move, she concludes, leaves “dissidents, doubters, and those who identify with nonorthodox versions of protected traditions” struggling for representation.¹⁰⁷ In this dissertation, I bring discourses of reason into sustained contact with Hurd’s dissidents and doubters as a means to identify, first, how it categorizes what counts as legally protected religion and, second, how it delimits who may count as a rights-bearing, democratic citizen. I do so by working across both disciplinary and methodological boundaries, drawing from: empirical data on religious life in the modern moment; philosophical articulations on the purpose of secular and post-secular governance; legal transcripts of court proceedings; interviews with religious plaintiffs; and accounts of testimonial storytelling. The juxtaposition of these disciplines and methodologies illuminate not only the powerfully productive capacities of the state and its legal arm, but also its ability to impact what I call the lived experience of religious freedom.

By focusing on the lived experience of religion within liberal democratic states, I explore the dynamic and contingent encounters between the religious individual and the law that structure the environment within which “complete life occurs.”¹⁰⁸ As such, this dissertation emphasizes the mutual interaction and blurred boundaries between “idealized” forms of religious life and the actual practice

¹⁰⁵ Asad, *Genealogies of Religion*, p. 47.

¹⁰⁶ Anker, *Orgies of Feeling*, p. 114.

¹⁰⁷ Hurd, *Beyond Religious Freedom*, p. 13.

¹⁰⁸ Rawls, John. *Justice as Fairness: A Restatement* (Cambridge: Harvard University Press, 2010), p. 10.

of such faiths in everyday moments, which are themselves constructed by and through discourses of reason. Like the legal efforts made to encourage Holt and Nance to embrace the unreasonable and subscribe to orthodox practices of the Muslim faith, lived religion, on my account, does not unfold separately from institutional understandings of organized or “proper” religion. The challenge inhering in this methodological approach, then, is to “constantly problematize a clean juxtaposition between everyday and official religion even while relying on these distinctions as heuristic devices that [prompt] new and interesting kinds of questions.”¹⁰⁹

In taking up this challenge, I follow Robert Orsi and Winnifred Fallers Sullivan by turning towards how religious individuals themselves narrate their faith and their experiences before the law.¹¹⁰ Through an engagement with what I earlier termed an archive of legal discourse, I illuminate how contemporary scholarship underestimates the affective powers of reason on religious practice and overestimates the ease with which religious individuals can separate their deeply entrenched beliefs from their public conduct. This schism, I suggest, sustains legal inequalities and political injuries within the daily lives of religious individuals – inequalities and injuries that, in turn, highlight a disconnect between what has been called “the actual religious lives of most Americans”¹¹¹ and the versions of faith that are sustained by the liberal democratic protections promised by the American constitution. It is within these accounts of injuries and inequalities, moreover, that the seeds for the rehabilitation of reason can be located and religious freedom cultivated.

IV. Chapter Overview

In this introduction, Chapter One, I endeavored to lay the foundational framework for the argument that unfolds over the remaining chapters of this dissertation. I detailed the manner in which reason functions as a power-laden discourse both within the operations of the law and in contemporary post-secularist literature, threading through the political, legal, and social life of religious individuals and conditioning the possibilities of religious freedom. Yet crucially, I argued that reason cannot and should be understood solely as a totalizing power; instead, at significant and revealing moments, reason provides an opening through which to advocate for the recognition of one’s faith as an extension of one’s body – it possesses the potential to serve, in other words, as a tool through which to repair the material and metaphysical rents in secular life, and achieve unencumbered religious freedom. I further suggested that this potential can be recovered through a sustained engagement with the everyday lives of religious individuals, particularly when they argue before courts of law for the accommodation of their faith-based conduct – so long as this engagement is attuned to the historical affectivity of reason and its ability to reproduce itself in the modern moment.

Chapter Two, “John Locke’s Reason,” takes up this task and, in doing so, examines the use of reason by John Locke who was, as noted earlier, the one of the initial proponents of a secular divide between public life and private belief. I argue that as Locke sought to quell the religious warfare of the 17th century, he advanced a vision of political life predicated on Protestant Christianity: freedom

¹⁰⁹ Hurd, *Beyond Religious Freedom*, p. 13.

¹¹⁰ See: Orsi, Robert A. *Between Heaven and Earth: The Religious Worlds People Make and the Scholars Who Study Them* (Princeton: Princeton University Press, 2005). Orsi, Robert. “Afterword: Everyday Religion and the Contemporary World: The Unmodern, or What Was Supposed to Have Disappeared but Did Not” in Schielke, Samuli and Liza Debevec, eds. *Ordinary Lives and Grand Schemes: An Anthropology of Everyday Religion* (New York: Berghahn Books, 2010). Sullivan, Winnifred Fallers. *The Impossibility of Religious Freedom* (Princeton: Princeton University Press, 2005).

¹¹¹ Hurd, *Beyond Religious Freedom*, p. 15.

could only be secured if religion was privately practiced and reverently oriented towards developing an inward connection with God. In this manner, religious individuals emerged as reasoned citizens through the process of recognizing, and then internalizing, the benefits that privatized religious belief bestowed upon the members of liberal states.

In Chapter Three, “Jürgen Habermas and the ‘Remainders’ of Public Reason,” I argue that when contemporary scholars like Jürgen Habermas and John Rawls use the language of reason to expand the concept of what constitutes acceptable public religious conduct in secular liberal states, they nonetheless reproduce the deeply Protestant – and deeply private – vision of reasonably practiced religion envisioned by Locke in Chapter Two. Although these scholars strive to carve out a meaningful and valued space for religious expression, they limit the full participation of devout citizens in the law- and policy-making processes of liberal democratic states. They do so by mandating that religiously-motivated speech be, in Habermas’s words, “cooperatively translated” to align with secular understandings of the public good. I argue that such acts of translation represent a powerful discursive phenomenon that entails both the willful forgetting and latent reproduction of the religious subordination that, historically, marked the rise of secular liberalism.

The next two chapters demonstrate how the theoretical tensions elucidated in the first two chapters arise in the legal regulation of contemporary religious practices; my aim is not only to show how law regulates religion, but also to identify liminal spaces within which devout individuals can resist the power of reason – and, in doing so, expand the politico-legal boundaries of religious freedom. Chapter Four, “Theorizing *Employment Division v. Smith*,” focuses on the experiences of Alfred Smith, a member of the Klamath Nation, who unsuccessfully sought legal accommodation for the consumption of peyote while employed by a drug rehabilitation facility in *Employment Division v. Smith*. Political theorists and legal actors often portray this case as a failure of religious freedom insofar as the decision limited the physical conduct of the plaintiffs; in doing so, however, they overlook how the very process of seeking accommodation – such as determining what counts as a “reasonable accommodation” – affected the metaphysical relationship of the plaintiffs to their faiths. By drawing from a legal archive of depositions, interviews, hearings, and oral arguments, I suggest that the legal force of reason constrains religious freedom by neglecting the histories that condition the capacities of the liberal state’s faithful citizens to enjoy full membership in the state. I conclude by articulating a framework for a more expansive vision of religious freedom – a vision that entails rehabilitating the role of reason through appeals to testimony within law- and policy-making processes.

Chapter Five, “Tolerance after *Masterpiece Cakeshop v. Colorado*,” argues that, if *Employment Division v. Smith* provided a path forward from the affective quality of reason, contemporary religious freedom cases, like that of *Masterpiece Cakeshop*, demonstrate the manner in which the law, in its discursive use of reason, can retain and reconstitute its power. Serving both a generative and cumulative purpose, this chapter draws from the elements of the preceding chapters in order to argue that contemporary religious freedom cases – even in their uses of testimonial resistance – are conditioned by the slippery and discursive nature of reason. By looking at how the parties at bar call upon, at alternating moments, the language of “reason” and “tolerance” to support their arguments, I determine that securing religious freedom – as it stands now – rests on the performance of a certain kind of behavior that was idealized by Locke in Chapter Two. In other words, even if cases like *Masterpiece Cakeshop*, and those that will follow in its footsteps, appear to secure greater religious freedom for its subject, the inner logic of the law nonetheless serves to reformulate and re-entrench the project of Lockean secularism for all who come before it.

Part I

THE POWER OF REASON

John Locke's Reason

*We should look, therefore, at the politics of national progress
– including the politics of secularism – that flow from the multifaceted
concept of modernity exemplified by “the West.”*

*For it is precisely this process that tells us how people
live the secular – how they vindicate the essential freedom and
responsibility of the sovereign self in opposition to
the constraints of that self by religious discourses.*

– Talal Asad,

*Formations of the Secular: Christianity, Islam, and Modernity*¹¹²

*Persons are tolerant to the extent that, even though
they disagree with others about the nature of the good and
true life, they tolerate all other views within the bounds
of reciprocity and generality. This is why toleration
is a virtue of justice and a demand of reason.*

– Rainer Forst,

“Toleration, Justice, and Reason”¹¹³

In the Introduction, I noted that many thinkers have hailed the late modern era as “post-secular,” but I omitted a crucial piece of information: that little consensus exists among them as to the configuration of the secular condition it surmounts and surpasses. At various points across various disciplines, such scholars note, secularism has functioned as: a political tool designed to separate public life from private belief, therefore securing the state’s safety against warring religious factions and establishing a zone of “religious freedom” that allows individuals to follow unencumbered the dictates of their conscience; a sociological mode of acculturation designed to prime devout religious immigrants for associative life in western democratic states; and an economic regulation tailored towards promoting the circulation of capital over and above individual faith-based differences. Further complicating these definitional inconsistencies, analytic distinctions persist among “the secular” (as an epistemic category), “secularization” (as a conceptualization of historical processes), and “secularism” (as a worldview or political ideology).¹¹⁴ For contemporary scholars to speak of a post-secular age suggests, to paraphrase

¹¹² Asad, Talal. *Formations of the Secular: Christianity, Islam, and Modernity* (Stanford: Stanford University Press, 2003), p. 15. Emphasis omitted.

¹¹³ Forst, Rainer. “Toleration, Justice, and Reason” in *The Culture of Toleration in Diverse Societies: Reasonable Tolerance*, ed. Catriona McKinnon and Dario Castiglione (Manchester: Manchester University Press, 2003), p. 78.

¹¹⁴ For a helpful introduction to the basic differences operating among these analytic distinctions, please see: Casanova, José. “Secular, Secularizations, Secularisms” in *The Immanent Frame* (October 25, 2007): <https://tif.ssrc.org/2007/10/25/secular-secularizations-secularisms/>. Last accessed July 8, 2018. See also: Scott, Joan W. *Sex and Secularism* (Princeton: Princeton University Press, 2018), pp. 4–15.

Charles Taylor, that a miasmic fog of triumphalism and melancholy has settled upon those who seek to determine the appropriate place of religion in public life.¹¹⁵ Post-secularists, in other words, possess at once the grim determination to move past the fraught task of isolating a singular secularism against which to work and a renewed vigor for theorizing how “religion can maintain a public influence and relevance despite the secular certainty that it can be neatly contained.”¹¹⁶

The hesitation to define or provide an origins story for secularism can be attributed to its location within post-modern, discourse-attuned thought. Wendy Brown writes: “[Such hesitations] reflect a late modern or post-modern consciousness of the exclusions and violations accomplished by master narratives, the oppressiveness of closure on identity, and the vulnerability to colonization and regulation presented by definitive naming.”¹¹⁷ On Brown’s account, the unwillingness of post-secularists to identify what constitutes “the secular” should be understood neither as academic oversight nor as outright refusal, but rather as the recognition that secularism – in any of its iterations or analytic distinctions – carries with it the powerful ability to shape individual lives and social worlds. To understand the discursive power of secularism, and to invite such power into post-secular scholarship, so the arguments go,¹¹⁸ would be to undercut the efficacy of the modes of freedom and liberty identified by those working outside the argumentative parameters imposed by a singular conception of “the secular.” Moreover, as Robert Audi concludes, the recognition that secularism cultivates certain modes of political, legal, and social governance over others does not guarantee that post-secularism will therefore encourage a “high level of tolerance for those whose [religious] behavior” is palpably present in the public sphere – rather, he determines, secularism’s exhaustion as an area of study means that the pursuit of a new form of organization for late modern life is necessary and warranted, regardless of its theoretical origins.¹¹⁹

In this chapter, I respect the hesitancy of post-secularists to speak definitively about secularism, but I also seek to problematize it. For while I support the claim that secularism possesses the potent capacity to impact (oftentimes adversely) the material and metaphysical conditions that shape the lives of religious individuals, I question the conclusion that a thorough engagement with the precepts of secularism – as a social, political, and legal framework – will replicate and entrench its affective powers within post-secular states. Such a conclusion assumes that modern politics have eliminated or reformed the vestiges of secularism that persist within their institutional structures and social mores and, most crucially, that post-secularists themselves have avoided reproducing the very

¹¹⁵ Taylor, Charles. *A Secular Age* (Cambridge: The Belknap Press of Harvard University Press, 2007), pp. 716-717. For more on Taylor’s reaction to the rise of post-secularist thought, please see: Warner, Michael, Jonathan VanAntwerpen, and Craig Calhoun, eds. “Introduction” in *Varieties of Secularism in a Secular Age* (Cambridge: Harvard University Press, 2010), pp. 22-25.

¹¹⁶ Habermas, Jürgen. “Notes on a Post-Secular Society” in *Sign and Sight* (June 18, 2008): www.signandsight.com/features/1714.html. Last accessed July 8, 2018.

¹¹⁷ Brown, Wendy. *States of Injury: Power and Freedom in Late Modernity* (Princeton: Princeton University Press, 1995), p. 30.

¹¹⁸ In the introduction to their edited volume, Philip Gorski, David Kim, John Torpey, and Jonathan VanAntwerpen write: “By imposing a particular definition of secularism, it is possible to predetermine the outcome of the debate.” See: Gorski, Philip S. and Jonathan VanAntwerpen, et al., eds. *The Post-Secular in Question: Religion in Contemporary Society* (New York: New York University Press, 2012), p. 7. See also: Habermas, Jürgen. “On the Relations Between the Secular Liberal State and Religion” in *Political Theologies* (New York: Fordham University, 2006), pp. 251-260. McLennan, Gregor. “The Postsecular Turn” in *Theory, Culture, and Society* 23 (2010), pp. 3-20.

¹¹⁹ Audi, Robert. *Rationality and Religious Commitment* (New York: Oxford University Press, 2011), p. 3.

power they seek to transcend simply by virtue of keeping it at arm's length. Together, these assumptions prevent post-secularists from identifying the myriad ways in which secularism performs and secures its power – an oversight that, as I argue here and in later chapters, undermines the means by which contemporary scholars and jurists attempt to secure religious freedom in a robustly plural age.

Given the above, my aim in this chapter is twofold: first, to articulate a definition of secularism that will guide the remaining chapters of this dissertation and, second, to accomplish the former in a manner that reveals the subtle yet powerful ways in which secularism patrols the boundaries between public life and private faith through the use of reason. As the broader project of this dissertation is to parse the power-laden persistence of reason in late modern religious freedom jurisprudence, my particular focus in this chapter on the historical origins of secularism may appear odd. This move, however, serves an important argumentative purpose: it distinguishes how reason's ability to cultivate a stable and natural presence within the late modern liberal state – how, in Foucault's words, it produces itself as an integral aspect of democratic life – can complicate efforts to be free from modes of governance deemed unjust, unequal, or simply ineffective. I argue that for post-secularists to focus primarily on the contemporary moment, to the exclusion of attending to how the very language they use is predicated by historical efforts to craft a state that differentiates public life from private belief, is to replicate the enduring and powerful work done by reason across time.

This chapter unfolds over the course of four sections. The first section excavates a narrative of secularism from post-secular thought that largely originates in John Locke's Enlightenment. Through an engagement with normative, critical, and liberal egalitarian scholars, I posit that the reliance of such scholars on Locke yokes the project of secularism to the promise of liberalism – that is to say, I argue that the circumscription of religion from the public sphere served as the medium through which nascent Anglo-European nation-states endeavored to guarantee to their citizens individual equality, liberty, and freedom. Yet I also argue that, when Locke's vision of secular liberalism is believed to fall short in its ability to address the political, legal, and social needs of late modernity, scholars make strategic and concerted appeals to the metaphysics of Immanuel Kant. Such appeals, I determine, attempt to rehabilitate Lockean Enlightenment ideals and reveal what Lars Tønder calls an "ontology of reason"¹²⁰ present in historical and contemporary discourse on matters of public faith. The second section narrows its focus by examining in greater detail the writings of Locke, who emerges from the previous section as the preeminent, albeit uninterrogated, Enlightenment theorist on secular liberalism. Through an engagement with his *A Letter Concerning Toleration*, I argue that what often goes unnoticed in post-secular treatments of Locke's Enlightenment is how his vision of an agnostic liberal government is predicated on a stridently Protestant notion of religion – a key component of which is the cultivation of religion's privatization through the use of reason. The third section situates Locke's reasoned secular liberalism within the broader context of his writings on religion. I determine that, within *An Essay Concerning Human Understanding* and *The Reasonableness of Christianity*, Locke appeals to reason as a means to craft self-regulating Protestant citizens in order to mitigate the destabilizing influence of public religion on the newly created, early modern liberal state. The fourth section concludes by returning to the writings of post-secularists, most notably those of liberal egalitarians John Rawls and Jürgen Habermas, to suggest that the idea of reason, when understood alongside the emergence of secular liberalism, carries with it a distinctive and palpable power – a power that cannot be easily disavowed.

¹²⁰ Tønder, Lars. "Toleration Without Tolerance: Enlightenment and the Image of Reason" in de Vries, Hent and Lawrence E. Sullivan, eds. *Political Theologies: Public Religion in a Post-Secular World* (New York: Fordham University Press, 2006), p. 327.

I. Enlightenment(s), Secularism(s), and Liberalism(s)

“The standard narrative of the birth of our age,” writes Robert Yelle in *After Secular Law*, “includes an account of the progressive extraction of the political and legal domain from the clutches of religious fanaticism.”¹²¹ Yelle notes that, under the guidance of this narrative, religion is perceived as “the evil Other, a monster whose taming” ushers in the birth of the early modern liberal state and the dawn of the era of “freedom and Enlightenment.”¹²² After enduring more than two centuries of contentious religious warfare, so the narrative goes, Anglo-Europeans desired politically, legally, and socially stable states governed not by the mandates of a dominant or domineering faith, but rather by the recognition that individuals possessed inherent worthiness and value. Such a state, the narrative continues, could only be achieved through, first, the relegation of individual religious belief to the private sphere and, second, the cultivation of loyalty to the states’ legal codes in the public sphere.¹²³ This move, often called “the great separation,”¹²⁴ crafted states whose continued legitimacy depended on the progressive erasure of religion from democratic processes, such that any persistent public religious practice could be subjected to regulation or categorized as anomalous. In its most idealized and mythologized form, the narrative of the early modern state suggests that its creation shook free the minds of humankind from the violence of “primitive thought,”¹²⁵ thereby ushering in a peaceful epoch that prioritized the wellbeing of the political community over and above discrete, faith-based differences.¹²⁶

The narrative of the western world’s march towards liberalism and away from religion features prominently in post-secularist literature, where it has been treated, at different moments across disparate disciplines, with approval as well as skepticism. These treatments, which map on to the broad categories of post-secularist literature outlined in the Introduction and I revisit in more detail below, endeavor to square the narrative’s prescriptive goals (the achievement of equal liberties and freedoms for all individuals) with its teleological character (the belief that religion will retreat from all

¹²¹ Yelle, Robert A. “Moses’ Veil” in Sullivan, Winnifred Fallers and Robert A. Yelle, eds. *After Secular Law* (Stanford: Stanford University Press, 2011), p. 23. Elsewhere, Charles Kimball writes: “It is somewhat trite, but nevertheless sadly true, to say that more wars have been waged, more people killed, and these days more evil perpetrated in the name of religion than by any other institutional force in human history.” For more, see: Kimball, Charles. *When Religion Becomes Evil* (San Francisco: Harper One, 2008).

¹²² Yelle, “Moses’ Veil,” p. 23.

¹²³ Cavanaugh, William T. *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict* (New York: Oxford University Press, 2009). Dunn, Richard S. *The Age of Religious Wars: 1559-1715* (New York: Norton, 1979). Sheehan, Jonathan. “Assenting to the Law: Sacrifice and Punishment at the Dawn of Secularism” in Sullivan, Winnifred Fallers and Robert A. Yelle, eds. *After Secular Law* (Stanford: Stanford University Press, 2011), pp. 62-80.

¹²⁴ Lilla, Mark. *The Stillborn God: Religion, Politics, and the Modern West* (New York: Knopf, 2007), p. 58.

¹²⁵ Lilla, *The Stillborn God*, p. 4.

¹²⁶ Contrary to this story, the nineteenth century historian of ancient law, Henry Sumner Maine, identifies the origins of a secular state in the creation of the Roman Code. More precisely, Maine tracks the creation of an independent, a-religious law alongside the Roman shift from communal sacrifices to monarchical sacrifices to, finally, the creation of a “juristical oligarchy” whose members become “depositories and administrators of the law.” In this shift, Maine locates the “severance of law from morality and of religion from law.” Maine, Henry Sumner. *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas* (Ann Arbor: University of Michigan Press, 2005), pp. 5-14.

aspects of life as modernity matures). Indeed, although each treatment finds the ideals of liberalism themselves compelling, they differ as to whether secularism itself is the appropriate vehicle through which to realize *true* freedom or *true* liberty. Further compounding this difference is the inability of the modern state – in any of its historical or contemporary instantiations – to secure the complete circumscription of religion from public life.¹²⁷ In surveying the field, the following question thus arises: If late modernity is distinguished by a vibrant and public religious quality, what purpose might the narrative serve in either crafting new or enforcing old laws and policies that govern an increasingly diverse population? The answers to this question offered by post-secular scholars not only assess the continued efficacy of the narrative that began this section, but they also reveal a common protagonist in the development and promulgation of secular liberalism: John Locke. In what follows below, I interrogate how normative, critical, and liberal egalitarian scholars work with and against the specter of Locke’s theories to not only configure a new governing order, but to do so in way that accounts for any persistent historical flaws or fallacies. I conclude that these efforts, when taken together and despite earlier protestations, construct a largely cohesive secular liberal narrative that can be the subject of analysis in both the remainder of this chapter and in later chapters – especially as such efforts, I demonstrate, leave uninvestigated a significant and powerful element of Lockean secular liberalism: reason.

Post-secular scholars working in the normative tradition – political theorists like Jean Cohen, Cécile Laborde, and Amy Gutmann, philosophers like Robert Audi, jurists like Michael McConnell, Nelson Tebbe, Christopher Eisgruber, and Lawrence Sager, and sociologists like Robert Bellah – credit Locke with “distinguish[ing] exactly the business of civil government from that of religion, and settl[ing] the just bounds that lie between one and the other.”¹²⁸ For Cohen and Laborde, Locke imbued the legal and political frameworks of early modern states, among them the United States and its constitutional amendments,¹²⁹ with secularist principles that animate “equal standing and rights for every citizen, personal and political freedom, and the diverse pursuit of public purposes.”¹³⁰ The religious character of late modernity challenges, but does not undermine, these principles. Indeed, Tebbe, Eisgruber, and Sager propose that, given the likelihood that religion cannot and will not be fully privatized in the twenty-first century,¹³¹ western governments ought to cultivate a stronger

¹²⁷ See, for instance, the data recounted in the Introduction to this dissertation.

¹²⁸ Locke, John. *A Letter Concerning Toleration* (Amherst, NY: Prometheus Books, 1990), p. 18. Also cited in Laborde, Cécile. *Liberalism’s Religion* (Cambridge: Harvard University Press, 2017), p. 15.

¹²⁹ McConnell, Michael. “The Origins and Historical Understanding of Free Exercise of Religion” in *Harvard Law Review* 103 (1989), p. 1416. It is important to note that McConnell does not fully agree with Locke’s arguments, suggesting that to interpret the First Amendment to the Constitution solely in terms of secularism is to ignore the work done by the anti-establishment clause, which, on his reading, promotes the accommodation of religion within the structures of government to a greater degree than Locke would permit.

¹³⁰ Cohen, Jean. “Rethinking Political Secularism and the American Model of Constitutionalism” in Cohen, Jean and Cécile Laborde, eds. *Religion, Secularism, and Constitutional Democracy* (New York: Columbia University Press, 2015), p. 115. In the American context, Cohen writes, Enlightenment-influenced thinkers “argued for a ‘wall of separation’ between church and state (Thomas Jefferson) and a ‘perfect separation between ecclesiastical and civil matters’ (James Madison), viewing their combination akin to a ‘mule animal,’ capable only of destroying but not reproducing liberty (Thomas Paine)” (p. 124).

¹³¹ Amy Gutmann argues that the absolute privatization of religion in late modern life would be an act of “two-way protection,” allowing both the worldly ideals of the state and the ecclesiastical promises

commitment to the non-establishment of belief within their law- and policy-making institutions. Such a move, they argue, would not only cohere with Locke’s secularist principles, but it would also encourage the state to adopt an attitude of “equal liberty and neutral treatment” towards any persistently public displays of faith,¹³² thereby transforming religion into one ethical commitment among many. In normative parlance, the late modern liberal state should reaffirm its adherence to the secular separation between matters of church and matters of governance by rigorously enforcing practices of non-establishment within its institutions – each individual would thus be endowed with the freedom to pursue her “conception of the good life” absent social, legal, or political interference,¹³³ even as the state itself embraced its narrative origins.

Yet for post-secular scholars working in the critical tradition – historians like Jonathan Sheehan, Robert Orsi, and David Alvarez, anthropologists like Talal Asad, Charles Hirschkind, and Saba Mahmood, religious studies scholars like Tisa Wenger and Robert Yelle, jurists like Winnifred Fallers Sullivan and Peter Danchin, and political theorists like Lars Tønder and Wendy Brown – the narrative of secular liberalism serves as the foundation upon which to assess whether Locke’s secularist principles truly secure “life, liberty, health, and indolency of body”¹³⁴ for all individuals. For instance, while Wenger acknowledges that Locke’s collective works were instrumental in canonizing the normative conviction that “religion ought to alter nothing in any man’s civil estate or civil rights,”¹³⁵ she, alongside Brown, determines that his oeuvre also “eliminated from view [the] many sources of subordination, marginalization, and inequality”¹³⁶ that permeate the institutional apparatuses of secular liberalism. To venerate the ideals of equal liberty and neutral treatment in the late modern moment,

of religion to flourish. Gutmann, Amy. *Identity in Democracy* (Princeton: Princeton University Press, 2003), p. 190.

¹³² Eisgruber, Christopher and Lawrence Sager. *Religious Freedom and the Constitution* (Cambridge: Harvard University Press, 2010). See also: Laborde, Cécile. *Liberalism’s Religion* (Cambridge: Harvard University Press, 2017), p. 13.

¹³³ Laborde, *Liberalism’s Religion*, p. 14. See also: Audi, Robert. *Rationality and Religious Commitment* (New York: Oxford University Press, 2011). Bellah, Robert N. *Habits of the Heart: Individualism and Commitment in American Life* (Berkeley: University of California Press, 2007). Canovan, Margaret. “On Being Economical with the Truth: Some Liberal Reflections” in *Political Studies* 38 (1990), pp. 5-19. Tebbe, Nelson. *Religious Freedom in an Egalitarian Age* (Cambridge: Harvard University Press, 2017).

¹³⁴ Locke, *A Letter Concerning Toleration*, p.18. Also cited in: Brown, Wendy. *Regulating Aversion: Toleration in the Age of Identity and Empire* (Princeton: Princeton University Press, 2006), p. 31.

¹³⁵ Wenger, Tisa. *Religious Freedom: The Contested History of an American Ideal* (Chapel Hill: The University of North Carolina Press, 2017), p. 8.

¹³⁶ Brown, *Regulating Aversion*, p. 17. Note that it is only recently that the institutions that make up the liberal state – the institutions that determine laws and regulations, craft the structure of higher education, or maintain health code regulations – have been called “apparatuses.” This is largely due to the influence of Giorgio Agamben’s interpretation of Foucault’s language of *dispositif* (“apparatus,” in English), which is meant to signify the “government of men” that has a “concrete strategic function and is always located in a power relation.” For Agamben, an apparatus is “literally anything that has in some way the capacity to capture, orient, determine, intercept, model, control, or secure the gestures, behaviors, opinions, or discourses of living beings.” To use this term, then, is to be attuned to the power implicit or concealed within the state. For more, see: Agamben, Giorgio. *What is an Apparatus?* (Stanford: Stanford University Press, 2009), pp. 3, 14.

such scholars argue, is to disregard the imperialist and intolerance impulses of the Enlightenment.¹³⁷ As Asad and Brown respectively suggest, in the effort to construct a government that viewed its citizens as similarly deserving of positive as well as negative rights, Locke articulated a vision of an individual who was “a single subject with a continuous consciousness in a single body”¹³⁸ – an articulation that abstracted the individual from her community of meaning or identity of import. Moreover, as Sheehan clarifies, this abstraction, what Laborde called the unencumbered ability of an individual to pursue her “conception of the good life,” forces “religion into the corners of human experience and destroys the stories it tells about nature, society, and mankind.”¹³⁹ On this reading, Alvarez suggests, Locke renders any disparities in political, legal, or social standing the effect of individual choice, rather than of state indifference.¹⁴⁰ Post-secular scholars working in this vein conclude that as “the dissipation of religion as an ideological force of the Enlightenment cannot be understood as an inevitable consequence of modernity,”¹⁴¹ the formative impact of the narrative of secular liberalism – and those who would redeploy it in the contemporary moment – must be interrogated; to do otherwise, so the arguments go,¹⁴² would be to endorse the contingent and irregular realization of its original ideals.

The foregoing responses to the narrative of secular liberalism and the formative role of Locke within it illuminate the fraught nature of scholarship on late modern, religiously plural western governance: as normative scholars recover the ethical and moral promises of secularism by recommitting to the principles of institutional non-establishment, critical scholars charge that these very same promises cultivate an isolated individuality borne of colonialism and the erasure of meaningful social difference. Within this fraught landscape, liberal egalitarian scholars – chief among them political theorists John Rawls and Jürgen Habermas – seek to chart a middle path between these

¹³⁷ Wenger, *Religious Freedom*, pp. 9-11. Wenger argues that Locke’s *A Letter Concerning Toleration* and *Second Treatise of Government* laid the foundation for English imperialism. Rejecting the Spanish methods of imperialism – which were designed to bring the gospel of Christianity to “uncivilized” areas of the world – Locke called upon secularism to position “the English as positively liberal colonial rulers whose policy of religious toleration [through privatization] demonstrated the practical and moral superiority of their rule.”

¹³⁸ Asad, *Formations of the Secular*, p. 74.

¹³⁹ Sheehan, Jonathan. “Enlightenment, Religion, and the Enigma of Secularization” in *The American Historical Review* 108 (2003), p. 1066.

¹⁴⁰ Alvarez, David. “Reading Locke after Shaftesbury: Feeling Our Way Towards a Postsecular Genealogy of Religious Tolerance” in McMurrin, Mary Helen and Alison Conway, eds. *Mind, Body, Motion, Matter* (Toronto: University of Toronto Press, 2016), pp. 72-109.

¹⁴¹ Sheehan, “Enlightenment, Religion, and the Enigma of Secularization,” pp. 1079-1080.

¹⁴² For more on the critical approach to post-secular scholarship, in addition to the works cited above, see: Danchin, Peter G. “Religious Freedom in the Panopticon in Enlightenment Rationality” in Hirschkind, Charles. “Is There a Secular Body?” in *Cultural Anthropology* 24 (2011), pp. 633-47. Sullivan, Winnifred Fallers and Elizabeth Shakun Hurd, eds. *Politics of Religious Freedom* (Chicago: University of Chicago Press, 2015), pp. 240-253. Mahmood, Saba. “Religious Reason and Secular Affect: An Incommensurable Divide?” in Asad, Talal and Wendy Brown, et al, eds. *Is Critique Secular? Blasphemy, Injury, and Free Speech* (New York: Fordham University Press, 2013), pp. 836-862. Orsi, Robert. *History and Presence* (Cambridge: Harvard University Press, 2018). Tønder, Lars. *Tolerance: A Sensorial Orientation to Politics* (New York: Oxford University Press, 2013). Sheehan, Jonathan. “Sacrifice Before the Secular” in *Representations* 105 (2009), pp. 12-36. Sullivan, Winnifred Fallers. *Politics of Religious Freedom* (Chicago: University of Chicago Press, 2015). Yelle, “Moses’ Veil.”

opposing interpretations of the narrative of secular liberalism and, in doing so, venerate its ideals and remedy its shortcomings. This undertaking, however, exposes a critical fissure in the narrative's cohesion: they determine that even if Locke serves as a compelling source within which to locate the genesis of liberal ideals, it is only through strategic appeals to another Enlightenment figure – namely, Immanuel Kant – that its imperialist and intolerant impulses can be overcome. To make this argument, both Rawls and Habermas engage in a twofold investigation into the narrative and its possibilities. First, in a move similar to that evinced by the normative scholars above, Rawls determines that the “historical origin of political liberalism (and of liberalism more generally) is the Enlightenment and its aftermath, with the very long controversies over religious toleration (now seen as the primary basis for secularism) in the 16th and 17th centuries.”¹⁴³ Habermas clarifies that not only was the “historical backdrop against which the liberal state emerged [...] the religious wars and confessional disputes in early modern times,” but so too were the most promising visions of overcoming such conflicts articulated in the “political writings of John Locke.”¹⁴⁴ Taken together, these statements configure the narrative of secular liberalism as a historical force that achieves a tangible political good: for both Rawls and Habermas, the political and legal mandates issued by Locke quelled the fractious religious wars endemic to the early modern state and ensconced individual rights to freedom and liberty within its institutional structures, thereby reducing the “potential for future conflict at the level of citizen interaction.”¹⁴⁵

Although Rawls and Habermas echo Locke when they declare that the “constitutional ideals of freedom and liberty” are guaranteed by secularist principles and are oriented towards the protection of “individual conscience,” they nevertheless determine that neither the narrative nor its normative reformulation are sufficient “models for understanding the western world’s religious renewal.”¹⁴⁶ Drawing from the critical determination that the “imperial Enlightenment [places] an emphasis on” the creation of “new boundaries around religion,”¹⁴⁷ Habermas contends that secular liberalism is unable to create an “inclusive society in which equal citizenship and cultural difference complement each other in the right way.”¹⁴⁸ He further elucidates:

In our post-colonial immigrant societies, discrimination against minorities is usually rooted in prevailing cultural prejudices that lead to a selective application of established, secularist constitutional principles. If one does not take seriously the universalist thrust of these principles in the first place, there is no vantage point from which to understand how the constitutional interpretation is bound up with the prejudices of the majority culture. [...] In

¹⁴³ Rawls, John. *Political Liberalism* (New York: Columbia University Press, 2005), p. xxvi.

¹⁴⁴ Habermas, Jürgen. “Religion in the Public Sphere” in *European Journal of Philosophy* 14 (2006), p. 4. Habermas, Jürgen. *Between Naturalism and Religion* (Malden, MA: Polity Press, 2008), p. 271.

¹⁴⁵ Habermas, “Religion in the Public Sphere,” p. 4. Samuel Moyn, in his interrogation of Rawls’s political liberalism and secular commitments, notes that Rawls also develops this viewpoint: “In the story offered by Rawls, the secular political space is the outcome of a bloody era of early modern religious warfare: what began with the nervous truce of a *modus vivendi* evolved into an overlapping consensus featuring not just peace, but justice too. In this narrative, religious freedom is a long-term companion of the creation of a secular political space, in which a transcendent state rises above the attempt by sects to infuse public matters with their private faith.” See: Moyn, Samuel. “Freedom of Religion or Human Rights” in Cohen, *Religion, Secularism, and Constitutional Democracy*, p. 28.

¹⁴⁶ Habermas, “Religion in the Public Sphere,” p. 2.

¹⁴⁷ Wenger, *Religious Freedom*, p. 9.

¹⁴⁸ Habermas, Jürgen. “Notes on a Post-Secular Society” in *Blätter für Deutsche und Internationale Politik* (2008), p. 23.

recognizing this, we have come up against the very limits of a normative political theory that can justify only rights and duties.¹⁴⁹

A formally neutral stance by the state towards plural and public practices of religion in late modernity troubles the realization of the ideals of secular liberalism. As the teleological promise of the narrative of the narrative was never fully realized, Habermas suggests above and Rawls argues elsewhere, contemporary institutional efforts to embrace or promote secularist principles may impact adversely those whose religions challenge the ethical boundaries demarcated by policies protecting “equal liberties of conscience.”¹⁵⁰ For instance, religious practices that fall outside of mainstream Judeo-Christian traditions – practices like animal sacrifice, sabbath mandates, and vaccination refusals – can create tensions between the ability of an individual to live her life unencumbered and the broader wellbeing of a religiously plural community. When confronted with such tensions, liberal egalitarians argue, the impulse of late modern secular liberal institutions is to safeguard the primacy of the majority culture by imposing unequal burdens of privatization on minority faiths and, in doing so, fail to guarantee the right to religious freedom for all persons.¹⁵¹ This impulse, Habermas concludes, imparts an “excessive and illegitimate power” to both early and late modern secular liberal states – a power that renders unattainable constitutional protections for vulnerable or minority faith populations.¹⁵²

It is this determination that motivates the second part of the liberal egalitarian engagement with the narrative possibilities of secular liberalism. Rather than abandon the narrative altogether, as some are wont to do,¹⁵³ Rawls and Habermas effect a move often deemed controversial by normative as well as critical scholars:¹⁵⁴ they appeal to reason to transform both the ethical and practical

¹⁴⁹ Habermas, “Notes on a Post-Secular Society,” pp. 25, 28.

¹⁵⁰ Rawls, John. *A Theory of Justice* (Cambridge: Harvard University Press, 1971), p. 206.

¹⁵¹ Habermas, “Religion in the Public Sphere,” p. 4. See also: Habermas, Jürgen. “The Political: The Rational Meaning of a Questionable Inheritance of Political Theology” in Mendieta, Eduardo and Jonathan VanAntwerpen, eds. *The Power of Religion in the Public Sphere*, (New York: Columbia University Press, 2011), p. 17. Here, Habermas argues that the differential treatment of individuals on the basis of religious beliefs compromises the legitimacy of the liberal state by reducing “democracy to a mere façade.”

¹⁵² Habermas’s deep skepticism of the ability of the liberal state to secure its ideals for its inhabitants can be, in part, attributed to place within the Frankfurt School and his early (and continued) fascination with the works of Karl Marx. But it is also important to note that, even if Habermas identifies as working within Marxist traditions, he nonetheless argues that the state, as well as the laws and policies it promulgates, can be perfected through devotion to democratic politics – a conclusion of which Marx would be deeply skeptical. For more, see: Giddens, Anthony. “Reason Without Revolution? Habermas’s Theory of Communicative Action” in *Social Theory and Modern Sociology* (Malden, MA: Polity Press, 2007), pp. 225-253.

¹⁵³ See, for instance: Connolly, William. *Why I am Not a Secularist* (Minneapolis: University of Minnesota Press, 1999).

¹⁵⁴ Many have argued that the interpretation of Kant offered by Rawls and Habermas are deeply flawed. Michael Sandel, for instance, argues that Rawls “desires the glow of Kantian moral nobility” without adopting the sacrifice demanded by Kant’s universal principles. Similarly, Bonnie Honig argues that the liberal egalitarian appeal to Kant “fails to politicize citizens or teach them about the individual or collective workings of power,” suggesting that both Kant and Rawls “act as if politics is a sign of failure, a Fall [sic].” See: Sandel, Michael. *Liberalism and the Limits of Justice: Second Edition* (New York: Cambridge University Press, 1998), p. 14. Honig, Bonnie. *Political Theory and the Displacement of Politics*

applications of Lockean secular liberalism such that they may better suit the conditions of late modernity.¹⁵⁵ Inspired by the principles of the Kantian Enlightenment, Rawls¹⁵⁶ and Habermas¹⁵⁷ reconfigure the political, legal, and social duties of religious and non-religious citizens alike in the western world. Instead of relying on institutions of government to demarcate and enforce the boundaries of religious expression, all citizens are understood to be endowed with the equal capacity for reason.¹⁵⁸ Reason allows citizens to be both the “legislator and judge of their own laws,”¹⁵⁹ a form of self-government that obliges citizens to, first, nurture their independent intellectual ability for complex thought and, second, engage in vigorous communal debate on the relative merits of such thoughts. Liberal egalitarians argue that citizens will deploy their reasoning skills within the marketplace of ideas,¹⁶⁰ which will allow them to not only discern the thought most suited to promulgation as universal law, but also foster a palpable sense of democratic inclusion.¹⁶¹ To

(Ithaca: Cornell University Press, 1993), p. 136. Tampio, Nicholas. “Rawls and the Kantian Ethos” in *Polity* 39 (2007), pp. 79-102.

¹⁵⁵ Habermas, *Between Naturalism and Religion*, p. 217. Elsewhere, in justifying his move towards Kant, he notes that “ever since the days of Spinoza and Locke, the philosophical justification given for religious tolerance points the absolutist state in a direction away from *unilaterally* declared religious toleration [...] and towards a conception of tolerance based on the *mutual* recognition of everybody’s religious freedom.” As cited in: Tønder, *Tolerance*, p. 58.

¹⁵⁶ Rawls, *Political Liberalism*, p. 133 ff.

¹⁵⁷ Habermas, Jürgen. *The Inclusion of the Other: Studies in Political Theory* (Cambridge: The MIT Press, 2000).

¹⁵⁸ Kant argues in *Critique of Pure Reason* that one of the hallmarks of an enlightened individual is her surrender to the discipline of reason – what he calls *die Disziplin der reinen Vernunft*. It is important to note, however, the meaning of the word *vernunft*, which Kant used instead of the word *verstand*. Although both words can be defined as “reason,” they impart different duties to those to whom they are directed. *Vernunft* implies that there is an orientation towards using one’s reasoning skills for normative goods; it imparts the ability to judge right from wrong. *Verstand* denotes the processes by which one’s mind understands worldly data or concepts. See: Kant, Immanuel. *Critique of Pure Reason* (Houndsmills: Macmillan, 1929), p. 708.

¹⁵⁹ Tønder, “Toleration without Tolerance,” p. 337. Rawls similarly mandates that citizens should “think of themselves as legislators and ask themselves what statutes, supported by what reasons, they would think it most reasonable to enact.” See: Rawls, John. “The Idea of Public Reason Revisited” in *University of Chicago Law Review* 64 (1997), p. 769.

¹⁶⁰ The metaphor of the marketplace of ideas, which is generally deployed to support vibrant free speech principles to challenge settled truth, can also be attributed to a variety of Euro-American sources: Mill, John Stuart. *On Liberty* (Indianapolis: Hackett Publishing Company, 1978). Jefferson, Thomas. *First Inaugural Address* (March 4, 1801). *Abrams v. United States* (250 US 616 (1919)). *United States v. Rumely* (345 US 41 (1953)). *Brandenburg v. Ohio* (394 US 444 (1969)).

¹⁶¹ Kant writes in *A Critique of Pure Reason*: “Reason must in its entire undertakings subject itself to criticism; should it limit freedom of criticism by any prohibitions, it must harm itself, drawing upon itself a damaging suspicion. Nothing is so important through its usefulness, nothing so sacred, that it may be exempted from this searching examination, which knows no respect for persons. Reason depends on this freedom for its very exercise. For reason has no dictatorial authority; its verdict is simply the agreement of free citizens, of whom each must be permitted to express, without let or hindrances, his objections or even his veto” (p. 738). Also cited in: Tønder, “Toleration without Tolerance,” p. 337.

paraphrase Jeremy Waldron, the aspirations of the Kantian Enlightenment are an inspiration for Rawls and Habermas:¹⁶² because reason alleviates the “repressive and oppressive nature” of the secular liberal state by charging all individuals with the duty to identify collaboratively promising ideas, beliefs, or convictions that can inform the content of the state’s laws and policies, it ameliorates the potential for religious minorities to bear unequal burdens of privatization in post-colonial, post-secular communities.¹⁶³

Yet even as religious minorities feel themselves connected to the ethos of the community, and all individuals are oriented towards recovering “semantic potentials from diverse religious traditions for the wider culture,”¹⁶⁴ this does not mean that liberal egalitarians fully dismantle the Lockean wall of seeming separation that exists between the state’s operations and its citizens’ religions. For Habermas and Rawls, while reason does indeed require individuals to engage with one another in the marketplace of ideas, there is no guarantee that any given conviction will be taken up as a new law or policy – even if citizens collectively agree upon its worthiness. Instead, and as will be discussed in further detail in Chapter Three, reason imparts a third obligation to citizens of a religiously plural state: the duty to identify a secular kernel of truth that can be siphoned from religion’s politically- and legally-motivated expressions of piety.¹⁶⁵ In other words, should religious individuals desire to make universal their beliefs in the laws and policies of liberal states, they must identify – with the help of other religious or non-religious citizens – an ostensibly agnostic component to their beliefs, such that its promulgation will not adversely or unduly impact individuals of other or of no faiths. Casting this process as one of “Kantian modulation,” Rawls argues that justice in post-secular states can only be realized if the Lockean “orthodox foundation systems” that separate religion from governmental rule – a separation that he affirms will secure the narrative’s constitutional ideals of equal liberty and freedom – remain in place, even if civil society itself becomes more robustly and vibrantly religious in character.¹⁶⁶ On the liberal egalitarian view, reason thus becomes a tool to safeguard the insulation of the institutions of the secular liberal state from the vagaries of religious belief, even as it seeks to make more equal the social relations between religious and non-religious persons. Put in slightly different parlance, appeals to the Kantian Enlightenment allow liberal egalitarians to not only reaffirm the normative impulses of the Lockean narrative of secular liberalism, but also redress the critical effects of its imperialist and intolerant origins.

¹⁶² Waldron, Jeremy. “Toleration and Reasonableness” in McKinnon, Catriona and Dario Castiglione, eds. *The Culture of Toleration in Diverse Societies: Reasonable Tolerance* (Manchester: Manchester University Press, 2003), p. 14.

¹⁶³ Habermas, “The Political,” p. 25. Habermas writes elsewhere: “Citizens should actively exercise their communicative and participatory rights, not only with regard to their own best interests but also with respect to the public good. This requires a greater emotional outlay, one that cannot be legally commanded. [...] If citizens understand society as a complementary learning process, both sides can, for cognitive reasons, then take seriously each other’s contributions to controversial themes in the public sphere.” Habermas, Jürgen. “On the Relations Between the Secular Liberal State and Religion” in de Vries, Hent and Lawrence E. Sullivan, eds. *Political Theologies: Public Religion in a Post-Secular World* (New York: Fordham University Press, 2006), p. 251. See also: Rawls, *Political Liberalism*, supra note 45.

¹⁶⁴ Habermas, “The Political,” p. 28.

¹⁶⁵ Habermas, “The Political,” p. 25.

¹⁶⁶ Rawls, *Political Liberalism*, p. 133. See also: Habermas, “On the Relations Between the Secular Liberal State and Religion,” p. 259.

Despite the ideological and methodological differences that persist among the foregoing treatments of the narrative of secular liberalism, it is possible to identify a compelling commonality: the understanding that the post-secular liberal state inherits from Locke a framework of institutional organization that is “much more than merely a form of government.”¹⁶⁷ To wit, across normative, critical, and liberal egalitarian interpretations of the narrative, Locke and his work serves simultaneously as the source for the constitutional ideals of equal liberty and neutral treatment, the mechanism of political marginalization and social subordination, and the inspiration for insulating law- and policy-making institutions from the machinations of a religiously plural populace. Yet even as Locke is cast as the lead in the narrative of secular liberalism, post-secular scholars confine their engagement with the specifics of his argument to margins, footnotes, and brief introductions; in such moments, what Alvarez has called “casually secular accounts” of Locke’s writing and what Waldron has suggested are “brazenly unattuned gestures” towards the Enlightenment,¹⁶⁸ his theories emerge from loose gatherings of images and words that seek to make sense of what western governance has been and currently is. The post-secular treatment of Locke, in other words, embodies what Brown earlier referred to as the post-modern reluctance to engage with potential sources of latent power: at once an opaque and nebulous figure, he functions as the springboard from which the reformation of the late modern state must be launched and the logically prior, deeply fraught entity that must be overcome.¹⁶⁹

By relegating references to Locke to single sentences or fleeting passages, however, post-secular scholarship raises – and then leaves unanswered – a pair of questions. First, what, precisely, constitutes the Lockean secular liberal entity meant to be overcome by a posture of post-secularism? And second, how might leaving uninterrogated the specifics of Locke’s argument have an impact on the ability of post-secular scholars to successfully surmount and surpass the problems they identify in his work? In the sections that follow below, I endeavor to answer these questions. Indeed, through a close reading of three key texts, I argue that Locke should be understood not only as an important source for recovering a definition of secularism that substantially exceeds the mere separation of church from state, but also as an undertheorized repository of ontological power in late modern post-secularism. With respect to the former point, I determine that although Locke did indeed desire the division between “this-worldly” and “other-worldly” affairs, this desire was not borne out of simple concern for the political and legal wellbeing of the citizens in the newly secular state, but rather out of a broader Protestant concern for the ultimate salvation of their souls. Following from this determination, and with respect to the latter point, I analyze the language deployed by Locke in safeguarding his citizens’ souls – an analysis that reveals his purposeful reliance on the use of reason to cultivate the separation of faith from political and legal life in a manner that secures the state even

¹⁶⁷ Mouffe, Chantal. “Religion, Liberal Democracy, and Citizenship” in *Political Theologies: Public Religions in a Post-Secular World* (New York: Fordham University Press, 2006), p. 318.

¹⁶⁸ Alvarez, “Reading Locke After Shaftesbury,” p. 75. Waldron, Jeremy. *God, Locke, and Equality: Christian Foundations in Locke’s Political Thought* (New York: Cambridge University Press, 2002), p. 11.

¹⁶⁹ Butler, Judith. “The Sensibility of Critique” in Asad, Talal and Wendy Brown, et al, eds. *Is Critique Secular? Blasphemy, Injury, and Free Speech* (Berkeley: University of California Press, 2009), pp. 101-137. Ian Hunter has also noted that late modern invocations and interpretations of the Enlightenment are often “intellectual practices or ‘spiritual exercises’ whose role is to permit attention to and transformation of the self.” For Hunter, like Butler, the Enlightenment thus operates as a heuristic device through which late modernity gains a deeper understanding of its past impulses and future obligations. For more, see: Hunter, Ian. *Rival Enlightenments: Civil and Metaphysical Philosophy in Early Modern Germany* (New York: Cambridge University Press, 2001), pp. 21-22.

as it secures individual souls. This reliance on reason, I argue, imbues secular liberalism with net-like, Foucauldian power. I conclude that to configure Locke as the problematic source of early modern secular liberalism, but to subsequently disengage with the potent and religiously-inflected ways in which he secures his ideal state, is to invite these same problems into late modern post-secularism. Indeed, as will be seen below and in the following chapter, this conclusion has significant implications for post-secular scholars working in the liberal egalitarian tradition as it demonstrates that reason, across time as well as geographical space, carries with it a discursive power that conditions its transformative and inclusive potential.

II. The Tolerance of John Locke

Before delving into the specifics of Locke's argument on matters of god and government, it is necessary to briefly clarify the terms that I deploy in the remainder of this chapter. Up to this point, I have suggested that the word "secularism" denotes the circumscription of religion from the public sphere, a removal that many normative, critical, and liberal egalitarian post-secular scholars characterize as crucial to the development of the liberal state – a development that finds its genesis in the writings of Locke. As intimated above, I argue over the remainder of this chapter that although this characterization is not incorrect, Locke's writings reflect a far more complex, power-laden, and religiously-inflected treatment of faith than is often realized in post-modern scholarship. To substantiate these claims, I engage in close textual analyses of three of Locke's seminal works over the next two sections: *A Letter Concerning Toleration*, *An Essay Concerning Human Understanding*, and *The Reasonableness of Christianity* – all of which use the language of "toleration," rather than secularism (which is used but once over the course of his works), to capture the process by which religion is relegated to the private sphere and a seemingly stable government is procured. Locke's preference for toleration can be, at least in part, attributed to the controversial nature of the term "secularism" in the Enlightenment. According to *Oxford English Dictionary*, the first use of secularism predated Locke's era, but until the mid-nineteenth century, it conveyed a primarily negative connotation: it implied the deep pain and eventual death wrought by living outside the Christian church.¹⁷⁰ By the twentieth century, secularism, generally understood, implied the simple dissociation of one entity from another – a broad meaning that allowed it to be taken up within the works of post-secular scholars, erasing its religiously and powerfully fraught history. In the following sections and chapters, I aim to return to contemporary secularism its religious overtones, but for the sake of exegetical consistency, I do so first here through the historical language of toleration.¹⁷¹ In Chapters Three and Four, I deploy the

¹⁷⁰ In the 19th century, Asad notes, freethinkers appropriated the use of the language of secularism to "avoid the charge of their being 'atheists' and 'infidels,' terms that carried suggestions of immorality in a still largely Christian society." Through the reconfiguration of secularist language, the freethinkers sought to achieve social reform: that is, the movement of politics away from personal morality in an era characterized by rapid industrialization and personal mobility. For more, see: Asad, *Formations of the Secular*, p. 23 ff. Asad, "Trying to Understand French Secularism," pp. 181-204. Casanova, José. *Public Religions in the Modern World* (Chicago: University of Chicago Press, 1994), pp. 12-13. Connolly, *Why I am Not a Secularist*, p. 21. Scott, *Sex and Secularism*, p. 10-15. Taylor, "Modes of Secularism," pp. 31-53. Sullivan, Winnifred Fallers. *Pay the Words Extra* (Cambridge: Harvard University Press, 2014).

¹⁷¹ Elizabeth Pritchard is one of the few Lockean scholars who insists on using the language of secularism, rather than Locke's preferred "toleration" or "tolerance." She notes that this insistence reflects her opposition to the tendency of tolerance to imply religious neutrality, while secularism more accurately captures the multidimensional ways in which early modern England was transformed into

language of secularism, but in Chapter Five, I revisit the language of toleration as it is used in contemporary legal appeals for religious accommodation in “secular” polities. With this clarification in mind, let us now turn to Locke.

Contrary to the narrative of secular liberalism, toleration, for Locke, does not operate as a simple matter of state policy oriented towards the securement of individual liberties through either the privatization of or the cultivation of neutrality towards religious practice. Toleration instead signifies “something more and something other than an ethical norm or social virtue, something more and other than a political exclusion and the delineation of a realm of activity toward which the state must stand in strict neutrality.”¹⁷² To understand Locke’s *Letter* as merely advocating for either would be to disregard the methodical and purposeful configuration of not only state power, but also religion and the citizen, that occurs in his work. It is, however, tempting to accede to this understanding. Written at a time in which sectarian conflict dominated the European continent, the *Letter* deploys, at first glance, toleration as a means to reconcile the political need for stability with the personal desire for divine salvation – an argumentative move that does indeed displace religion from the public sphere into the private sphere, constituting it as the stuff of individual concern and thereby ostensibly separating church from state.¹⁷³ For instance, early on in the *Letter* and in a quote that was reproduced in the previous section, Locke writes: “I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion, and to settle the just bounds that lie between the one and the other.”¹⁷⁴ He further argues that the man who conflates civil governance with religious governance “jumbles heaven and earth together, the things most remote and opposite, who mixes

a diverse, yet peaceful, state. For more, see: Pritchard, Elizabeth A. *Religion in Public: Locke’s Political Theology* (Stanford: Stanford University Press, 2013), pp. 4-5.

¹⁷² McClure, Kirstie. “Difference, Diversity, and the Limits of Toleration” in *Political Theory* 18 (1991), p. 364.

¹⁷³ Much of the secondary literature on Locke is divided between those who would advocate for a philosophical, non-religious reading of Locke, and those who would prefer to emphasize the religious premises of his works. Although this chapter adheres fairly closely to the latter view, it is nonetheless useful here to recognize that the former view is by no means incorrect – it just may not tell the whole story of Locke’s writings and their legacy. For instance, Noah Feldman argues that even when Locke’s strident Protestantism is considered, it does nothing to subtract from the substantial influence that Locke had on the development of American constitutional law. Indeed, for Feldman, the Establishment Clause of the 1st Amendment to the United States Constitution (which states: “Congress shall make no law respecting an establishment of religion...”) was the direct descendent of Locke’s passionate prohibition on religion’s presence in the public sphere. The protections provided for an individual’s liberty of conscience, he concludes, would have been impossible had Locke not mandated that a liberal government could not impose a uniform religion on its citizens or subjects. While Locke does indeed urge governmental restraint in matters of religion (that is to say, governmental restraint *beyond* requiring religion’s public circumscription), it will become clearer as this chapter progresses as to why this very restraint implicitly endorses a specific religious ideology. For more on those who would advocate for a non-religious reading of Locke, see: Feldman, Noah. “The Intellectual Origins of the Establishment Clause” in *New York University Law Review* 77 (2002), pp. 347-428. Dunn, John. *The Political Thought of John Locke: An Historical Account of the Argument of the Two Treatises of Government* (New York: Cambridge University Press, 1983). Note that Dunn does not wholly reject a religious reading of Locke, but rather suggests that the religious undercurrents in his works were largely the result of a restless young man desperate to curry favor in England while exiled in Utrecht.

¹⁷⁴ Locke, *Letter*, p. 18.

these societies, which are, in their original end, and in every thing [sic], perfectly distinct, and indefinitely different from each other.”¹⁷⁵ On this reading, “the religious” and “the political” are oriented towards two very different ends: the former is concerned with the salvation of souls and the achievement of a heavenly afterlife, whereas the latter is concerned with the suitable organization of daily life and the “possession of outward things – money, hand, houses, furniture, and the like.”¹⁷⁶ To properly secure these material goods and peacefully communal lives, Locke imbues a magistrate with the power to decide what comprises “this-worldly” matters that are subject to civil jurisdiction and what comprises “other-worldly” matters that are subject to ecclesiastical jurisdiction. In this manner, the *Letter* easily reads as a treatise on how to ensure the appropriate separation of the religious from the political and, in doing so, prevent men from “persecuting, tormenting, destroying, or killing other men upon the pretense of religion.”¹⁷⁷ Taken together, the foregoing elements of Locke’s argument convert sectarian difference in the matter of religion to religious pluralism as a matter of law; the judicious removal of religion from the domain of the political under the watchful eye of the magistrate, in other words, allows for the pursuit of “life, health, liberty, or possessions”¹⁷⁸ to take primacy – therefore creating a secure and profitable polity within which a religiously plural population can thrive.

Tempting though this interpretation may be, it must be pushed further. For it is not just that Locke removes religion from the public sphere to the private, but rather that he does so in a normative,

¹⁷⁵ Locke, *Letter*, p. 32.

¹⁷⁶ Locke, *Letter*, p. 18.

¹⁷⁷ Locke, *Letter*, p. 14.

¹⁷⁸ This quote, pulled from *Second Treatise of Government*, is often cited by scholars of Locke to demonstrate that Locke’s religiously-inflected vision of toleration (secularism) can be traced to texts other than his *Letter*. More precisely, such scholars determine that Locke’s emphasis on the protection of worldly goods from political influence – like property and personal possessions – signals his reverence of God and his distaste for persecution. Private property, a majority of contemporary theorists conclude, provide the foundation upon which the *Letter* rests. I agree that this view is largely correct. Indeed, Locke’s theory of private property unfolds in two parts. The first part shows how religion belongs to the “jurisdiction of the private sphere, based on the assumption that religious beliefs, like other modes of private property, are a product of the labor that individuals put into the land given by God to mankind in general.” The second part, shows that it is impossible to “regulate the private sphere politically, since politicians, being subject to the jurisdiction of the public sphere, only have the means to *protect* property, leaving it to each individual to decide how he or she wants to *appropriate* this property.” Combined, these visions of private property and religious belief lead Locke to conclude that the business of the church must be distinguished from that of the state. Locke concludes: “If this be not done, there can be no end put to the controversies that will be always between those that have, or at least pretend to have, on the one side, a concernment for the interest in men’s souls and, on the other hand, a care of the commonwealth.” Locke, John. *Two Treatises of Government* (Cambridge University Press, 1988), p. 104. Tønder, “Toleration without Tolerance,” p. 331. Locke, *A Letter Concerning Toleration*, p. 17. For more see: Dunn, John. “The Claim to Freedom of Conscience: Freedom of Speech, Freedom of Thought, Freedom of Worship?” in Grell, Peter Ole, ed. *From Persecution to Toleration: The Glorious Revolution and Religion in England* (New York: Oxford University Press, 1991). Marshall, John. *John Locke: Resistance, Religion, and Responsibility* (New York: Cambridge University Press, 1994), pp. 33-72. Shapiro, Ian. “John Locke’s Democratic Theory” in Locke, John. *Two Treatises of Government and A Letter Concerning Toleration* (New Haven: Yale University Press, 2003), pp. 212-218. Tuckness, Alex. *Locke and the Legislative Point of View: Toleration, Contested Principles, and the Law* (Princeton: Princeton University Press, 2002), pp. 17-25.

constitutive, and stridently Protestant manner.¹⁷⁹ While the magistrate may confidently determine what is this-worldly and what is other-worldly, he cannot and does not know what may serve as the “truest” form of salvation for his subjects. Locke writes: “The one only way which leads to heaven is not better known to the magistrate than to private persons, and therefore I cannot safely take him as my guide, who may be as ignorant of the way as myself, and who certainly is less concerned for my salvation as I am.”¹⁸⁰ Religion must be excised from the public sphere not simply because of the polity’s need for protection from warring spiritual factions, but because an individual’s salvation must be protected from the machinations and complications endemic to public and political life. Locke pushes this understanding of individual salvation further:

All the life and power of true religion consists in the inward and full persuasion of the mind; and faith is not faith without believing. Whatever profession we make, to whatever outward worship we conform, if we are not fully satisfied in our own mind that the one is true, and the other well-pleasing unto God, such profession and practice, far from being any furtherance, are indeed great obstacles to our salvation.¹⁸¹

For Locke, public displays of piety – performed with much fanfare and absent true and faithful devotion to God – are an insufficient means through which to secure divine salvation. For while an individual may engage in the rituals of religion (e.g., the Catholic practice of communion or the dietary restrictions of Judaism), such actions cannot and should not be taken as incontrovertible proof of the strength of his or her faith. Furthermore, if certain rituals are completed *without* conviction, these actions may very well constitute an affront to God.¹⁸² Under such a regime, the magistrate must be prohibited from compelling belief in matters of religion because any resultant action taken by the individual would not demonstrate true piety. Yet despite the lack of power by the magistrate to compel religious belief or conduct, he still remains the aforementioned power to determine what constitutes appropriate religious behavior in the public sphere. It is the retention of this boundary-setting power that serves as the locus for toleration’s reason-based, subject-forming power – a power that, as I noted earlier, replicates itself within post-secularist thought.

Above, I determined that Locke’s argument regarding the separation of church and state emerged via a religious understanding of religion. More precisely, it emerged via a Protestant Christian understanding of religion – its practice must be voluntary, sufficiently subdued and private in nature

¹⁷⁹ As hinted at above in note 62, this is not a terribly controversial or uncommon view. As Matthew Scherer notes, the *Letter’s* argument for the separation of church and state is “buttressed at every turn by arguments that acknowledge and even intensify the interconnection of religion and politics.” Thus, in advancing the argument that Locke imbues the governance of the public sphere with Protestant ideology, I follow most explicitly in the footsteps of James Tully, Lars Tønder, Kirstie McClure, and Matthew Scherer. That being said, this chapter does represent a new contribution to the literature of post-secularism by recovering Locke’s religious foundation and using this as a method for contemporary critique and interrogation. For more, see: Tully, James. *An Approach to Political Philosophy: Locke in Contexts* (New York: Cambridge University Press, 1993). Tønder, *Tolerance*, at *supra* note 31. McClure, “Difference,” at *supra* note 62. Scherer, Matthew. *Beyond Church and State: Democracy, Secularism, and Conversion* (Cambridge: Cambridge University, 2013), p. 82.

¹⁸⁰ Locke, *Letter*, p. 18.

¹⁸¹ Locke, *Letter*, p. 19.

¹⁸² For more on this subject, see: Wolterstorff, Nicholas. *Divine Discourse: Philosophical Reflections on the Claim that God Speaks* (New York: Cambridge University Press, 1995).

so as to encourage genuine faith and, ultimately, directed towards the salvation of one's soul.¹⁸³ This reading of Locke, however, is still not quite complete. Indeed, as Locke advocates for the separation of public conduct from private belief, he makes repeated appeals to the language of toleration. The toleration of other men's beliefs and their individually-determined paths towards salvation, he argues, "is so agreeable to the Gospel of Jesus Christ, and to the genuine reason of mankind, that it seems monstrous for men to be so blind, as not to perceive the necessity and advantage of toleration in so clear a light."¹⁸⁴ Here, Locke intentionally removes religion from public life on Protestant Christian grounds so as to better accommodate the presence of other faiths. Reason, he argues in an almost proto-Kantian fashion, allows all men to recognize and respect others' beliefs as well as their diverse paths toward salvation. Within the context of the liberal state, man's capacity for reason compels citizens to not only privatize their beliefs out of concern for their salvation, but also to regard persons of different faiths as their social and political equals. Put in late modern parlance, toleration, through its reliance on reason, allows Locke's liberal state to transcend the sectarian warfare that characterized early modern England and, in doing so, enshrine a mode of interpersonal behavior that subtly dissuades such public conflicts from arising again.

But what about this story of reasoned toleration and religion's privatization could be marshalled to tell a story about an ontological, subject-forming power that can wend its way from the seventeenth to the twenty-first century? There are two answers to this question, both of which rest on the subtle, yet powerful, collapse in Locke's distinction between "the religious" and "the political." The first answer rests in the above paragraphs, specifically within the liberal principles of toleration and privatization that derive from Protestant Christian mores. At the most basic level, those citizens who participate in the public sphere – or, at the very least, endeavor to tolerate their peers – must submit to the political guidance offered by such mores, even if they contradict or conflict with the citizens' own religious beliefs. Indeed, in the eyes of Locke's newly crafted liberal state, a secular subject is a reasoned Protestant.

The second answer rests in Locke's concern for civil order and "the public weal."¹⁸⁵ Kirstie McClure argues: "In short, what the *Letter* is framed to address is the need to settle both civil and religious discourses within determinant boundaries, affixed in some precise way to worldly practice, and to provide a criterion of judgment capable of not only delimiting their respective practical expressions but of exposing the excess of pretense in either idiom."¹⁸⁶ Locke's argument, simply

¹⁸³ This stipulation was, at the time of Locke's writings, quite exclusionary towards Catholics. The practice of the Catholic faith was considered by Locke to be un-Christian as it relied on the performance of communion, public processions to Mass, and other demonstrable public actions. These public elements could not, for Locke, be understood to convey proper introspection – that is to say, these public actions did not demonstrate that a Catholic person had sufficient concern for the state of both his soul and his relationship to God. On some accounts, Locke's exclusion of Catholics from his vision of the public sphere was a result of his belief in their allegiance to a "foreign power" – namely, the Pope. Interestingly, however, Locke also excluded atheists from associative life in secular liberal states, despite their conformance to a-religious conduct. This exclusion was based on his assumption that atheists, whom he understood to have no internal moral code, could not be counted upon to keep their political promises. For more, see: Greenawalt, Kent. *Religion and the Constitution: Volume 1: Free Exercise and Fairness* (Princeton: Princeton University Press, 2006), p. 21 (fn 36).

¹⁸⁴ Locke, *Letter*, p. 17. Emphasis added.

¹⁸⁵ Locke, *Letter*, pp. 16-17.

¹⁸⁶ McClure, "Difference," p. 377.

stated, seeks to define the acceptable limits of power and individual state action. However, the limits he allows to be imposed on individuals and enforced by the magistrate accomplish two troubling ends: first, the direction that a religious individual's actions in the public sphere must properly correspond to worldly needs and, second, the governance of all non-Christian (and therefore non-Protestant) action extends even to the private sphere. The construction of what be considered a Lockean secular subject is therefore slightly altered from the definition given in the previous paragraph: a secular subject is a citizen who privatizes his or her religion according to Protestant values in order to preserve the orderliness of the public square as well as recognizes that faith-based convictions do little to secure political well-being.

An example treated by Locke in the *Letter* further clarifies this point. In addressing the practice of animal sacrifice, Locke emphasizes the primacy of civil order and the power of the magistrate to secure it. He writes:

If any people congregated on account of religion should be desirous to sacrifice a calf, I deny that that ought to be prohibited by law. Meliboeus, whose calf it is, may lawfully kill his calf at home, and burn any part of it he thinks fit. For no injury is thereby done to anyone, no prejudice to another man's goods. And for the same reason he may kill his calf also in a religious meeting.¹⁸⁷

Here, the law defines the extent to which toleration may be afforded to an individual's faith-based action. On an initial reading, it appears as though Locke establishes a simple correlative formula: if civil authority permits a certain action during the course of day-to-day worldly life, the action (even if it is motivated by religious convictions) must also be permitted to take place in the public sphere. This reading is corroborated by Locke's treatment of infant baptisms.¹⁸⁸ He continues:

If [...] the interest of the commonwealth required all slaughter of beasts should be forborne for some while, in order to the increasing stock of cattle that had been destroyed by some extraordinary murrain, who sees not that the magistrate, in such a case, may forbid all his subjects to kill any calves for any use whatsoever? Only it is to be observed that, in this case, the law is not made about a religious but a political matter, nor is the sacrifice, but the slaughter of calves, thereby prohibited.¹⁸⁹

In the first passage, Locke's argument about the privatization of religion suggests that, even though the grounds of such privatization derived from Protestant theology, non-Protestant religious actions ought to be permitted in churches, synagogues, mosques, religious gatherings, or private homes. The second passage quoted above disturbs this reading. Indeed, in giving the magistrate the power to curtail certain religious practices in the service of the state, Locke suggests that even privately permissible religious actions will always be subject to political control. In this instance, as well as in others, the *Letter* elevates political power over individual belief and imbues the magistrate with the extensive authority to regulate private religious life.

¹⁸⁷ Locke, *Letter*, p. 47.

¹⁸⁸ To wit, Locke writes with respect to the example of a magistrate compelling all citizens to baptize their children in the Catholic faith: "Let it be granted that the washing of an infant is in itself an indifferent thing; let it be granted also that the magistrate understand such washing to be profitable in the curing or preventing of any disease the children are subject to, and esteem the matter weighty enough to be taken care of by the law. In that case he may order it to be done. But will anyone therefore say that a magistrate has the same right to ordain by law that all children be baptized by priests in the sacred font in order to the purification of their souls? The extreme difference is visible to everyone." Locke, *Letter*, p. 46.

¹⁸⁹ Locke, *Letter*, pp. 47-48.

The power of the magistrate to circumscribe the exercise of non-Protestant religions due to the interests of the “public weal” upsets the strict separation of religion and politics for which Locke so passionately advocates. He states:

Whatsoever is lawful in the commonwealth, cannot be prohibited by the magistrate in the church. Whatsoever is permitted unto any of his subjects for their ordinary use neither can nor ought to be forbidden by him to any sect of people for their religious uses. [...] *But those things that are prejudicial to the commonweal of the people in their ordinary use, and therefore forbidden by laws, those things ought not to be permitted to churches in their sacred rights. Only the magistrate ought always to be careful that he do [sic] not misuse his authority, to the oppression of any church, under the pretense of public good.*¹⁹⁰

Although Locke admonishes the magistrate to be “very careful” in determining which behaviors to prohibit, the perfectly neutral execution of this admonition cannot be guaranteed. Instead, in order to determine what constitutes a conflict between private religious expression and communal well-being, the magistrate has the power and discretion to appeal to some pre-determined notion of what comprises “proper” religious behavior. As such, unqualified toleration – that is to say, the equal protection of all religions by government actors – may fall by the wayside should the possibility of tangible harm to the community arise through the public practice of a particular religion, leaving those faiths that do not conform to Protestant Christian norms of rational privatization vulnerable to censorship. Even when clear tangible harm to the commonweal is not straightforwardly clear, Locke errs on the side of letting the magistrate determine what constitutes a harm. For instance, Locke condemns, in the same breath, the private practices of infant sacrifices and sexual promiscuity. He notes:

You will say, by this rule [that the magistrate has no power to forbid private rites and ceremonies], if some congregations should have a mind to sacrifice infants, or, as the primitive Christians were falsely accused, lustfully pollute themselves in promiscuous uncleanness, or practice any other such heinous enormities, is the magistrate obliged to tolerate them, because they are committed to religious assembly? I answer, no. These things are not lawful in the ordinary course of life, nor in any private house; and, therefore, neither are they so in the worship of God, or in any religious meaning.¹⁹¹

The above passage makes clear that, even if non-Protestant religious actions take place in the realm of the private, they cannot escape the reach of the magistrate’s political power.

The purpose of the preceding paragraphs has been to demonstrate, first, that Lockean secular liberalism (rendered as tolerance by Locke) emerges from a religious understanding of the proper role of faith in the public sphere and, second, that reason serves as a means through which this understanding is enforced and maintained. Reason does not function as an empty rhetorical device whose presence can be ignored in Locke’s *Letter*; instead, if the role of reason is traced throughout the text – from the definition of the goals of the liberal state to the treatment of animal sacrifice, infant sacrifice, and sexual promiscuity – what emerges is a powerful construction of the tolerant, liberal, and publicly Protestant subject. Put differently, the role of reason is central both to the liberal project and to Protestantism, as securing the political and social well-being of the commonwealth necessarily entails privatizing and subsequently policing individual practices of religion.

What the preceding paragraphs have not yet accomplished, however, is the full exploration of the implications of Locke’s reliance on reason and Protestantism for governing individual conduct in the public sphere. Up to this point, and in moves that buttress the earlier liberal egalitarian

¹⁹⁰ Locke, *Letter*, pp. 48-49. Emphasis added.

¹⁹¹ Locke, *Letter*, p. 47.

determination that the Lockean secular liberal state possesses an “excessive and illegitimate power,” it treated what religious practices can and cannot be permitted in public life – as well as what religious practices can and cannot be practiced in private – but it has yet to articulate fully the impact that this regulation-via-reason could have on a devout citizen’s relationship with his or her faith. In what follows, I situate Locke’s reliance on reason in articulating liberal tolerance within the context of his other writings on faith, primarily *An Essay Concerning Human Understanding* and *The Reasonableness of Christianity*. Situating Locke’s *Letter* within the context of his other works demonstrates the extent to which reason is tied to the practice of the Protestant faith and how this could alter the material and metaphysical conditions of an individual’s life, even as it lays the groundwork for reassessing reason’s appropriation by post-secularists. I thus examine Locke’s use of reason in his writings on human understanding and faith to show how he configures reason as a means to construct a self-regulating liberal subject.

III. Reason and the Regulation of Conduct

The task of understanding Locke’s views on the relationship between reason and religion in the context of the broader body of his scholarship is, at best, an unwieldy task. As discussed briefly above, Locke wrote the *Letter* at a time in which religious warfare dominated the English – and, more broadly, the European – political landscape. Yet Locke’s project in the *Letter* was not simply to articulate a vision of political liberalism that would resolve all conflict by appealing to the rational core of mankind; it was, instead, a marked effort directed towards constructing a new juridical apparatus that would seek to address and resolve the relative “truth” claims operating among the religious citizens in a diverse and fractious population.¹⁹² Indeed, liberalism, for Locke, could not be successfully installed over the existing infrastructures of divinely-inspired rule – as this method of governance operated under the assumption that the role of the law was to “propagate the true faith and inculcate absolute value”¹⁹³ – without first articulating a solution to the problem of the intractability of diversity in religious and moral beliefs. This solution, I argue, was predicated, first, on the creation of the critical faculty of reason and, second, the reasoned separation of the body from the mind. Only when these two factors were taken together and promulgated within the new liberal state could the state be rightly said to be directed towards the preservation of life, liberty, and equality above the preservation of religion.¹⁹⁴ Yet as shall be seen below, Locke’s attempts at negotiating the mind-body divide are not themselves completely divested of an understanding of “true faith and absolute value” that structures and constrains the actions taken by liberal citizens.

¹⁹² Tully, *An Approach to Political Philosophy*, p. 182. Michael Warner similarly notes that Locke’s reliance on religious concepts to argue for toleration suggests that “in order to manage religious freedom, secular government first regulates what counts as religion.” Warner, Michael. “Is Liberalism a Religion?” in de Vries, Hent, ed. *Religion: Beyond a Concept* (New York: Fordham University Press, 2008), pp. 610-617.

¹⁹³ Tully, *An Approach to Political Philosophy*, p. 182. Stephen Macedo also notes that Locke’s liberalism “depends on the prevalence of religious sensibilities that support toleration” – indeed, importantly, the very first sentence of the *Letter* insists that toleration is “the chief characteristic mark of the true church,” which Macedo determines is indicative of Locke’s determination to suggest that toleration is, above all else, a religious mandate. Macedo, Stephen. “Liberalism beyond Toleration: Religious Exemptions, Civility, and the Ideological Other” in *Philosophy and Social Criticism* 45 (2019), p. 376.

¹⁹⁴ For more on Locke’s prioritization of equality, one that coexists proudly with religious belief, in newly formed liberal states, see: Waldron, *God, Locke, and Equality*, p. 44.

The first central feature of Locke's vision of liberalism is a rejection of the theory that both an individual's assent to be governed and his religious beliefs are directed by some "natural disposition to the true or the good."¹⁹⁵ In *An Essay Concerning Human Understanding* (hereafter referred to as his *Essay*), Locke explicitly endeavors to "search out the bounds between opinion and knowledge; and examine by what measures, in things, whereof we have no certain knowledge, we ought to regulate our assent, and moderate our persuasions."¹⁹⁶ Teleological understandings of "the good" – that is to say, the innate and natural morality developed by an individual if given proper time and care – form the basis of the assumptions against which Locke works. Indeed, the arguments he levels against teleological assumptions of political life and human nature are, once again, twofold: first, that the principles, ideas, and dispositions that are said to be innate are, in fact the product of custom and education and, second, that the first argument is available to any individual with a predilection for the suspension of belief and the valuation of rational examination. To see precisely how these arguments work, and what vision of the liberal state they create, each will be taken in turn.

Locke suggests that it is "an established opinion amongst some men, that there are in the understanding certain innate principles; some primary notions, characters, as it were stamped upon the mind of man, which the soul receives in its very first being; and brings into the world with it."¹⁹⁷ For Locke, the belief that the mind of mankind is imprinted from birth with certain values and ideals is an incredibly dangerous belief. Inherent within this way of thought, he argues, is the assumption that certain states or political orders are pre-destined to be viewed as "good" or as "moral" simply by virtue of the fact that persons are conceived, born, live, and die within its confines. Moreover, the implicit notion of assent contained within these teleological understandings of human faculties troublingly insulates from critique both the foundations of the "moral notions" and the political order to which individuals implicitly assent. Locke continues:

Doctrines, that have been derived from no better original, than the superstition of a nurse, or the authority of an old woman; may, by length of time, and consent of neighbors, grow up to the dignity of principles in religion and morality. For such, who are careful (as they call it) to principle children well [...] instill into the unwary, and, as yet, unprejudiced understanding, (for white paper receives any characters) those doctrines they would have them retain and profess.¹⁹⁸

Here, what is understood to be innate principles and morals are, in fact, the result of social custom and education. Children are schooled "as soon as they have apprehension"¹⁹⁹ and their teachers "never suffer those propositions to be otherwise mentioned, but as the basis and foundation, on which they build their religion or manners."²⁰⁰ Taking the preceding arguments together, the legitimacy of divine rule is thus, for Locke, a ruse constructed and maintained by the belief in innate or teleological thought; it is a fallacy established by custom and education, and then justified and reinforced by appeals to implicit assent.

Locke challenges these established bodies of innate knowledge and political power through a process of what he calls "suspension and examination,"²⁰¹ which, as the name implies, suspends

¹⁹⁵ Tønder, "Toleration without Tolerance," p. 333.

¹⁹⁶ Locke, John. *An Essay Concerning Human Understanding* (Indianapolis, IN: Hackett Publishing Company, 1996), p. 5.

¹⁹⁷ Locke, *Essay*, p. 7.

¹⁹⁸ Locke, *Essay*, p. 22.

¹⁹⁹ Locke, *Essay*, p. 22.

²⁰⁰ Locke, *Essay*, p. 22.

²⁰¹ Locke, *Essay*, p. 28.

judgment and examines the grounds for and against any proposition before assenting or acquiescing to it. This method, which James Tully argues was the great legacy of the Enlightenment,²⁰² endeavors to cut across deeply entrenched religious and moral lines. As Locke opines in the opening of his *Essay*, and later repeats in subsequent chapters:

The great difference that is to be found in the notions of mankind is from the different use they put their faculties to, whilst some (and those the most) taking things upon trust, misemploy their power of assent, by lazily enslaving their minds, to the dictates and dominion of others, in doctrines, which it is their duty carefully to examine; and not blindly, with an implicit faith, to swallow.²⁰³

This edict is intended to at once dissolve the “epistemological foundations of the *ancien régime*”²⁰⁴ and instill within the *tabula rasa*²⁰⁵ of the liberal citizens the faculties of reason and rationality. He argues that the human mind

if it will proceed rationally, ought to examine all the grounds of probability, and see how they make more or less, for or against any probable proposition, before it assents to or dissents from it, and upon due balancing the whole, reject or receive it, with more or less firm assent, proportionally to the preponderancy of the greater grounds of probability on one side or the other.²⁰⁶

At work in Locke’s argument is an important Enlightenment ideal: that once our beliefs and assents are carefully examined in the light of reasoned and rational criteria, we can assess their legitimacy. There is, on this assessment, no room left for the dogma or superstition derived from customary practices of religion and morality. Although Locke does stipulate that the faculty of reason may not be available to everyone – on condition of their education, their “idiocy,” or their residence within politically repressive regime²⁰⁷ – he nonetheless suggests that those beliefs and governments premised on rational reflection will be those most likely to be directed towards the principles of liberty, freedom, and equality.²⁰⁸

To say that the faculty of reason that emerges from Locke’s further writings on faith and politics is devoid of any religious overtones would be a fallacy. For although Locke takes pains to differentiate the reason presented in the portions of the *Essay* reproduced above as necessarily distinct from the troubled trappings of customary education, he does not fully dissociate it from the version of reasoned Protestantism that emerges from the *Letter*. Indeed, thus far, the vision of reason articulated in the *Essay* is an internal, intellectual process directed towards some political good; it is the private reflection on what would be considered best for mankind, regardless of past or current customs. However, what emerges from the *Letter* is an account of reason that has direct consequences for public conduct; it is, in other words, the internal reason presented in the *Essay*, but made manifest in the sphere of individual action. But which iteration of reason could hold sway in assessing the efficacy of post-secular public reason? The answer to this question rests in Locke’s argument in *The*

²⁰² Tully, *An Approach to Political Philosophy*, p. 191.

²⁰³ Locke, *Essay*, p. 30. See also: Tully, *An Approach to Political Philosophy*, p. 191.

²⁰⁴ Tully, *An Approach to Political Philosophy*, p. 192.

²⁰⁵ Locke, *Essay*, p. 87. Here, Locke argues that a child just born is a “white paper” that “receives any characters.”

²⁰⁶ As cited in Tully, *An Approach to Political Philosophy*, p. 193.

²⁰⁷ Locke, *Letter*, p. 10.

²⁰⁸ Locke further stipulates in the *Essay*: “Examination is a consulting guide. The determination of the will upon enquiry is following the direction of that guide: And he that has as power to act, or not to act according to such determination directs, is a free agent” (p. 266).

Reasonableness of Christianity (hereafter referred to as *Reasonableness*), which carefully constructs a wall of separation between “the religious” and “the political” – only to dismantle it when addressing rational public conduct.

“Whatsoever should be [...] universally useful, as a standard to which men should conform their manners,” argues Locke in *Reasonableness*, “must have its authority from reason or revelation.”²⁰⁹ On an initial reading of this phrase, it would appear that Locke endeavors to delineate between politics based on the rule of reason and politics based on the rule of God. Both exist, and both may promulgate laws that regulate the behavior of their constituents, but they derive their authority – that is to say, their legitimacy as a liberal state – from vastly different sources. He continues:

He that will [...] have his rules pass for authentic directions, must shew [sic], that either he builds his doctrine from the principles of reason, self-evident in themselves, and that he deduces all the parts of it from thence, by clear and evident demonstration; or must shew [sic] his commission from heaven, that he comes with authority from God, to deliver his will and commands to the world.²¹⁰

Here, as in the *Essay*, it is possible to see Locke privilege the process of “suspension and examination” in order to arrive at rational principles. Legitimate states and their legislative representatives must engage in the weighing of facts and the deconstruction of false customs in order to arrive at policies that can be rightly said to privilege liberty and equality over “an old woman’s [...] religion and morality.”²¹¹ But again, as in the quote that began this paragraph, Locke adduces that authentic government can indeed derive from divine revelation. Put simply, it would seem that, from his repeated use of the word “or” to separate reason-based rule from faith-based rule, these modes of governance are both legitimate sources of authority.”

Yet as Locke’s work progresses, the distinction erected between reason-based rule and faith-based rule slowly erodes. Not only does reason emerge as “a law of morality, that Jesus Christ hath given to us in the New Testament,” but so too does the “truth and obligation of reason’s precepts, have their force, and are put past doubt to us, by the evidence of [the Christian] mission.”²¹² Locke’s appeal here to evidence in revealing the religious force behind the principle of reason recalls his suggestion in the *Essay* that all customs, traditions, and religions must be weighed and subjected to evidentiary investigations. He clarifies:

A great many things which we have been bred up in the belief of, from our cradles, (and are notions grown familiar, and, as it were, natural to us, under the Gospel) we take for unquestionable obvious truths and easily demonstrable; without considering how long we might have been in doubt or ignorance of them, had Revelation been silent. [...] It is no diminishing to Revelation, that reason gives it suffrage too to the truths Revelation has discovered. But it is our mistake to think that because reason confirms them to us, we had the first certain knowledge of them from thence.²¹³

Locke’s argument here determines that, even if individuals were to remove themselves from the contexts provided by their learned customs and educations, the “suspension and examination” of Christianity would result in mankind’s rational endorsement of its precepts. Christianity, on this view, is at once a customary religion and a rational method of organizing political life – even though it is

²⁰⁹ Locke, John. *The Reasonableness of Christianity* (Stanford: Stanford University Press, 1958), p. 63.

²¹⁰ Locke, *The Reasonableness of Christianity*, p. 63.

²¹¹ Locke, *The Reasonableness of Christianity*, p. 62.

²¹² Locke, *The Reasonableness of Christianity*, p. 63.

²¹³ Locke, *The Reasonableness of Christianity*, p. 90-91.

not an immutable or ineradicable tradition, it is, like reason itself, a legitimate source of authority to which individuals should give their assent.

Rationality in Locke's *Reasonableness* is thus a twofold proposition: first, it entails the regulation of public conduct and, second it determines that this public conduct – in order to be considered appropriate by the state – must conform to the standards put forth by Christianity and confirmed by internal, rational examination. This vision of reason is reflected in both the *Essay* and the *Letter*. It becomes, in other words, a deeply powerful method of governance directed towards endowing its constituents with a particular internal process that produces and later legitimizes outward behavior. Indeed, when these three works of Locke are taken together, it is possible to see the materialization of what Tønder called “an ontology of reason.”²¹⁴ Secular liberalism, for Locke, is premised upon the internalization of reasoned tolerance across diverse and dynamic religious populations, such that the individuals that comprise these populations *constitute themselves* as liberal, Christian subjects. Put slightly differently, devout citizens, regardless of their status as Christians, will, through the cognitive faculty of reason, be able to access an intellectual process of “suspension and examination” that will lead them to conclude that the principles of Protestant privatization best secure the political ideals of liberalism. Secular liberalism, historically understood, is a process that is at once deeply disciplinary and deeply Protestant.

IV. The Power of (Post) Secular (Public) Reason

The purpose of this chapter was, first, to uncover in post-secularist thought a conception of secularism that could act as a lodestar throughout the remaining chapters of this dissertation and, second, to do so in a way that attended to the powerful and subtle ways in which secularism performs and secures its historical power. More specifically, I sought to illuminate the ways in which secularism, as it emerged from the foundational works of John Locke, is profoundly dependent on a religiously-inflected discourse of reason, through which devout citizens constitute themselves as subjects not only to a Protestant god, but also to the political goals of the liberal state.

I also had a much broader purpose in this chapter: to lay the theoretical groundwork for a critique of the seemingly power-free and value-neutral attitude of post-secular public reason adopted by liberal egalitarian scholars. Although this critique will be taken up to a greater extent and in more detail in the following chapter, it is nonetheless pertinent to make more concrete the ontological connections that operate between secular reason and post-secular public reason here. Recall that, at the outset of this chapter, I detailed how the liberal egalitarian engagement with the Lockean narrative of secular liberalism was intended to produce a practical solution to the existential problems of late modernity identified by normative and critical literature: that is to say, respectively, the preponderance of diverse religious practices in the public sphere and the impulses of secularist states to unfairly burden with privatization demands those whose religious practices fell outside a normalized, Judeo-Christian spectrum. Recall also that liberal egalitarians categorized the Lockean narrative of secular liberalism as possessing an “excessive and illegitimate power,”²¹⁵ a power that derived from its ability to hold the promises of constitutional equality and state neutrality hostage to the adherence of an individual to the circumscription of her religious practices from associative life – this power, liberal egalitarians further determined, could only be overcome through a concerted appeal to Kantian reason. This reason, which will be reformulated as by liberal egalitarians as “public reason” in the following chapter, imposed obligations on individuals to cultivate their capacities for critical thought,

²¹⁴ Tønder, “Toleration without Tolerance,” p. 335.

²¹⁵ *Supra* note 41.

to discuss the relative merits of different arguments or beliefs derived from such thoughts, and – should a consensus emerge for changes in laws or policies – to identify a secular kernel of truth that can be generally apprehended by all persons and promulgated to equal and neutral effect within the state’s laws and policies. By appealing to Kant, so the arguments went, the post-secular liberal state could transcend the Protestant, subject-forming power possessed by Lockean forms tolerance and instead cultivate a robustly plural civil society that maintained its secular political and legal institutions. Yet when this vision of Kantian reason is placed in conversation with the methodical work done by Lockean reason in the construction of the secular liberal state, not only do similarities emerge in how each form of reason imposes duties on individual citizens within the public sphere, but so too does this conversation demonstrate how these very same duties educe and reproduce a specific form of power and a specific form of religiosity. To argue that post-secular reason absolves itself from charges of excessive and illegitimate power through the appeal to Kantian reason, in other words, is to disregard how discourse wends through time and history within fragments of speech that congeal into repositories of meaning and conceal its affective, net-like power. Contemporary appeals to reason that endeavor to transform the historical framework of secular liberalism thus must account for and engage with the ontological potential of Protestant tolerance.

In the following chapter, I explore how liberal egalitarians – specifically, the practically- and legally-oriented theories of Habermas – style post-secularism as advocating for political inclusiveness and rejecting the power-laden regulations on religious expression found in societies that conform to historical notions of secular reason, but still call upon reason, especially reason possessed by secular or non-religious citizens, to act as a barrier between faith-based politically-motivated speech and “generally apprehensible” politico-legal discourse in the public sphere. In this manner, although religious citizens are free to pursue their values and beliefs within the public sphere, I argue that their ultimate access to and participation within the *civitas terrena*²¹⁶ depends on their ability to accept the ultimate goals of the liberal state and regulate their conduct accordingly. I thus conclude that reason, in both its secular and post-secular instantiations, carries with it an ability to affect the material and metaphysical lives of devout citizens in western democracies – an affect, a discursive power, that undermines the constitutional protections that safeguard what Locke called an individual’s “life, liberty, health, and indolency of body.”²¹⁷

²¹⁶ Habermas calls access to the law- and policy-making apparatuses of the liberal state the *civitas terrena*. As members, citizens are “empowered to be the authors of the laws to which they are subject as addressees.” For more, see: Habermas, *Between Naturalism and Religion*, p. 130, and Chapter Three.

²¹⁷ *Supra* note 23.

Habermas and the ‘Remainders’ of Public Reason

This is one of the great merits of rational deliberation: it ensures the subject against remorse, regret, or resentment, or at least against the rational variants of these emotions. This insurance is supposed to empower subjects, in part by freeing them from a sense of blame for misfortune. But their empowerment derives from a disempowerment, from the subject’s rational limitation of herself.

– Bonnie Honig,
*Political Theory and the Displacement of Politics*²¹⁸

Nothing of theological content will persist being transformed; every content will have to put itself to the test of migrating into the realm of the secular, the profane.

Theodor Adorno,
“Reason and Revelation”²¹⁹

“The secularization of the state,” lectured Jürgen Habermas to a crowded auditorium at New York University in late November 2009, “must not be confused with the secularization of civil society.”²²⁰ This statement captures what is, for Habermas, an unsettling facet of contemporary life: that, as the result of the robust religious heterogeneity that arose from the increase in transnational migration after the fall of the Berlin Wall,²²¹ the “political capacities for promoting cohesion in the West are becoming

²¹⁸ Honig, Bonnie. *Political Theory and the Displacement of Politics* (Ithaca: Cornell University Press, 1993), p. 150.

²¹⁹ Adorno, Theodor. “Reason and Revelation” in Mendieta, Eduardo, ed. *The Frankfurt School on Religion: Key Writings by the Major Thinkers* (New York: Routledge, 2005), p. 167.

²²⁰ Habermas, Jürgen. “‘The Political’: The Rational Meaning of a Questionable Inheritance of Political Theology” in Mendieta, Eduardo and Jonathan VanAntwerpen, eds. *The Power of Religion in the Public Sphere* (New York: Columbia University Press, 2011), p. 23.

²²¹ For example, Habermas writes elsewhere: “Religious traditions and communities of faith have gained a new, hitherto unexpected political importance since the epochmaking change of 1989-1990. [...] Religious movements process the radical changes in social structure and cultural dissynchronies [sic], which under conditions of an accelerated or failing modernization the individual may experience as a sense of being uprooted. What is more surprising is the political revitalization of religion at the heart of the United States and [...] Europe, where the dynamism of modernization unfolds most successfully.” See: Habermas, Jürgen. “Religion in the Public Sphere” in *European Journal of Philosophy* 14 (2006), pp. 1-25.

dangerously restricted.”²²² On his account, the secular traditions that had been established by Enlightenment thinkers nearly four centuries ago were no longer capable of responding to the challenges (and, indeed, to the demands) posed by the composition of the modern *demos*. Although Habermas determined that secularism succeeds in securing for all individuals certain institutional freedoms and liberties by insulating the law- and policy-making apparatuses from the vagaries of religious belief, he nonetheless pointed towards a looming crisis of what he called “democratic legitimation.”²²³ So long as religious communities continue to comprise a significant portion of civil society, he argued, deliberative modes of politics should not, as a matter of course, exclude the voices of faithful citizens. Habermas concluded that attempts to preserve the strict separation between church and state would not only deny the potential “truth contents” that religion could offer liberal states, but that they would also belie the closeness with which piety is oftentimes intertwined with political action – attempts that would, in time, erode the governing authority of the state vis-à-vis the exclusion of its citizens from democratic processes.²²⁴

Habermas’s narrative of secular liberalism’s imminent decline – a decline coupled with an attendant, and demonstrative, rise in religious plurality²²⁵ – illuminates a paradox of late twentieth and early twenty-first century governance: in the very moment when modern states are set to secure their power by fully realizing their secular potential (as Karl Marx put it in “On the Jewish Question”²²⁶), they are instead witnessing the marked collapse between what was historically considered “private belief” and “public concern.”²²⁷ Put in slightly different parlance, religion’s resistance to privatization frustrates – at the most basic level – the secular liberal state’s status as an agnostic arbiter of competing conceptions of “the good.” As the bright line demarcating ecclesiastical matters from politico-legal matters fades, so too does the state’s ability to secure universal equality, liberty, and freedom become tied to subjective discourses on “metaphysics, morals, and miracles.”²²⁸ Thus the challenge of this

²²² Habermas, “The Political,” p. 15.

²²³ Habermas, “The Political,” p. 24.

²²⁴ Habermas, “The Political,” pp. 25-27.

²²⁵ See, for example, the empirical data recounted in the Introduction to this dissertation.

²²⁶ In “On the Jewish Question,” Marx posits that the most complete articulation of the liberal state is one in which mankind’s faith in God (as a guarantor of ecclesiastical salvation) has been replaced by faith in the state (as a guarantor of terrestrial rights, liberties, and freedoms). On his account, this division between man-as-spiritual-being and man-as-political-being creates for the state a “political community [...] that necessarily degrades *true* and *authentic* man.” For Marx, true and authentic man – what he called species-being – rested in man’s ultimate transcendence of both the liberal state and religion. See: Marx, Karl. “On the Jewish Question” in Tucker, Robert C., ed. *The Marx and Engels Reader* (New York: W.W. Norton and Company, 1978), p. 43. Emphasis in original.

²²⁷ Marx (*supra* note 9) is not alone in his belief that secularization goes hand-in-hand with modernization. Indeed, in the 1960s and 1970s, several prominent sociologists and philosophers declared that, with the dawn of the twenty-first century, religion would fade “both in society and in the minds of individuals.” This theory – which Peter Berger termed the “secularization thesis” – is broadly understood to be defunct, as seen in Chapter Two. See: Berger, Peter L. *The Desecularization of the World: Resurgent Religion and World Politics* (Washington, DC: Ethics and Public Policy Center, 1999), p. 2.

²²⁸ Scherer, Matthew. *Beyond Church and State* (New York: Cambridge University Press, 2013), 135. Scherer here is referring, in part, to Baruch de Spinoza’s argument in *Theological-Political Treatise* that one of the foremost functions of secularism is to stimulate rational thought by virtue of foreclosing the belief that God had a particular *telos* for mankind – instead, he argued that miracles (which were

paradox, as Habermas perceives it,²²⁹ consists in finding a way to make compatible the continued public presence of religion with the ideological and constitutional parameters of the liberal state; more specifically, the *solution* to the challenge of this paradox rests in forging a new discursive partnership between faith and reason – a partnership that could expand the acceptable conditions for both religious and secular participation within democratic governments.²³⁰

Yet as Habermas relies on the conjunction of faith and reason to reinvigorate and revalue religion's presence in political life, he elides a deeply powerful and problematic history: the history of how reason came to be associated with the privatization of religion. The force of this history, which Chapter Two argued was most tangible in John Locke's *A Letter Concerning Toleration*, *An Essay Concerning Human Understanding*, and *The Reasonableness of Christianity*, complicates the efficacy of Habermas's proposed solution to the paradox of twenty-first century governance. To wit, in the preceding chapter, Locke – one of the primary architects of what political theorists now call “the secular liberal state” – relied on reason to remove religion from the public square to the private sphere. He did so, first, by deploying the rhetoric of reason to secure the political stability of the state as well as the physical wellbeing of its inhabitants and, second, by using this selfsame language to forge a connection between the material benefits of secular governance and a decidedly Protestant vision of faith. As a result, reason functioned for Locke as a multifaceted tool that at once quelled the faith-based conflicts endemic to early modernity and ascribed normative value to nurturing an interiorized relationship to one's god. It was primarily this latter function that Chapter Two determined imbued reason with a palpable power. Under Locke's rubric, a reasoned citizen privatized his religion not only out of concern for the continued viability of the state, but also out of desire for his own divine salvation – “outward worship” insufficiently expressed the “full persuasion of the faithful and rational mind” that was “well-pleasing unto God.”²³¹ When situated historically, reason thus emerges as a regulative feature that installs within the liberal state a doctrine of secularism reliant on the conviction that true faith is best nurtured privately, even as it instills within the state's subjects a mode of self-regulatory discipline predicated on this very conviction.

If the purpose of the previous chapter was to argue that the history of religion's privatization is entangled with the history of Protestant rationality and that this entanglement produces a particular form of the governable subject for the liberal state, then the purpose of this chapter is to assess the emancipatory potential of marshalling a discourse of reason to reintroduce religion to public and political life. I ask: is it possible to harness the positive elements of the semantic potential of reason – the drive towards a transcendental moral or ethical good, or the hope for respectful interpersonal speech in diverse societies – without also taking on the problematic aspects of its historical relation to the state, namely the secular effort to declare faith infelicitous and relegate its practice to the private

taken by religious believers as evidence of God's will) should be understood as law-like events whose causes may not be immediately apprehensible.

²²⁹ Habermas has called the new visibility of religion in public affairs “a challenge for the secular self-interpretation of [liberal] modernity.” Radio interview with Eugen Kogon, published in the *Frankfurter Hefte* (June 1958): 494. As cited in: Lima, María Herrera. “The Anxiety of Contingency: Religion in a Secular Age” in *Habermas and Religion* (Malden, MA: Polity Press, 2013), p. 49.

²³⁰ Habermas writes: “Secular and devout citizens can fulfill the normative expectations of the liberal role of citizens [...] if they likewise satisfy certain cognitive conditions and ascribe to each other the corresponding epistemic attitudes.” As cited in: Habermas, Jürgen. *Between Naturalism and Religion* (Malden, MA: Polity Press, 2012), p. 119.

²³¹ Locke, John. *A Letter Concerning Toleration* (Amherst, NY: Prometheus Books, 1990), p. 19. Locke further justifies this point by critiquing the practices of animal and infant sacrifice, respectively.

sphere? By way of exploring the answers to this question, I interrogate *whether* and *how* the historical relationship of reason to religion enables or constrains the political and spiritual agency of devout citizens in Habermas's ideal of the late modern liberal state. In doing so, I advance two main arguments. First, I argue that although Habermas acknowledges, and subsequently denounces, the latent power historically possessed by the secular liberal state, he insufficiently attends to just how deeply such power is embedded in the "reasoned" discourse of its institutions. Second, and following from the first, I determine that in calling upon reason to remake the role accorded to religious citizens in the contemporary moment, he – perhaps unwittingly, perhaps strategically – configures an individual whose political salience hinges on her ability to translate the religious content of her speech into secular language. Together, these two arguments conspire to weaken the transformative force of Habermas's vision; for when he calls upon reason to police *when* and *how* religious speech must conform to the pre-existing standards of secular governance, he reproduces and reinforces Locke's belief that the internalization of one's faith best secures justice in both this and other worlds.

This chapter progresses in four sections. The first section sketches the broader scholarly context in which the central arguments of this chapter are situated. The second section examines how Habermas not only constructs reason as an ideal congruent with the presence of religion in the public sphere, but also how this ideal is intended to stand in contradistinction to some notion of the Enlightenment-era liberal state. Habermas specifies that "the public use of reason"²³² positively distinguishes his method of governance from its power-laden secular predecessors²³³ – a rhetorical move that I argue ultimately falls short. The third section investigates the theoretical underpinnings of the public use of reason. More specifically, it investigates how Habermas conceptualizes the cognitive processes by which secular and non-secular citizens are expected to navigate a state governed by public reason. These cognitive processes, this section posits, impose an asymmetrical burden on devout individuals who desire to implement political or legal change on the bases of their beliefs. The fourth section concludes this chapter by examining the metaphysical impact that public reason has on an individual's experience of and relationship to her faith. It suggests that as Habermas shifts the duty of maintaining an agnostic government to its religious constituents by endowing upon them the psychic responsibility of policing the boundary between faith-based and secular speech, he venerates an individual who is profoundly unfree. On this reading, the public use of reason renders religious arguments for politico-legal change as "incidental, inessential infelicities"²³⁴ that have no bearing on broader discussions of justice, freedom, and liberty. It transforms devout citizens into secular subjects who are cognitively, spiritually, and politically disempowered – they are individuals who, in other words, are near facsimiles of the Lockean subjects against which Habermas ostensibly works.

I. The Role of Reason in the Public Sphere

²³² Habermas also refers to the "public use of reason" as "public reason." This chapter uses the phrases interchangeably.

²³³ Habermas, Jürgen. *Between Naturalism and Religion* (Malden, MA: Polity Press, 2008), p. 119.

²³⁴ This phrase – and thus much of the theoretical motivation of this chapter – owes a debt to Bonnie Honig's critique of John Rawls. Honig suggests that the task of political liberalism, as Rawls understands it, is to "rationalize" politics. Its goal is to prompt individuals to use reason to come to the "right" resolutions for just governance; as Honig writes, "Rawls assigns to political liberalism [the task of] isolating the right vantage point, establishing the right setting, facilitating the identification of these right resolutions, and dissolving the remainders of politics rather than engage them." This chapter will suggest, in part, that Habermas engages in a project with goals similar to those Honig ascribes to Rawls. For more, see: Honig, *Political Theory and the Displacement of Politics*, p. 127.

The expansive quality of both Habermas and his interlocutors' works cannot be overemphasized. Positioned at the intersection of normative and critical political theory, Habermas's half-century of scholarship draws attention from sociologists, political scientists, historians, and jurists with topical interests as diverse as religion, citizenship, terrorism, constitutional design, and communicative discourse. Often called "the leading social theorist alive"²³⁵ as well as the "most important figure of the Frankfurt School since Max Horkheimer,"²³⁶ Habermas counts among his interlocutors Michel Foucault, John Rawls, Hans-Georg Gadamer, Charles Taylor, Judith Butler, and many other prominent scholars. Within this vast oeuvre, moreover, arguments over the efficacies and limitations of Habermas's scholarship abound. To write on Habermas is to engage in a task that can be characterized, at its most daunting, as Sisyphean.

Although this chapter does draw from and participate within these broader conversations, it primarily seeks to isolate and articulate an understanding of how reason conditions the lived experiences of devout individuals in Habermas's vision of post-secular democratic governance. The works and interlocutors with which this chapter engages are thus quite narrow. For while the emphasis on reason and rationality pervades Habermas's work – much of which represents an attempt to reorient readers to think of reason as a method of dignified argumentation and democratic engagement with one's peers, rather than as an instrumental or strategic mode of human behavior²³⁷ – it was only after the catastrophic events of September 11, 2001, that Habermas sought to reconcile his ideal of reason with the reality of public religious plurality. This section first gives an account of the theoretical context within which Habermas endeavored to align his extant scholarship on reason with his

²³⁵ Dillon, Michele. "Jürgen Habermas and the Post-Secular Appropriation of Religion: A Sociological Critique" in *The Post-Secular in Question: Religion in Contemporary Society*, eds. Philip Gorski et al (New York: New York University Press, 2012), p. 249.

²³⁶ Allen, Amy. "The Unforced Force of the Better Argument: Reason and Power in Habermas' Political Theory" in *Constellations* 19 (2012), p. 353. As Horkheimer is often credited with the creation of the Frankfurt School of Critical Theory, this is high praise indeed. Similarly, Craig Calhoun, Eduardo Mendieta, and Jonathan VanAntwerpen have called him "perhaps the most distinguished and enduringly influential figure [...] during the late twentieth century and to the present day." See: "Editors' Introduction" in *Habermas and Religion* (Malden, MA: Polity Press, 2013), p. 2.

²³⁷ Habermas's work on reason and rationality – particularly his *Theory of Communicative Action* – is often juxtaposed with the work of Max Weber. In *The Protestant Ethic and the Spirit of Capitalism*, Weber argued that the modern pursuit of profit and economic gain was influenced by the Protestant, specifically the Calvinist, need to assuage "salvation anxiety." As Calvinists believed that God had already determined who was saved and who was damned, economic and material success became a psychological stand-in for godly favor. As Habermas himself interprets Weber: "What Weber depicted [in *The Protestant Ethic*] was not only the secularization of Western culture, but also and especially the development of modern societies from the viewpoint of *rationalization*. The new structures of society were marked by the differentiation of the two functionally intermeshing systems that had taken shape around the organizational cores of the capitalist enterprise and the bureaucratic state apparatus. Weber understood this process as the institutionalization of purposive-rational economic and administrative action. To the degree that everyday life was affected by this cultural and societal rationalization, traditional forms of life – which in the early modern period were differentiated primarily according to one's trade – were dissolved." For more see: Habermas, Jürgen. *The Philosophical Discourse of Modernity* (Malden, MA: Polity Press, 1985), p. 2. Emphasis in original. Weber, Max. *The Protestant Ethic and the Spirit of Capitalism* (New York: Penguin Classics, 2002).

newfound interest in religion and, second, parses the academic response to this effort. In light of this theoretical context, I contend that as contemporary scholars began to endorse or critique Habermas's application of public reason to religion, a singular – and quite fraught – aspect of this application was overlooked: the latent power of public reason to sever the spiritual mind from the physical body in service of the liberal democratic state.

In several of his post-September 11th works, Habermas recounted his shock at the Islamic “fundamentalist convictions that informed the terrorist actions”²³⁸ and his repulsion at the reactionary impulse of Euro-American leaders to declare their nations Christian states.²³⁹ He detailed his particular unease with the uncontested manner in which Christian rhetoric was marshaled to justify both the invasion of the Middle East and the increasing social hostility towards practitioners of the Islamic faith.²⁴⁰ He wrote: “Conflicts between world views and religious doctrines that lay claim to explaining man’s position in the world as a whole cannot be laid to rest. In the absence of the uniting bond of civic solidarity, which cannot be legally enforced, citizens do not perceive themselves as free and unequal participants in the shared practices of democratic opinion and will formation.”²⁴¹ Habermas’s concern was not that religion could be used as a tool to justify terrorism, war, or other acts of violence, but rather that *religious speech* could alienate the members of democracy from one another during the course of political deliberations. September 11th and the religious discourse that arose in its wake thus sparked an anxiety over the potential fragility of “the public sphere” – a space governed by the allocation of procedural rights to all citizens regardless of their discrete cultural, religious, or ethnic commitments and, from September 12th, a space structurally compromised by the collapse of the World Trade Center’s twin towers.²⁴²

But what constitutes “the public sphere” and what function does it serve for democratic governments, such that the presence of religious speech within it could compromise its continued validity? As the span of Habermas’s scholarship is so vast, and the range of philosophers and social theorists with whom he engages is so varied, the answers to this question defy easy summary – indeed, the answers to this question could be said to structure, in some fashion, the remainder of this chapter. To get a handle on what operates as the public sphere in his work, it is best to begin where Habermas himself begins: with the theory of communicative action. Simply stated, the public sphere designates

²³⁸ Habermas, Jürgen and Jacques Derrida. *Philosophy in a Time of Terror* (Chicago: University of Chicago Press, 2003), p. 22.

²³⁹ Habermas, “Religion in the Public Sphere.”

²⁴⁰ *Supra* note 22 and Calhoun, Mendieta, VanAntwerpen, “Editors’ Introduction,” p. 4. In “Religion in the Public Sphere,” Habermas writes at length about the Christian base that not only secured George W. Bush’s election in 2002, but also sounded the war drums for his invasion of Afghanistan and Iraq. Regarding the attacks on Islamic men and women (as well as those who were wrongly believed to be Islamic as a result of their physical appearances), further empirical evidence attesting to their virulence can be seen in: Volpp, Leti. “The Citizen and the Terrorist” in 49 *UCLA Law Review* (2002), pp. 1575-1600. Bayoumi, Moustafa. “Racing Religion” in Radway, Janice A. et al, eds. *American Studies: An Anthology* (New York: Wiley-Blackwell, 2009), pp. 99-108.

²⁴¹ Habermas, “Religion in the Public Sphere,” p. 13.

²⁴² It is important to note that Habermas *does not* believe that religion only became a concern for the public sphere after September 11, 2001. It served, rather, as a moment of crystallization for his thinking on what he believed was the general failure of secularism to privatize religion – a belief that will be further explored in the following section.

a “theater in modern societies in which political deliberation is enacted through the medium of talk.”²⁴³ It is an arena within which private citizens gather to deliberate over “issues of public concern and common interest”²⁴⁴ and, in doing so, provide an institutionalized check on the power of the state. Citizens within the public sphere are expected to conform to “the theory of communicative action,” in that their deliberations must be critically reasoned and conducted without recourse to emotion, tradition, or strategic interest; it is only by eschewing these latter categories of speech acts can the promulgation of just laws and policies be assured.²⁴⁵ At the core of this theory is the assumption that each participant within the public sphere will use plain language to raise validity claims about the propositional truth, normative rightness, and sincerity of the statements raised by their peers.²⁴⁶ The purpose of interpersonal engagement is to find – through the use of back-and-forth argumentation – a reasoned consensus that can serve as the basis for political, legal, or societal change. Under Habermas’s rubric, communicative action functions as a cooperative process of reasoned negotiation in which “no participant has a monopoly on correct interpretation.”²⁴⁷ The formation of the laws and policies that structure the contemporary liberal democratic state are thus not beholden to *who* is speaking or *whether* she possesses a high economic, social, political, or cultural status, but rather by the *soundness* of the reasons she offers in the course of communal deliberations in a public space.

Given the above, it is easy to see how a generalized understanding of religion could function as an anathema to the discursive parameters of the public sphere and, for much of Habermas’s work, it did. When he originally conceived of his theory of communicative action in 1962 – and when he revised it in subsequent decades – religious discourse in the public sphere was “limited in the degree of its freedom of communication” as its claims regarding redemption and salvation could never be “rationally validated” outside of appeals to emotion or tradition.²⁴⁸ Moreover, Habermas expected that, as modern liberal states began to adopt and conform to the ideology of the public sphere, “the authority of the holy would be gradually replaced by the authority of an achieved consensus.”²⁴⁹ Religious discourse and religious authority were intended, in other words, to be *personae non grata* in matters of political and societal importance. In short, by imposing constraints on the manners and modes of speech welcome in the public sphere, Habermas posited a nearly insurmountable polarization between religion and reason.

It is within this theoretical context that Habermas witnessed the enduring presence of faith-based discourse in the public sphere after September 11th and, for fear of a crisis of democratic

²⁴³ Fraser, Nancy. “Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy” in Calhoun, Craig, ed. *Habermas and the Public Sphere* (Cambridge: The MIT Press, 1994), p. 110.

²⁴⁴ Habermas, Jürgen. *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Cambridge, MA: The MIT Press, 1991).

²⁴⁵ Dillon, “Jürgen Habermas and the Post-Secular Appropriation of Religion,” p. 250. Dillon writes that in the public sphere, citizens will “seek to reach a common understanding of the situation or question at issue and plan for mutually agreed upon future action.” See also: Habermas, Jürgen. *The Theory of Communicative Action*, vol. 1 *Reason and the Rationalization of Society*, trans. Thomas McCarthy (Boston: Beacon Press, 1984), p. 86.

²⁴⁶ Habermas, *The Theory of Communicative Action*, vol. 1, p. 75.

²⁴⁷ Habermas, *The Theory of Communicative Action*, vol. 1, p. 100.

²⁴⁸ Habermas, Jürgen. “Transcendence from Within, Transcendence in This World” in Browning, Don and Francis Schussler Fiorenza, eds. *Habermas, Modernity, and Public Theology* (New York: Crossroad, 1992), p. 233.

²⁴⁹ Habermas, Jürgen. *Legitimation Crisis* (Boston: Beacon Press, 1975), p. 120.

deliberation,²⁵⁰ began to endeavor to repair the rent between religion and reason. Although the specifics (and the effects) of this argumentative shift will be evaluated in the remaining sections of this chapter, it is nonetheless prudent to sketch an initial understanding of how he sought to make religion compatible with the precepts of the public sphere. Broadly construed, Habermas approached the topic of religion as an opportunity to underscore the importance of inclusion and toleration for democratic life. Alarmed by the skepticism and exclusionary rhetoric espoused by both strident secularists and publicly circumspect Judeo-Christians, Habermas relied on John Rawls's notion of translation,²⁵¹ which he had himself drawn from Immanuel Kant,²⁵² to reaffirm the obligations citizens had to reciprocally render their arguments in language that would be accessible to one another. For religious citizens, this entailed the duty of rationally comprehending that the commitments of the liberal state to freedom and equality necessarily prohibit the wholesale promulgation of faith-based legislation within its institutional framework. For secular citizens, this entailed the duty of recognizing that the moral and ethical content of religious speech could impart new knowledge to the existing framework of the state. Each citizen would bear the responsibility of treating his or her peers with unerring respect; as envisioned by Habermas, religious and non-religious citizens would work together to strip away the overtly spiritual tones of a faithful individual's contributions to democratic deliberations – leaving behind, ideally, an inclusive public sphere infused with “generally apprehensible” kernels of secular truth.²⁵³

Reactions to this new articulation of the public sphere, as well as religion's recast role within it, were divisive. On the one hand, philosophers like John Rawls and Robert Audi welcomed Habermas's newly inclusive public sphere. Audi, in *Democratic Authority and the Separation of Church and State*, hailed the Rawlsian-cum-Habermasian translation proviso as crucial to “enabling secular governments to provide for the liberty of all in a way that observes a reasonable separation of church – meaning religious institutions – and state and minimizes alienation of religion citizens.”²⁵⁴ For Audi, the charge that each citizen must behave with dignity and respect towards one another – regardless of differences in world views – not only established an ethic of civic virtue, but it also institutionalized a discursive procedure that would thwart the possibility that either religious or secular citizens would be unjustly coerced by the policies of the state. On the other hand, theorists like Nicholas Wolterstorff, Amy Allen, and Michele Dillon warned that religion's rehabilitation by Habermas assumed, first, that religion “comprises a monolithic and immutable body of dogma that is closed to reason” and, second, that non-translated faith-based arguments for political change would always be “cognitively

²⁵⁰ *Supra* note 6.

²⁵¹ In the chapter entitled “The Idea of Public Reason” in *Political Liberalism*, Rawls writes: “As reasonable and rational, and knowing that they affirm a diversity of reasonable religious and philosophical doctrines, [citizens] should be ready to explain the basis of their actions to one another in terms each could reasonably accept that others might endorse as consistent with their freedom and equality.” The extent to which Habermas relies on Rawls will become clearer as this chapter progresses. For more, please see: Rawls, John. *Political Liberalism* (New York: Columbia University Press, 1993), p. 218.

²⁵² For more, see the first two sections of Chapter Two.

²⁵³ Habermas, *Between Naturalism and Religion*, p. 122.

²⁵⁴ Audi, Robert. *Democratic Authority and the Separation of Church and State* (New York: Oxford University Press, 2011), p. 3.

inaccessible”²⁵⁵ to secularists as such arguments derived from revelation rather than introspection.”²⁵⁶ By revaluing the place of faith in the public sphere, Allen determined, Habermas was able to “have his religious cake and eat it, too”²⁵⁷ – he was, in other words, able to preserve the legitimacy of the democratic liberal state by maintaining its aura of inclusiveness even as he consciously undermined its citizens’ contributions.

Despite the differences in opinion that persist over the persuasiveness of Habermas’s efforts to align religion with the procedural demands of the public sphere, one commonality is evident: the desire to assess if Habermas is correct in his treatment of faith in relation to his understanding of reason. Each group detailed above sought to make a claim regarding the “reasonableness” of religion. The former group determined that religion is a quantifiable entity that can be effortlessly bracketed during the course of political deliberation, whereas the latter group emphasized that the mere possession of religious belief did not therefore render an individual “irrational” and in need of secular translation. These approaches to Habermas illustrate much about how contemporary liberal democracies *should* treat the religious citizens that populate their territories, but they do little to explain *how* the painstaking ways in which Habermas details and justifies the practices of the public sphere impact an individual’s experience of her faith. The remainder of this chapter is devoted to parsing this experience.

II. The Decline of Secularism and the Rise of Post-Secularism

This chapter began by linking Habermas’s use of reason in the contemporary moment to its Enlightenment-era historical iteration, particularly as it was deployed by Locke. This section returns to this assertion and recasts it in light of the argument put forth above. Over the course of the preceding section’s argument, Habermas’s rehabilitation of religion’s value for the public sphere after September 11th was largely told as a tale of concern over the continued viability of the democratic liberal state. While this is not an incorrect portrayal of Habermas’s treatment of religion, it does not capture the full scope of why Habermas initially felt compelled to engage with the “problem” of religion. I contend that Habermas’s impulse to make religion compatible with the procedural precepts of the public sphere was borne from his desire to account for the inability of the historical liberal state to neutralize the destabilizing effect that religion may have on plural polities. More precisely, I determine that as Habermas constructs an origin story for secularism by way of endeavoring to rectify its failures, he summons and then attempts to surmount the power-laden specter of Locke. In doing so, Habermas inherits a discourse reliant on the understanding that properly practiced reason necessitates the widespread privatization of religion – an inheritance that will ultimately undermine his efforts to divest contemporary liberalism of its subject-producing power.

At the outset of his Yale lectures, Habermas states:

The encounter with religion as a contemporary intellectual formation requires secular thought to engage in a reflection on its own origins that takes the form of a genealogy of secular and post-metaphysical thought within the horizon of the Axial Age and the discussion of faith and

²⁵⁵ Dillon, Michele. “The Authority of the Holy Revisited: Habermas, Religion, and Emancipatory Possibilities” in *Sociological Theory* 17 (1999), p. 291.

²⁵⁶ Wolterstorff, Nicholas. “An Engagement with Jürgen Habermas on Postmetaphysical Philosophy, Religion, and Political Dialogue” in Calhoun, Craig et al, eds. *Habermas and Religion* (Malden, MA: Polity Press, 2013), p. 108.

²⁵⁷ Allen, Amy. “Having One’s Cake and Eating it Too: Habermas’s Genealogy of Postsecular Reason” in Calhoun, Craig et al, eds. *Habermas and Religion* (Malden, MA: Polity Press, 2013), p. 133.

knowledge in the High Middle Ages. Assuming that it understands its own evolution as a learning process, the tradition of humanist Enlightenment thought discovers within itself a heritage of religious traditions that it has assimilated and transposed.²⁵⁸

Habermas's desire to grapple with the problem of religion derives not only from the philosophical tradition to think through the value of faith's place in political life, but also from the inability of secularism to act as a bulwark against the undue intrusion of faith in the political and legal affairs of the state. By employing a genealogical methodology – that is to say, the purposeful tracing of a discrete ideal through a series of canonical texts – Habermas aims to arrive at an understanding of both *why* religion continues to flourish in the contemporary moment despite the promulgation of secularist policies across the West and *how* the universal ideals of freedom, liberty, and equality can be guaranteed over and above the particularist demands of religion. As Habermas casts the enduring legacy of the western world as the intellectual imperative to engage in reciprocal and reflexive learning,²⁵⁹ he argues that to truly understand the public presence of contemporary religious practice, one must first understand the context within which the privatization of religion was first desired and later institutionalized. This context, he states, is otherwise known as the era of Enlightenment.

Subjecting the Enlightenment ideal of religion's privatization to a genealogical inquiry serves two critical purposes for Habermas: first, it dislodges and unsettles an overly confident secularism and, second, it uncovers a latent Christian worldview that was wrongly imposed on non-Christian persons. He writes:

The Enlightenment remained ignorant of the barbaric reverse side of its own mirror for too long. Its universal claims made it easy to overlook the particularistic kernel of its European origin. This immobilized, rigidified rationalism has been transformed into the stifling power of a capitalistic world civilization, which assimilates alien cultures and abandons its own traditions to oblivion.²⁶⁰

Habermas's acknowledgement of the force of Enlightenment in assimilating “alien cultures” into European secular life is an important one, and it serves to complicate liberalism's assertion that an agnostic state can best secure the rights, liberties, and freedoms of its constituents. On this reading, not only was the Enlightenment blind to what Thomas McCarthy has called the “barbarism at the heart of its own civilizing mission,”²⁶¹ but so too did it discursively link the quality of “rationalism” with the performance of the Christian faith. Habermas continues: “Christianity, which thought it could use this [civilizing impulse of the Enlightenment] as an ‘innocent catalyst for the worldwide transmission of its message of hope,’ the Church which believed it could send out its missionaries in the wake of the European colonizers, participated unwittingly in this dialectic of disenchantment and loss of memory.”²⁶² The success of the Enlightenment rested, for Habermas, on its promise to secure for all persons, regardless of their faiths, political freedoms and social stability. Yet as the ideals of the Enlightenment spread through Europe and the rest of the world, this promise was corrupted by its association with a particular faith. Christianity, as rendered here by Habermas, actively sought to divest newly enlightened individuals of their spiritual beliefs, cultural traditions, and, at times, long-

²⁵⁸ Habermas, Jürgen. *The Controversy over the Secularization Hypothesis and the Role of Religion in a Post-Secular Society*. Lecture at Yale University, October 6, 2008.

²⁵⁹ Habermas, Jürgen. *Essays on Faith and Knowledge: Postmetaphysical Thinking and the Secular Self-Interpretation of Modernity* (unpublished), p. 3.

²⁶⁰ Habermas, Jürgen. *Religion and Rationality* (Cambridge: The MIT Press, 2002), p. 130.

²⁶¹ McCarthy, Thomas. *Race, Empire, and the Idea of Human Development* (Cambridge: Cambridge University Press, 2009), p. 231.

²⁶² Habermas, *Religion and Rationality*, p. 130.

standing political processes. The Enlightenment, understood genealogically, thus collapses the distinction between secular liberalism and the Christian faith – a collapse that implicates secularism in the metaphysical mistreatment of its adherents.

By revealing the origins of putatively secular categories, concepts, and normative ideals, Habermas's genealogy of the Enlightenment seeks to clarify the dangers with a wholesale endorsement of historically practiced western liberalism. However, as Habermas traces the collusion of Christianity with secular liberal ideals, he leaves unquestioned how this implicates the framework upon which his theories of communicative action and the public sphere are built. For example, his theory of communicative action posits that the public sphere functions as a dialogical space within which discrete citizens may gather to agree upon a mutually satisfying course of political action. Until the turn of the twenty-first century, this sphere was predicated on the deliberative participation of the *private* citizen; that is to say, on the deliberative participation of a citizen who had successfully conformed to the dictates of non-emotional, non-traditional, and non-religious rationalism. If Habermas's argument regarding the promulgation of Enlightenment ideals is taken seriously, then his configuration of the public sphere is a space conditioned on the submission of its participants to the alienating force of Christianity.²⁶³ Discussions on how to best secure just laws and policies cannot take place if the Enlightenment language of "freedom," "liberty," and "equality" does not exist. Habermas does not take his genealogical inquiry into secularism this far; instead, he eschews the problematic heritage of liberalism that he had so thoroughly identified and turns his attention towards another Enlightenment target: John Locke. I argue that this eschewal has the effect of leaving unquestioned the relationship of the theory of communicative action to Christian rationalism, which in turn undermines the strength of Habermas's claims to religious toleration and inclusion in the post-September 11th public sphere.

In the previous chapter, Locke sought to reconcile two tasks that many of his contemporaries considered to be diametrically opposed: first, to create a new mode of governance that would tame the threatening influence of religion on political and social stability and, second, to attend to the diverse spiritual needs of the citizens of such a governance. In this respect, the argumentative tasks set by Habermas are not unlike those set by Locke – though this is a comparison that Habermas would have likely considered misguided and misplaced. Locke functions for Habermas as a deeply flawed liberal theorist against whom a doctrine of "post-secular public reason" can take shape. Habermas

²⁶³ Habermas's public sphere has been subjected to critique on the basis of power by many critical theorists (chief among them feminist and critical race scholars). In particular, they charge that his theorization of "the ideal speech situation ruled by reason" marginalizes the importance of power inequalities in social interactions and the different interests, experiences, and language capabilities that participants bring to a particular communicative context. For these scholars, Habermas's emphasis on reason negates the relevance of emotion and the affective attachments that are part of people's experiences, and under-appreciates the metaphorical, rhetorical, and storytelling dimensions of communication. Iris Marion Young has said that Habermas "embraces the disembodied coldness of modern reason." Few of these critiques, however, focus specifically on how religion (or the lack thereof) in the public sphere impacts the lives of its constituents. For more, see: Calhoun, Craig. *Critical Social Theory: Culture, History, and the Challenge of Difference* (Cambridge: Blackwell Publishers, 1995). Frazer, Elizabeth and Nicola Lacey. *The Politics of Community: A Feminist Critique of the Liberal-Communitarian Debate* (Toronto: University of Toronto Press, 1993). Gould, Carol. "Diversity and Democracy: Representing Difference" in Benhabib, Seyla, ed. *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton: Princeton University Press, 1996), pp. 171-86. Young, Iris Marion. *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990), p. 125.

urges his readers to view Locke's work, particularly *The Letter Concerning Toleration*, as fulfilling the archetypal role of the "liberal conception of secularism [that emerged] from the religious wars and confessional disputes of early modern times."²⁶⁴ When Locke invests his magistrates with the discretionary power to permit or deny a display of religious belief outside the discrete confines of the home or place of worship, Habermas scoffs that this investiture provides "slim guidance to modern public officials beset by the western world's religious renewal."²⁶⁵ In a rhetorical move that recalls his indictment of the global creep of the Enlightenment, Habermas concludes: "It is not enough to rely upon the condescending benevolence of a secularized authority that comes to tolerate minorities hitherto discriminated against."²⁶⁶ Locke's vision of secular liberalism is at once venerated and summarily dismissed, leaving unquestioned not only how reason and Christianity function in his newly created state, but also how the two become discursively linked in his efforts to simultaneously manage religious pluralism and spiritual salvation.²⁶⁷ In light of his earlier attentiveness to the influence of Christianity on Enlightenment era secular liberalism, his refusal to probe the influence of Christianity on Locke's theories appears distinctly odd – an oddity that will shortly become deeply problematic.

When the preceding paragraphs are taken together with the previous section, what emerges is a fraught understanding of the public sphere and the religious discourse that populates it. Indeed, the first part of this chapter has sought to articulate the theoretical tensions that pervade Habermas's work as well as his attempts to resolve them. In the first section, I argued that the theory of communicative action – particularly its emphasis on reasoned dialogue – informed his concept of the public sphere, a concept that was reformulated to include faith-based discourse amid the rise of "religious fundamentalism and the confusion of a supposed *Kulturkampf*."²⁶⁸ I suggested that the critical response to the twenty-first century reformulation of the public sphere – a response that primarily focused on whether religion promotes the capacity for rational thought, rather than whether Habermas's instantiation and institutionalization of "rational thought" for religious persons negatively impacts the very faiths it seeks to accommodate – fell short. In the second section, I sought to rectify this shortcoming by detailing how Habermas attends to and disavows the conjunction of rationalism with Christianity in secular liberalism. He aligns himself with a vein of post-colonial critique that implicates the values of Enlightenment era liberalism in the oppression of non-Christian peoples *even as* he declines to interrogate how these values inform his own rhetorical appeal to reason in the public sphere. Locke, arguably one of the key figures in discerning the powerful link between reason and Christian secular liberalism, functioned merely as a cipher. Throughout these two sections, I also asserted that Habermas's reliance on, first, reason as a tool for organizing politico-legal discourse and, second, genealogically-driven indictments of secularism would create a significant problem: the use of reason to separate the spiritual mind from the physical body in service of molding an ideal public servant, a separation that simply repackages and redeploys Locke's argument on the necessity of religion's privatization. The third and fourth sections of this chapter investigate in more depth how this problem emerges and its repercussions for the efficacy of "post-secular public reason." With an eye towards the findings of Habermas's genealogical inquiry, the third section revisits the procedural

²⁶⁴ Habermas, "Religion in the Public Sphere," p. 4. See also: Habermas, *Between Naturalism and Religion*, p. 271.

²⁶⁵ Habermas, "Religion in the Public Sphere," p. 2.

²⁶⁶ Habermas, "Religion in the Public Sphere," p. 4.

²⁶⁷ For more on how this happens, please see the latter half of Chapter Two in this dissertation.

²⁶⁸ Habermas, Jürgen. "Faith and Knowledge" in Mendieta, *The Frankfurt School on Religion*, p. 329. N.B.: Habermas's skeptical use of *Kulturkampf* should be understood as the German equivalent of referencing Samuel Huntington's argument on "the clash of civilizations."

components of the theory of communicative action. I contend that post-secular public reason places an asymmetrical burden on religious citizens in the course of democratic deliberations and, as a result, systematically undervalues their contributions. The fourth and concluding section places this argument alongside the reading of Locke offered in Chapter Two; in doing so, I maintain that post-secular public reason achieves the effect that it actively sought to avoid – namely, the re-entrenchment of a secular liberal governance predicated on the production of religious citizens.

III. The Power of Post-Secular Public Reason, Revisited

Given the power-laden history of the Enlightenment and the political insufficiencies of Lockean liberalism, and following the writings of many sociologists and data scientists, Habermas declares the project of secularism in the western world largely dead.²⁶⁹ Although he cautions that “the baby should not be thrown out with the bathwater,”²⁷⁰ he nonetheless determines that the insights provided by his genealogical inquiry in the origins of secularism renders it an outdated tool that can no longer protect liberal states against the excessive intrusion of religion in their political and legal affairs. In light of the failure of secularism to privatize religion, Habermas suggests that a doctrine of “post-secular public reason” could assuage the delegitimizing effects of overtly religious language in moments of democratic deliberation. At his clearest and most concise, Habermas understands post-secular public reason to be a mode of political governance and social organization that strives to both dismantle the alienating power of the liberal state and provide a meaningful role for religion in the public sphere. More precisely, the Habermasian vision of a post-secular liberal state determines that when the Enlightenment ideals of freedom, liberty, and equality are imposed upon diverse religious communities, the state’s political institutions and procedures must be reformed to maintain the ideals’ integrity. Post-secularism allows for the expression of religious conduct and speech outside of the confines of the private sphere and permits their influence on politically-oriented discourse over freedom, liberty, and equality – but only so long as they meet the rigorous demands of public reason. Thus, as Habermas conceives of it, public reason provides the post-secular liberal state with the means to dismantle the powerful and problematic precepts of secularism, even as it privileges the original ideals that emerged from the institutionalization of religion’s privatization.

Habermas asserts that public reason functions neither as a simple matter of secular governance nor as an “overhasty reduction of the polyphonic complexity of religious voices.”²⁷¹ He states: “The domestic procedure [of the liberal state] owes its legitimizing power to two components: first, the equal political participation of all citizens, which ensures that the addressees of the laws can also understand themselves to be the authors of these laws; and second, the epistemic dimension of deliberation that grounds the presupposition of a rationally acceptable outcome.”²⁷² In this passage,

²⁶⁹ Habermas, Jürgen. “A Postsecular World Society? On the Philosophical Significance of Postsecular Consciousness and the Multicultural World Society” in *Monthly Review Online* (<https://mronline.org/2010/03/21/a-postsecular-world-society-on-the-philosophical-significance-of-postsecular-consciousness-and-the-multicultural-world-society/>), March 21, 2010. Last accessed December 9, 2018.

²⁷⁰ Habermas, “A Postsecular World Society?”

²⁷¹ Habermas, *Between Naturalism and Religion*, p. 131.

²⁷² Habermas, *Between Naturalism and Religion*, p. 121. In making this argument, Habermas cites to Rawls. Rawls writes in “The Idea of Public Reason Revisited”: “Ideally citizens are to think of themselves as if they were legislators and ask themselves what statutes, supported by what reasons satisfying the principle of reciprocity, they would think it most reasonable to enact” (769). For more,

Habermas isolates the factors crucial to the continued legitimacy of the liberal state in pluralistic polities: first, robust cross-cultural engagement in law- and policy-making decisions and, second, the encouragement of reasoned and rational debate on said decision-making processes such that they can rightly be said to promote the liberal ideals of freedom, liberty, and equality. Yet Habermas's interpretation of democratic deliberation and inclusion in the liberal state can, and should, be pushed further. Indeed, Habermas argues that all citizens must – and will – cultivate a deep sense of respect for and solidarity with their peers, regardless of the inevitable instances of interpersonal disagreement or dissent that will arise during the normal course of deliberation.²⁷³ Moreover, he determines that this cultivation of respect must move past the simple social and institutional recognition of an individual's right to negative liberty. Respect, he clarifies, imposes an active moral duty on a liberal state's members to engage one another on diverse subjects and to decide collaboratively on a course of political action.²⁷⁴ It is only by doing so that “political actions can count as legitimate” as they appear as impartial outcomes derived from “the light of generally acceptable reasons.”²⁷⁵ Public reason, properly defined, thus buttresses the legitimacy of the liberal state by not only cultivating an atmosphere of respectful democratic engagement, but also by imposing internal and informal regulations that require secular *and* religious community members to use readily accessible language and reasoning when engaging in civic debate.

It is not just that Habermas prioritizes the use of public reason in matters of political self-determination, but rather that he does so – much like Locke in Chapter Two – in a normative, constitutive, and profoundly powerful manner. Although Habermas's appeal to reason in post-secular societies consciously seeks to divest itself of the Protestant Christian character found in Enlightenment-era treatments of rational religious conduct in liberal states, this divestiture does not therefore mean that Habermas escapes the problem of subject formation. This problem most clearly emerges in how Habermas defines what may serve as both the form and content of “generally acceptable reason.” For while the community member-turned-public actor may certainly profess religious convictions publicly, such beliefs cannot and should not be used as generally acceptable reasons in the course of political deliberation. Habermas articulates:

Citizens of a democratic polity owe one another good reasons for their political positions. Even if the religious contributions are not subject to self-censorship, they depend on *cooperative acts of translation*. For without a successful translation the substantive content of religious voices has no prospect in being taken up into the agendas and negotiations within political bodies and of gaining a hearing in the broader political process.²⁷⁶

In order to achieve political salience or traction within liberal governments, religious language deployed within the public sphere must undergo a process of translation²⁷⁷ that renders it sensible to

see: Rawls, John. “The Idea of Public Reason Revisited” in *University of Chicago Law Review* 64 (1997), pp. 765-807.

²⁷³ Habermas, *Between Naturalism and Religion*, p. 121. He writes: “Citizens should respect one another as free and equal members of their community.”

²⁷⁴ Again, Habermas cites to Rawls in support of this claim. Rawls writes: “The ideal of citizenship imposes a moral, not a legal, duty – the duty of civility – to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason. This duty involves a willingness to listen to others and a fairmindedness in deciding when accommodations to their views should be reasonably made.”

²⁷⁵ Habermas, *Between Naturalism and Religion*, p. 132.

²⁷⁶ Habermas, *Between Naturalism and Religion*, p. 132. Emphasis added.

²⁷⁷ Habermas often refers to this as the “translation proviso” of public reason.

persons of other (or of no) faiths. The public presence of religion in associative life, or even in national debates, does not ensure its eventual ascription to or promulgation within national law or policy. Moreover, when Habermas declares that the content of religious speech must be subjected to cooperative acts of translation, he institutionalizes an epistemic filter that reinforces the secular standing of the liberal state. Indeed, even though he admonishes secular citizens to “open their minds to the potential truth content” of faith-based public speech that “might well emerge in the guise of generally acceptable reason,”²⁷⁸ he reminds religious citizens of the “institutional threshold [...] that only allows secular contributions from the Babel of voices in the public sphere to pass through.”²⁷⁹ For Habermas, a cooperative act of translation thus rests on a twofold process: first, on the religious citizens’ proactive removal of any demonstrable faith-based motivations for their political actions and, second, on the willingness of secular citizens to aid in the secularization of faith-based speech if religious citizens are unable to do so.

Above, we see a tension in Habermas’s argument between the claim that public reason accords religion a meaningful place in associative life and that it subjects religious discourses to a secular standard. This tension renders vulnerable the value of the contributions made by religious citizens to political discourse in the post-secular liberal state. For although Habermas recognizes that the moral imperatives of public reason potentially “impose an asymmetrical burden on religious traditions and religious communities,” he nonetheless provides little more than a vague gesture towards remedying this problem. He offers two distinct solutions: first, the right of pious citizens to refuse to “make a strict separation between secular and religious reasons in the political arena when they experience this [separation] as an attack on their personal identity,” and, second, the imposition of a normative code of citizenship that requires all cognizant persons to make a good-faith effort to understand the “possibility that both religious and secular contributions to the public sphere may have substance.”²⁸⁰ After posing each potential solution, however, Habermas reasserts that the post-secular liberal state must remain agnostic to the persuasiveness of religious dialogue. This argumentative move at once elevates the state above the perceived fray of religiously plural associative life and relegates the task of socio-political order to the translational capabilities of rational citizens – it is a move, in other words, that constructs the religious citizen as the secular subject.

Lest Habermas be condemned too swiftly for failing to attend to the subject-producing aspects of public reason, it is prudent to interrogate the theoretical commitments underlying his initial appeal to public reason. Could it be said that Habermas merely inherits the problem of subject production from the scholarship upon which he relies, rather than proactively – and problematically – dismissing the findings of his genealogical inquiry into secular liberalism? As I intimated in the first section, Habermas takes up, extends, and redeploys the concept of public reason as well as its reliance on cooperative acts of translation from John Rawls’s *Political Liberalism*. To further explore the implications of this move (and to understand what, if any, problems Rawls bequeaths to Habermas), it is necessary to investigate how Rawls himself conceives of the religious citizen in the liberal state. Although Habermas and Rawls diverge on how to best “do” political theory – the former aligns himself with non-ideal theory (which aims to develop practical solutions to demonstrable political problems) whereas the latter adheres to ideal theory (which aims to use reflexive philosophical thought to derive a just and fair political institution) – Habermas’s *Between Naturalism and Religion* extensively cites to Rawls to argue for an epistemic barrier between deliberation in the public sphere and the eventual promulgation of statewide laws and policies. It is precisely when Habermas removes public

²⁷⁸ Habermas, *Between Naturalism and Religion*, p. 132.

²⁷⁹ Habermas, *Between Naturalism and Religion*, p. 131.

²⁸⁰ Habermas, *Between Naturalism and Religion*, p. 139.

reason from the realm of the ideal and installs it within the realm of the non-ideal that the problem of the asymmetrical burden placed on religious citizens becomes clearer – although this alone does not absolve Habermas’s use of public reason of its subject-forming tendencies.

In *Between Naturalism and Religion*, Habermas deploys Rawls as a theoretical bridge between, on the one hand, the liberal commitment to providing a neutral political environment in which individuals may pursue their self-determined understandings of “the good life” without undue influence from others and, on the other hand, the critical argument that the public presence of faith does not automatically nullify the possibility of meaningful politico-legal discourse.²⁸¹ Habermas finds Rawls to be at his most useful in building this bridge when he links the practice of public reason to the ideal of equal membership in the liberal state. Rawls writes: “Our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.”²⁸² A liberal state, on Rawls’s understanding, is legitimate only if the principles upon which it is founded are derived from robust public discourse and subsequently appear agreeable to its reasoned constituents. In “The Idea of Public Reason,” Rawls clarifies:

As reasonable and rational, and knowing that they affirm a diversity of reasonable religious and philosophical doctrines, [citizens] should be ready to explain the basis of their actions to one another in terms each could reasonably accept that others might endorse as consistent with their freedom and equality. Trying to meet this condition is one of the tasks that this ideal of democratic politics asks of us. *Understanding how to conduct oneself as a democratic citizen includes understanding an ideal of public reason.*²⁸³

For Rawls, the ideal liberal state must be founded on the endowment of each citizen with the unassailable rights to freedom, liberty, and equality. Such rights are preserved through the explicit acknowledgment that a multitude of religious and philosophical commitments coexist simultaneously within the public sphere. He argues that, because citizens will naturally wish to preserve their individual religious and philosophical beliefs, they will endeavor to advocate for the political needs that derive from such beliefs in a manner that is as neutral and as generally applicable as possible. By philosophically reflecting upon the institutions that will best encourage the neutrality of the public sphere, reasonable citizens will uniformly arrive at and reaffirm the primacy of liberal democratic states. Within such states, citizens will thus limit the polarizing content of their speech by “respectfully engaging”²⁸⁴ in what Habermas will later call “cooperative acts of translation.”

But what role does Rawls accord religious citizens in ideal liberal states? Would he allow a law or policy based on religious reasoning to be promulgated within the state’s institutional apparatuses? At first glance, the answer to the latter question is a qualified yes. Rawls writes:

We must distinguish public reason from what is sometimes referred to as secular reason and secular values. These are not the same as public reason. For I define secular reason as reasoning in terms of comprehensive nonreligious doctrines. [...] Political values are not moral doctrines, however available or accessible these may be to our reason and common sense reflection.²⁸⁵

²⁸¹ Habermas, *Between Naturalism and Religion*, p. 124. Here, Habermas refers primarily to the influence of Southern Baptists on the African-American struggle for civil rights in the mid-twentieth century.

²⁸² Rawls, John. *Political Liberalism* (New York: Columbia University Press, 1993), p. 137.

²⁸³ Rawls, “The Idea of Public Reason,” p. 218. Emphasis added.

²⁸⁴ Rawls, John. “The Idea of Public Reason Revisited” in *Political Liberalism* (New York: Columbia University Press, 1993), p. 446.

²⁸⁵ Rawls, “The Idea of Public Reason Revisited,” p. 452.

Public reason is a political, not a moral, matter. In stark contrast to Habermas, it appears as though this distinction allows Rawls to designate *all* speech made in the public sphere as worthy of possible promulgation in the liberal state, so long as the resultant laws protect the equal basic rights of all reasonable persons. But this is not quite what Rawls argues. He continues:

[The requirements of public reason] allow us to introduce into political discussion at any time our comprehensive doctrine, religious or nonreligious, provided that, *in due course*, we give properly public reasons to support the principles and policies our comprehensive doctrine is said to support.²⁸⁶

Again, at first glance, the meaning of Rawls's addition of an "in due course" proviso to the concept of public reason is indeterminate. On the one hand, almost immediately after articulating this proviso, Rawls argues that religious doctrines may be "introduced in public discussion at any time."²⁸⁷ This introduction could potentially occur at the time of a legislative decision, which would allow religious speech to substantially influence law or public policy – particularly if the proviso absolves the religious citizen of the need to present a public reason for days, months, or even years. On the other hand, Rawls *also* indicates that the power of the liberal state to support the equal basic rights of all citizens is "a coercive power [...] and all parties know the facts of [political] oppression." With this move, Rawls resolves the indeterminacy of the proviso and actively limits its breadth. Religious citizens must rationally and reflexively comprehend that the commitments of the liberal state to freedom and equality necessarily prohibit the promulgation of faith-based legislation within its institutional framework. Although this does not mean that religious speech cannot be permitted in the public sphere, it does mean that a secularizing norm operates both among individual citizens and within the liberal state's law- and policy-making institutions. Public reason is therefore not *precisely* secular reason; it is instead the proactive submission of religious citizens to a secularizing norm in service of the ideal liberal state.²⁸⁸ Rawls's use of public reason in the ideal liberal state produces, as Bonnie Honig asserts, "well-ordered subjects who are comfortable in (and not also resistant to) their subscription to practices of self-containment and self-concealment."²⁸⁹

Simply stated, Habermas inherits a theory bound to subject formation when he takes up and redeploys Rawls's argument on public reason. The reflexive quality of public reason – found in its ideal form in *Political Liberalism* and its non-ideal form in Habermas's theories of communicative action in post-secular polities – endows the liberal state with an agnosticism predicated on the cognitive regulation of the public sphere and its discourse. Indeed, when Habermas charges secular citizens with the task of aiding religious citizens with the translation of their speech into plain language, he

²⁸⁶ Rawls, "The Idea of Public Reason Revisited," p. 453. Emphasis added.

²⁸⁷ Indeed, the meaning of the "in due course" proviso is the subject of extensive debate. For more see: Audi, *Democratic Authority and the Separation of Church and State*. Greenawalt, Kent. *Religious Convictions and Political Choice* (Oxford: Oxford University Press, 2011). Weithman, Paul. *Religion and the Obligations of Citizenship* (Cambridge: Cambridge University Press, 2001).

²⁸⁸ The case for Rawls's participation in secularist thought can be made even clearer. In *Political Liberalism*, for instance, he states that "Catholics and Protestants in the sixteenth century" lacked the ability or willingness to disconnect their divergent religious views from conceptions of public life. He then distills one cardinal point about the insufficiency of pre-secular regimes: "Both faiths held that it was the duty of the ruler to uphold the true religion and to repress the spread of heresy and false doctrines." Rawls thus insists on the sanctity of an authoritative line of division between religion in private life and public political discourse, even as he joins modern scholars of religious pluralism in trying to rethink or reformulate that line.

²⁸⁹ Honig, *Political Theory and the Displacement of Politics*, p. 127.

seeks to neutralize the *Kulturkampf*²⁹⁰ that infuses non-ideal post-September 11th political discourse. On a very practical level, Habermas infuses his secular citizens with the power, which is itself derived from their reflexive knowledge of how an ideal liberal state functions, to regulate who may access the state's political institutions *and* the cognitive conditions under which such access is granted. Over time, religious citizens will rationally comprehend that freedom, liberty, and equality cannot be secured in the absence of secular discourse and adjust their behavior accordingly.

Yet Habermas, as a scholar of both Rawls and the secular liberal state's origins, anticipates and refutes the possibility that post-secular public reason requires the submission of religious citizens to a secularizing norm. Recall from above that Habermas offers two solutions to the problem of subject formation: first, the right of religious citizens to refuse to translate their public speech if they perceive it as an attack on their identity and, second, the imposition of a normative code of ethics that impresses upon all citizens the need to make good faith efforts to understand their secular *and* religious peers. In support of the first solution, Habermas writes:

If the new epistemic attitude fostered by public reason were merely the contingent result of condition or forced adaptation, then the question of how those cognitive preconditions for the reasonableness of a liberal civic ethos are met would have to be answered *à la* Foucault – namely, as the result of the kind of “discursive power” that imposes itself in the apparent transparency of enlightened knowledge. Of course, the answer is contradicted by the normative self-understanding of the liberal state.²⁹¹

The right of pious citizens to refuse to acquiesce to secular public reason, when combined with the normative imperatives he places on secular and religious citizens alike to make good faith efforts to comprehend the meaningfulness of all forms of public communication, absolves public reason of the charge that it may be actively producing subjects for the liberal state. As there is no overtly forceful or coercive component to reason – and because the liberal state is patently committed to the equal liberty and freedom of its citizens – it cannot be discursively productive. The argumentative force of Habermas's conclusion, however, falls short as soon as one looks more closely at the arguments made by Foucault on the power of subject formation, initially treated in the Introduction to this dissertation. He writes in “The Subject and Power”:

Power applies itself to immediate everyday life which categorizes the individual, marks him by his individuality, attaches him to his identity, imposes a law of truth on him which he must recognize and which others have to recognize in him. It is a form of power that makes individual subjects. There are two meanings of the word “subject”: subject to someone else by control and dependence; and *tied to his own identity by conscience or self-knowledge*. Both meanings suggest a form of power which subjugates and makes subject to.²⁹²

For Foucault, as was seen in the Introduction to this dissertation, power does not manifest itself in easily comprehensible ways. It becomes apparent through a sustained – often genealogical – investigation into the social standards imposed on an individual, how he or she views his or her innate identity in relation to others, and how he or she interprets the limits or boundaries placed on free action. It functions not as a top-down force that mandates a particular action or behavior, but rather as the subversive and internalized ordering of an individual's desires. In Foucault's parlance, subjects constitute *themselves* as the objects of governance.²⁹³

²⁹⁰ *Supra* note 51.

²⁹¹ Habermas, *Between Naturalism and Religion*, p. 138.

²⁹² Foucault, “The Subject and Power,” p. 781. Emphasis added.

²⁹³ Foucault refers to the subversive ordering of individual life as “governmentality.” In a nutshell, governmentality is a technique of internalized governing that structures the lives and choices of

This argument is not unfamiliar to Habermas and scholars of his work. Indeed, in the first section to this chapter, Habermas himself engages in a genealogical investigation to uncover the subtle “dialectic of disenchantment and loss of memory”²⁹⁴ that encouraged non-Christian peoples to adopt the ideals of and subsume themselves to the Enlightenment. In that instance, the rationalism of Christianity sought to impart to its practitioners the “conscience or self-knowledge” that the promise of freedom, liberty, and equality overshadowed the immediate presence of uncivilized religiously plural strife. Habermas soundly rejected the subject-forming power of Enlightenment secularism. Yet, in the above paragraphs, Habermas validates the use of self-knowledge (rendered as “self-understanding”²⁹⁵) to preserve the secular institutions of the ideal and non-ideal liberal state: reason requires liberal citizens to proactively recognize the limits of the liberal state to accommodate religious speech and, as such, they must regulate their public lives accordingly. Perplexingly, the cooperative translation proviso articulated by Habermas as the second solution to the problem of subject formation thus appears to reproduce it.

Habermas’s refusal to entertain the possibility that post-secular public reason may impact, construct, or otherwise construe the socio-political lives of religious citizens undermines the efficacy of his vision of the late modern non-ideal liberal state. The values upon which the state rests are at once deviant from and beholden to the Enlightenment’s valorization of freedom, liberty, and equality. Similarly, his use of reason decries the power it has to affect the lives of religious individuals even as it is used to (self-)relegate faith to the private sphere. And finally, power appears as an entity to be simultaneously eschewed and marshaled, depending on the vibrancy of the state’s religious discourse. Put differently, in the pursuit of a tangible (non-ideal) mechanism by which liberal states and their constituents could navigate the quagmire of post-September 11th religious tensions, Habermas crafted a theory of democratic participation that endowed secular citizens with the power to subject religious individuals to extensive psychic regulation. Religious citizens’ political participation and legal representation hinged on the rational “self-concealment” or “self-containment” of their faiths. What is particularly odd about this state of affairs is that Habermas (by way of Rawls) imagines the contemporary western liberal state in a way that is rather unlike any of its past iterations and, in doing so, has an opportunity to address (or offer redress to) the growing body of literature that stipulates that secularist policies place potentially harmful constrictions on the agency of religious citizens. Moreover, in stark contrast to Locke’s vision of the liberal state, Habermas not only accords a vibrant and meaningful place to religious citizens in the public sphere, but also encourages secular citizens to understand and appreciate the potential truth contents contained in faith-based speech. Given the contrast between Habermas’s lofty aspirations and the power-laden reality of post-secular public reason, where then does his theory leave those who are committed to revaluing religion’s place in political life? The answer to this question recalls the power of liberalism to police the dialectic of the spiritual mind and physical body found in Locke.

IV. The Specter of Locke and the Phenomenology of Post-Secular Religious Life

This chapter sought to use Habermas’s interlocutors and early writings on communicative action to illuminate the self-regulating power at the core of his vision of post-secular public reason. I

individuals absent overt power. For more, see the Introduction to this dissertation and: Foucault, Michel. *Security, Territory, and Population: Lectures at the Collège de France, 1977-78* (New York: Palgrave Macmillan, 2009), p. 200.

²⁹⁴ *Supra* note 45.

²⁹⁵ *Supra* note 74.

endeavored to make problematic a unified, and non-coercive, reading of Habermas's scholarship on religion by highlighting how reason is inextricably linked to liberal democratic values – values which are themselves inextricably linked to the colonizing force of Christianity and subject formation. By way of concluding, I seek to strengthen these arguments by reengaging with how Habermas treats, and subsequently rejects, Locke's articulation of secular liberalism. This serves two purposes: first, it details the extent to which reason possesses the power to shape the lived experiences of late modern religious individuals and, second, it complicates how political and legal institutions can marshal the language of reason to revalue the public presence of faith.

In Chapter Two, I articulated the ways in which secularism, as it emerged from the foundational works of John Locke, is profoundly dependent on an “ontology of reason” that renders devout citizens subject to the political goals of the liberal state. More precisely, I argued that as Locke worked to identify the religious conduct that could be considered proper and appropriate (by considering the examples of animal and infant sacrifice as well as the practice of Catholic communion and public processions), he appealed to a Protestant Christian understanding of reason. Reason, in *The Letter Concerning Toleration* and *The Reasonableness of Christianity*, endowed both political officials and individual citizens with the ability to regulate public religious conduct through a process of “suspension and examination.”²⁹⁶ Locke writes:

He that will [...] have his rules pass for authentic directions, must shew [sic], that either he builds his doctrine from the principles of reason, self-evident in themselves, and that he deduces all the parts of it from thence, by clear and evidence demonstration; or must shew [sic] his commission from heaven, that he comes with authority from God, to deliver his will and commands to the world.²⁹⁷

Here, it is possible to see Locke privilege the process of what Rawls and Habermas would call “reflexive self-understanding” in order to arrive at rational political principles. Legitimate states and their legislative representatives must engage in the weighing of facts and the deconstruction of false customs in order to arrive at policies that can be rightly said to privilege liberty and equality over “an old woman's [...] religion and morality.”²⁹⁸ Indeed, although he suggests that man can rule with divine intuition, he nonetheless adduces that authentic liberal government must subject even Protestant principles to examination, lest modernity fall prey to the “ignorance of traditions [...] bred in us from our cradles.”²⁹⁹ Yet, even if individuals were to remove themselves from the contexts provided by their learned customs, traditions, and educations, the “suspension and examination” of Christianity would result in mankind's rational endorsement of its precepts. Christianity, on this view, is at once a customary religion and a rational mode of organizing political life – it encourages the pursuit of freedom, liberty, and equality when its practice is itself encouraged.

For Locke, then, reason is thus a twofold proposition: first, it entails the regulation of public conduct and, second, it determines that this public – in order to be considered appropriate by the state – must conform to the standards put forth by Christianity and confirmed by internal, rational examination. It becomes, in other words, a deeply powerful method of governance directed towards endowing its constituents with a particular internal process that produces and later legitimizes an outward behavior. Secular liberalism, on Locke's rendering, is premised upon the internalization of reasoned toleration across diverse religious populations, such that the individuals that comprise these

²⁹⁶ See Chapter Two.

²⁹⁷ Locke, John. *The Reasonableness of Christianity* (Stanford: Stanford University Press, 1958), p. 63.

²⁹⁸ Locke, John. *An Essay Concerning Human Understanding* (Indianapolis: Hackett Publishing Company, 1996), p. 5.

²⁹⁹ Locke, *The Reasonableness of Christianity*, p. 90.

populations constitute *themselves* as liberal, Christian subjects. Put slightly differently: devout citizens, regardless of their status as Christians, will, through the cognitive faculty of reason, be able to access an intellectual process of “suspension and examination” that will lead them to conclude that the principles of Protestant privatization best secure the political ideal of liberalism. Secular liberalism is a political preference that is at once deeply productive and deeply Protestant.

The Lockean practice of suspension and examination, much like the practice of reflexive self-understanding at issue in this chapter, necessitates the siphoning off of otherworldly beliefs from this-worldly actions. Indeed, Locke requires each citizen to submit her spiritual commitments to an internal interrogation prior to her discursive engagement with her democratic peers. For those who conform to the dictates of Protestant Christianity, this edict may have little-to-no effect on their day-to-day activities. For individuals who practice non-Protestant religion, however, Locke’s argument can impact everything from how one advocates for religious accommodation within a workplace to the vendors one can patronize when at the market. Before engaging in public conduct, an individual must stop, suspend and examine her private convictions, and then proceed in a rational (Protestant) manner. Public officials, moreover, can subject an individual’s belief to their own suspension and examination. All told, the impact of Locke’s argument is to radically disempower religious individuals from fully participating in public life.

The purpose of recounting Locke’s account of Protestant rationality and public conduct at the conclusion of an interrogation of Habermas is not to simply draw rudimentary parallels between “suspension and examination” and “reflexive self-understanding.” For although these parallels *do* exist and *do* possess argumentative weight, they do something much more: they suggest that reason, when deployed in conjunction with the values of democratic liberalism in religiously plural polities, will consciously shape an individual’s experience of and relation to her religion. Reason carries with it a power to bring into being a mode of public conduct predicated on the self-regulation of individual belief; reason requires, in other words, a religious citizen to constantly assess the validity of her worldview in relation to the value of liberal ideals. This constant assessment and re-assessment have the effect of rendering faith subservient to secularism – a degradation that may, in turn, trigger a crisis of belief or the adherence to a doctrine that actively conflicts with an individual’s chosen faith. From a phenomenological standpoint, then, Habermas’s ideology of post-secular public reason does little more than extend the ontology of Lockean secular liberalism by leaving unquestioned the impact that “suspension and examination” or “reflexive self-understanding” has on the lived experiences of religious individuals.

At the outset of this chapter, I asked: is it possible to harness the positive elements of the semantic potential of reason – the drive towards a transcendent moral or ethical good, or the hope for respectful interpersonal speech in diverse societies – without also taking on the problematic aspects of its historical relation to the state, namely the secular effort to declare faith infelicitous and relegate its practice to the private sphere? My answer to this question should now be clear: no. To seek to make reason, religion, and secular liberalism compatible is to wade into an historical quicksand replete with subversive power, subject formation, and political disempowerment. Habermas himself appears to recognize this when he states:

To be sure, from the perspective of the liberal state, only those religious communities who abstain, by their own recognition, from spreading their beliefs and imposing them on others, deserve the predicate of ‘reasonable.’ [...] Religious consciousness must, first, come to terms with the cognitive dissonance of encountering other denominations and religions. It must, second, adapt to the authority of the sciences which hold the societal monopoly of secular knowledge. It must, last, agree to the premises of a constitutional state grounded in profane

morality. Without this thrust of reflection [*Reflexionsschub*], monotheisms in relentlessly modernized societies unleash a destructive potential.³⁰⁰

Yet, as shall be seen in the following chapters, some hope outside of the Locke-Habermas dialectic exists. By interrogating the discrete alterations that faith undergoes as religious individuals mount petitions for public accommodation or display overt (and non-Protestant) religious commitments, it is possible to see how emergent liminal spaces exist within law and politics that can restore agency to those who have been disempowered by discourses of reason.

³⁰⁰ Habermas, “Faith and Knowledge,” p. 329.

Part II

THE PROMISE OF RELIGIOUS FREEDOM

Theorizing Employment Division v. Smith³⁰¹

The affective force of individual stories allows these stories to become a collective story told across the land – in poetry, in memoir, and in a new oral medium. While there are differences between the personal story and the collective story we tell, I believe that it is necessary for Indigenous peoples in North American to make new ways of seeing ascendant power, to move to shape the endless spin of the discourses in play, to show the affective legacy of our experiences.

– Dian Million,

“There is a River in Me: Theory from Life”³⁰²

Membership talk conditions Native people as problems – unknowable, illegitimate – and also determines the conditions of belonging, the legitimacy of legal personhood outside of official or state law.

– Audra Simpson,

*Mohawk Interruptus*³⁰³

In the moments just prior to the Supreme Court’s denial of Alfred Smith’s claim that the Klamath Nation practice of sacramental peyote consumption ought to be exempted from criminal regulation, Justice Antonin Scalia declared: “To make an individual’s obligation to obey the law contingent upon the law’s coincidence with his religious belief permits him to become a law unto himself.”³⁰⁴ Delivered to a crowded courtroom in late April 1990, this statement captures what was, for the Justices, a deeply rooted anxiety: that, should the Court side with Smith, few bulwarks would remain against a tide of religious individuals citing their beliefs in order to be exempted from “compliance with otherwise valid laws.”³⁰⁵ Scalia further suggested that to decide in favor of Smith would be to absolve individuals of

³⁰¹ This chapter incorporates previously published material: Heard, Kathryn. “Theorizing *Employment Division v. Smith*: The Affective Politics of the Legal Regulation of Religion” in 16 *Law, Culture, and the Humanities* 1 (2020), pp. 53-69.

³⁰² Million, Dian. “There is a River in Me: Theory from Life” in *Theorizing Native Studies* (Durham: Duke University Press, 2014), p. 32.

³⁰³ Simpson, Audra. *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Durham: Duke University Press, 2014), p. 9.

³⁰⁴ Scalia, Antonin. Supreme Court of the United States, Washington, District of Columbia. April 17, 1990. Announcement of Decision From Bench.

³⁰⁵ *Employment Division, Department of Human Resources of Oregon v. Smith*. 494 US 872 (1990). *Smith* at 879.

their democratic responsibility to contribute to and participate within a secular public square due to the “mere possession of religious convictions.”³⁰⁶ Although Scalia qualified the stringency of his remarks by acknowledging that the First Amendment’s provisions for the free exercise of religion³⁰⁷ could never be construed in such a way as to abrogate an individual’s right to “bow down before a golden calf” or “abstain from certain foods,”³⁰⁸ he nevertheless noted that properly practiced public religion must respect “the belief-action distinction.”³⁰⁹ First used to proscribe the Mormon practice of polygamy in *Reynolds v. United States*,³¹⁰ this distinction mandates that the law must refrain from criminalizing religious thought, but not religious conduct – provided said conduct poses a palpable threat to liberty and the equality of all individuals. By calling upon *Reynolds* to underscore the Court’s reasoning in *Employment Division v. Smith*, Scalia thus prohibited Smith from participating in a rite he considered central to his spiritual wellbeing, even as he preserved “constitutional traditions and common sense”³¹¹ by preemptively curtailing future free exercise challenges to ostensibly neutral laws.

In the days immediately following the decision in *Smith*, Native American³¹² organizations – buoyed by the robust concurring and dissenting opinions respectively filed by Justices Sandra Day O’Connor and Harry Blackmun – condemned the Klamath Nation’s “loss of cultural integrity [...] and, therefore, religious survival.”³¹³ Simultaneously, spiritual leaders from Christian, Jewish, and Islamic communities worked alongside the American Civil Liberties Union and elected officials to draft federal legislation that would overrule “the Supreme Court’s elimination of the requirement that the government justify burdens on the religious exercise imposed by laws neutral towards religion.”³¹⁴ Now known as the Religious Freedom Restoration Act (RFRA),³¹⁵ this legislation secured the

³⁰⁶ *Smith* at 879.

³⁰⁷ The First Amendment states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

³⁰⁸ *Smith* at 877 and 878.

³⁰⁹ Long, Carolyn N. *Religious Freedom and Indian Rights: The Case of Oregon v. Smith* (Lawrence, KS: The University Press of Kansas, 2000), p. 48. See also: *Smith* at 879.

³¹⁰ *Reynolds v. United States* (98 US 145 (1878)).

³¹¹ Scalia, Announcement of Decision From Bench.

³¹² Many historical and contemporary scholarly works are divided over the proper terms by which to refer to the Indigenous and aboriginal people in what is now the United States and Canada. Some use the term “Indian,” although I only use this term when referring to historical texts in direct quotation. As much as possible, I privilege the tribal name of those whose stories I relate and, following from the language used by Smith himself, I use the terms Native and Native American. I often use the term Indigenous to describe a category of membership that stretches beyond the boundaries of both the Klamath Nation and North America. At times, and only in direct quotation, I recount the usage of several derogatory terms like “redskin,” “savage,” and “barbarian.” I use these latter terms only when analyzing how Native cultures and religious practices were narrated by the political and legal practices of American colonialism.

³¹³ *Smith* at 920.

³¹⁴ Epps, Garrett. *To an Unknown God: Religious Freedom on Trial* (New York: St Martin’s Press, 2001), p. 231.

³¹⁵ 42 USC §2000bb. In passing RFRA, Congress sought to “restore” constitutional jurisprudence on matters of religious freedom to standards set by prior Supreme Court decisions, specifically those set by *Sherbert v. Verner* (374 US 398 (1963)) and *Wisconsin v. Yoder* (406 US 205 (1972)). Simply put, *Sherbert* and *Yoder* mandate that the government cannot substantially burden religious exercise absent

bipartisan support of all but three senators and was signed into law by then-President Bill Clinton in 1993. The magnitude of the furor caused by the responses to and remedies for *Smith* inspired one journalist to note that the American political and legal landscape would forever bear the marks of the “fight to the death to preserve the right of every person to practice whatever convictions he has.”³¹⁶

Yet within this tumultuous post-*Smith* terrain, one figure was noticeably absent: Alfred Smith himself. To both the Court and to those who worked to mitigate the impact that *Smith* could have on the free exercise of religion, Smith functioned as a cipher. For the former, he represented the possibility that an insidious and irrational “rule of religion” would endanger the positive freedoms and negative liberties guaranteed to all by secular democratic governance.³¹⁷ For the latter, he represented an injustice wrought by an elite group of individuals far removed from the religiously-inflected lives of everyday Americans. In each setting and with each new invocation of *Smith*, the complex rationale given and spiritual experiences recounted by Smith in support of his use of sacramental peyote were elided: not only did the Court dismiss Smith’s religious beliefs with a mere half-sentence by ascribing them to the Native American Church³¹⁸ (an organization to which he never belonged³¹⁹), but so too did RFRA proponents cast him as a “redskin expected to be in a headdress, born with a freakish set of rituals to practice.”³²⁰ The pervasiveness of the dismissals and reformulations of Smith’s spirituality prompted him to later remark: “My religion and my reasons for peyote use could not be recognized by the law. I was given a God – a God that I didn’t even understand.”³²¹

This chapter interrogates, first, Scalia’s assertion that the law must uphold the belief-action distinction in order to preserve democratic norms and, second, the affect that this distinction had on Smith’s relationship with the law as a protective institution. I argue that as Smith responded to the law’s repeated requests for justification as to why his religious convictions ought to exempt him from the criminal regulation of peyote, he experienced a profound sense of legal, political, and spiritual disempowerment – a disempowerment compounded by the erasure of the complexities of his faith in both the decision and aftermath of *Smith*. By way of making this argument, I bring Scalia, Smith, and *Smith* into conversation with the principles and procedures of public reason as advanced by the subject of Chapter Three: Jürgen Habermas. Indeed, Habermas articulates a vision of how the law- and policy-making institutions of post-secular liberal democratic states ought to rely upon public reason,

compelling justification. However, the final language of RFRA declined to extend permanent legal protection to the consumption of sacramental peyote. In the House report accompanying the bill, the authors wrote: “In terms of the specific issue addressed in *Smith*, this bill would not mandate that all states permit the ceremonial use of peyote, but it would subject any such prohibition to the aforesaid balancing test. The courts would then determine whether the State had a compelling governmental interest in outlawing bona fide religious use by the Native American Church and, if so, whether the State had chosen the least restrictive alternative required to advance that interest.” See: Report No. 88, 103d Congress, 1st Session, 1993.

³¹⁶ Hentoff, Nat. “Justice Scalia vs. the Free Exercise of Religion,” *Washington Post*, May 19, 1990, p. A25. As cited in Epps, *To an Unknown God*, p. 235.

³¹⁷ Sullivan, Winnifred Fallers. “The World that Smith Made” in Hurd, Elizabeth Shakmun, ed., *Politics of Religious Freedom* (Chicago: University of Chicago Press, 2015), p. 234.

³¹⁸ *Smith* at 890. See also: Sullivan, “The World that Smith Made,” p. 235.

³¹⁹ Smith, Alfred Leo. Personal Interview with Garrett Epps. June 21, 1995. My heartfelt thanks to Garrett for granting me access to the unprocessed archives of his interviews with Smith at the University of Oregon Law School.

³²⁰ Smith, Personal Interview.

³²¹ Smith, Personal Interview.

buttressed by cooperative acts of translation, to preserve the secular character of political life even as positive public space is made for the pursuit of religion.³²² Yet even as many venerate this vision as the ideal to which legal actors and religious individuals ought to aspire, when this ideal is considered along Smith's lived experience before the Court, a disquieting disjuncture between theory and practice emerges. For although Habermas encourages religious individuals to adopt an epistemic stance of public reason and to engage in cooperative acts of translation in order to settle collaboratively the appropriate limits of both religion and the law, I argue that, when applied to *Smith*, these methods of discursive engagement work to not only underscore the absolute primacy of the law over religion, but also to undercut Smith's own understanding of his faith. Simply put, *Smith* stripped Alfred Smith of his sense of belonging, both in deliberative democratic politics and in his religious community.

This chapter also seeks to chart a way forward from the recognition that public reason functions as a discursive power that adversely impacts the material and metaphysical wellbeing of religious individuals. To do so, I draw from the archives of *Smith* – its depositions, transcripts of oral arguments, post-decision interviews, and more – to demonstrate that public reason carries with it a Protestant sensibility that lands asymmetrically on those whose faith-based practices fall outside the orthodox parameters established by Judeo-Christianity. Yet rather than letting these archives be understood solely as a congealed site of discursive ephemera, I argue that their reconstruction can illuminate how reason's power can be resisted, and disrupted, *in situ*. More precisely, I argue that if cooperative translation becomes a site of contextualized testimony rather than abstracted requests, it can rehabilitate the “process of justice and its guarantees for democratic inclusion.”³²³ This approach harnesses both the inner logic of the law – by which I mean, to borrow a phrase from moral legal philosophers,³²⁴ the ways in which the law binds itself, through its procedures and modes of argumentation, in order to secure external socio-political legitimacy – and its built environment in order to attend, first, to how religious individuals experience injuries under the everyday operations of governance and, second, to how the narration of such injuries can illuminate what Iris Marion Young called the “shadows and histories, scars and traces, often occluded in routine communication.”³²⁵ This approach could have, in *Smith* and for Smith, challenged – and, ideally, altered – Scalia's determination that the enforcement of a belief-action distinction serves as an appropriate remedy to the politico-legal challenges of post-secularism.

³²² Habermas, Jürgen. *Between Naturalism and Religion* (Malden, MA: Polity Press, 2008), p. 119.

³²³ Chakravarti, Sonali. *Sing the Rage: Listening to Anger After Mass Violence* (Chicago: The University of Chicago Press, 2014), pp. 4, 5. As cited in the Introduction, fns. 70-72.

³²⁴ Joseph Raz, for instance, writes: “Lawyers, both academic and practicing, are fond of talking of the life of the law, its spirit, or its inner logic. In part, these expressions refer to the unwritten conventions of the legal profession. These extend beyond habits and manners, and affect the presentation of argument. They include conventions of interpretation and a sense of propriety in the conduct of cases which may be decisive in determining their outcome. There is no doubt that, because of the importance of the legal profession and its conventions in contemporary legal systems, any study of the law which disregards them is liable to produce a distorted picture.” Raz further argues that such logic is meant to be a source of development – of legal progress made through the articulation of its rationale. Raz, Joseph. *Ethics in the Public Domain* (New York: Oxford University Press, 1995), pp. 238-39. For more, see: Nonet, Phillippe and Philip Selznick. *Law and Society in Transition: Towards Responsive Law* (New York: Octagon Books, 1978).

³²⁵ Young, Iris Marion. *Intersecting Voices: Dilemmas of Gender, Political Philosophy, and Policy* (Princeton, NJ: Princeton University Press, 1997), pp. 53-55.

I build this argument over the course of four sections. In the first section, I sketch the literature of lived experience in order to trace how, and under what conditions, narratives of lived experience challenge subject formation in late liberal democratic states. The second section focuses on the figure of Smith himself and, through an engagement with archival material, reconstructs his lived experience before the bench. I highlight how the Court's reliance on reasoned, "common sense" dialogue discounts spiritual revelation and induces metaphysical crises – an abstracted reliance that imposes asymmetrical burdens on devout individuals who desire to experience their religion as an embodied practice. The third section returns to the example that began this chapter, tracing the broader social and legal contexts in which *Smith* was located. I examine how Scalia and his fellow Justices enacted a modified form of Habermas's adjudicatory ideal – that is to say, the discursive use of reason informed by cooperative acts of translation – in pursuit of a legal solution to public religious pluralism. The fourth and final section revisits the literature of lived experience with an eye towards the legal-historical context from which Smith's claim emerged. I argue that if Smith's experience before the bench had incorporated testimonies as to the harmful histories of settler colonialism,³²⁶ which were themselves suffused with Protestant Christian understandings of secular life, an immanent resistance to the seemingly neutral procedures of the law could have occurred. This section concludes by considering the emancipatory limits of narratives of lived experience in religious accommodation cases – particularly for those petitioners who seek to limit the positive rights of others through their challenges.

I. A Methodology of Lived Experience: Towards Testimony

To understand *why* lived experience can be marshalled as a means to resist reason's discursive power, and *how* such resistance can unfold within testimony, a foray into contemporary social scientific and humanistic scholarship is useful. In this section, I trace not only how political theorists configure the destabilizing nature of narratives of lived experience, but also how Habermas – as a theorist who foregrounds a "medium of talk"³²⁷ in his vision of communal life – exerts a substantial gravitational pull for those who seek to incorporate narratives in a measured, metered manner in the march towards religious freedom. I argue that there is peril in this pull, but also promise: if Habermas's reasoned discourse is meant to perfect the inclusive capacity of the law- and policy-making institutions of post-secular liberal democratic states while also insulating them from the vagaries of faith, then so too is it possible to harness its procedural posture to emancipatory ends. An immanent alteration of how intersubjective engagement occurs, and what can rightly be articulated within the boundaries of the

³²⁶ In this chapter, I tend to use the language of settler colonialism, although I sometimes speak of colonialism in the abstract. In using this phrase, I intend to signal that the westward expansion of the American state can be defined as a "system of oppression based on genocide and colonialism that aims to displace a population of a nation (oftentimes Indigenous people) and replace it with a new settler population. Settler colonialism finds its foundations on a system of power perpetuated by settlers that represses Indigenous people's rights and cultures by erasing it and replacing it by their own." Settler colonialism differentiates itself from colonialism by foregrounding the dispossession of Native peoples as a means to establish the settler's culture as "rightful" – colonialism represents the domination (partially or fully) over another sovereign nation. For more, please see: Legal Information Institute at Cornell Law School, "Settler Colonialism."

https://www.law.cornell.edu/wex/settler_colonialism#:~:text=Settler%20colonialism%20can%20be%20defined,with%20a%20new%20settler%20population (last accessed June 15, 2020).

³²⁷ For more, see Chapter Three, fn 26, citing to *The Structural Transformation of the Public Sphere*.

law, can both highlight what is occluded by a regime of public reason even as it illuminates the harmful nature of that which has been occluded. This section determines, in other words, that testimony represents a reconfigured, and emancipatory, instantiation of cooperative translation. It is this determination that lays the groundwork for future sections' engagement with *Employment Division v. Smith*.

In its most generous and discipline-spanning definition, the study of lived experience focuses on “the subjective dimensions of social relations, on how particular social arrangements and configurations are lived and made sense of, highlighting the complex intersections between public culture and private subjectivity and the transformative potentials that may arise there.”³²⁸ As a category of research distinct from the historically- or quantitatively-oriented fieldwork often completed by archaeologists or biologists, whose studies often endeavor to portray definitively life as it was or is, academic literature driven by the analysis of lived experience centers an “authorial voice and subject position”³²⁹ whose narrative agency reveals a situated, emotional approach to concrete events and regulations.³³⁰ Scholarly analyses of first-person stories are meant to bridge the “analytic gap between outside positionalities [like membership in discrete categories defined by race, gender, sexual orientation, class, or national origin] and interior worlds,”³³¹ thereby offering insights into how political, social, and legal processes are complicit in the construction and understanding of the complete self over time.³³²

Despite the widespread recognition that narratives of lived experience serve as textual sites rich for academic analysis in fields like English and sociology, the discipline of political theory attends inconsistently to how, in the course of everyday life, an individual may find herself and her needs conditioned by techniques of governance. For although the discipline itself is replete with centuries (if not millennia) of treatises demarcating the proper aims and limits of the rules mediating collective life,³³³ the situated and subjective self – that is, the self that not only articulates the experience of life lived under a prevailing political and legal authority, but also infuses her everyday activities with meaning alongside or contrary to such authority – materializes only in glimpses at the edges of the field. Yet in recent years, efforts to understand, first, why lived experiences have been historically

³²⁸ Pickering, Michael. “Experience and the Social World” in Pickering, Michael (ed). *Research Methods for Cultural Studies* (Edinburgh: Edinburgh University Press, 2008), p. 18.

³²⁹ Maynes, Mary Jo, Jennifer L. Pierce, and Barbara Laslett. *Telling Stories: The Use of Personal Narratives in the Social Sciences and History* (Ithaca, NY: Cornell University Press, 2008), p. 15.

³³⁰ Ellis, Carolyn and Michael G. Flaherty (eds). *Investigating Subjectivity: Research on Lived Experience* (Newbury Park, CA: SAGE Publications, 1992).

³³¹ Maynes et al., *Telling Stories*, p. 16.

³³² For instance, John Paul Eakin argues that the self is a process – rather than a singular and static entity – as “identity formation is not available for conscious inspection as it happens. We can never expect to witness the emergent sense of self as an observable event precisely because it is an ongoing process, taking place mostly beneath our notice from day to day – and, indeed, physiologically, moment by moment.” For Eakin, the self can become clearer in moments of auto-narration, in which individuals are empowered to reflect on how their interior worlds shifted in relation to outside stimuli. This difference, between the narrated self and the regulated self, is meant to reveal the embedded power of social, political, and legal processes. For more, see: Eakin, John Paul. *How Our Selves Become Stories: Making Selves* (Ithaca, NY: Cornell University Press, 1999), pp. x, 69-74. See also Holstein, James A. and Jaber F. Gubrium, *The Self We Live By: Narrative Identity in a Postmodern World* (New York: Oxford University Press, 2000), pp. 71-75.

³³³ Maynes et al., *Telling Stories*, p. 30.

relegated to the margins of the discipline and, second, how they can operate as founts for the illumination of injustices, the expansion of egalitarian possibilities, and the cultivation of a freer, more sovereign self have intensified. Indeed, from postmodern considerations of political autobiographies³³⁴ to feminist critiques of trans-exclusive identity recognition practices³³⁵ to democratic assessments of universalizing moralistic impulses,³³⁶ contemporary political theorists have begun to engage with the discrete self as a means both to highlight the subtler and non-hierarchical operations of modern power and to hone the capacity of experiential storytelling to destabilize dominant politico-legal discourses. By treating narratives of lived experience as possessive of emancipatory potential, Jade Larissa Schiff concludes, political theory can cultivate a responsiveness that addresses and ameliorates “the root causes of individual suffering”³³⁷ – and, in doing so, move from the sidelines of political science scholarship to its forefront.

It is important to temper the scholarly hope articulated in the preceding paragraph with the acknowledgement that the theoretical project of making the affects of governance visible through stories of lived experience, and marshalling such visibility to mount a resistance to an elusive form of power, presents significant challenges. For while the proliferation of narrative-centered contemporary scholarship has largely succeeded in expanding the possibilities of *what* counts as a legible claim of harm and *who* is authorized to make such a claim, practitioners of experience-driven political theory note that their efforts to recount situated and emotional subjectivities can foster ideological entrenchments among academic, political, legal, and lay interlocutors alike. Joan Scott argues that first-person narratives of experience – narratives that elucidate what she calls “the consequences and repressions” that accompany the enforcement of normative laws and policies, as when queer individuals lay bare the psychic wounds that flow from “ontological economies of assumed

³³⁴ See, for instance: Allen, Danielle. *Our Declaration: A Reading of the Declaration of Independence in Defense of Equality* (New York, NY: Liveright Publishing Corporation, 2014). Bennett, Nolan. *Claims of Experience: Autobiography and American Democracy* (New York, NY: Oxford University Press, 2019). Frank, Jason. *Constituent Moments: Enacting the People in Postrevolutionary America* (Durham, NC: Duke University Press, 2010). Näsström, Sofia. “The Legitimacy of the People” in *Political Theory* 35 (2007), pp. 624-58. Shapiro, Michael. *Deforming American Political Thought: Ethnicity, Facticity, and Genre* (Lexington, KY: University Press of Kentucky, 2006). Shulman, George. *American Prophecy: Race and Redemption in American Political Culture* (Minneapolis, MN: University of Minnesota Press, 2008).

³³⁵ See, for instance: Butler, Judith. *Undoing Gender* (New York, NY: Routledge, 2004). Hagel, Nina. “Alternative Authenticities: Thinking Transgender Without Essence” in *Theory and Event* 20 (2017), pp. 599-628. Heyes, Cressida. *Self-Transformations: Foucault, Ethics, and Normalized Bodies* (New York, NY: Oxford University Press, 2007). Spade, Dean. “Mutilating Gender” in Stryker, Susan and Stephen Whittle (eds). *The Transgender Studies Reader* (New York, NY: Routledge, 2006), pp. 315-33.

³³⁶ See, for instance: Maxwell, Lida. *Public Trials: Burke, Zola, Arendt, and the Politics of Lost Causes* (New York: Oxford University Press, 2015). Lara, María Pía. *Moral Textures: Feminist Narratives in the Public Sphere* (Cambridge, UK: Polity Press, 1998). Schiff, Jade Larissa. *Burdens of Political Responsibility: Narrative and the Cultivation of Responsiveness* (New York, NY: Cambridge University Press, 2014). Scott, Joan W. “The Evidence of Experience” in *Critical Inquiry* 17 (1991), pp. 773-797. Young, Iris Marion. *Inclusion and Democracy* (New York, NY: Oxford University Press, 2000).

³³⁷ Schiff continues: “Our ability to cultivate responsiveness to suffering as a problem – indeed, our capacity to apprehend such suffering as a problem to begin with – depends in part on the kinds of stories we tell ourselves and each other about our relationship to suffering, and how we listen to those stories.” Schiff, *Burdens of Political Responsibility*, p. 20.

heterosexuality”³³⁸ – risk occluding the “inner workings or logics of the governing mechanisms” that produce the subjectivity of the narrator.³³⁹ Put slightly differently, on Scott’s account, storytelling risks imparting to an interlocutor the *existence* of a harm, but not necessarily the means by which that harm was constituted – especially if the narrative itself was accompanied by an emotional outcry, a point similarly made by Lida Maxwell and Nolan Bennett.³⁴⁰ Such scholars suggest that, from the perspective of a possible interlocutor, narratives that incorporate feelings of sadness, annoyance, or injury that stem from routine operations of government or denials of legal claims may appear as the logical consequence of a life lived within a democratic polity. Institutional guarantees of freedom and equality, said interlocutors could argue, require the imposition of value-neutral limits on the permitted scope of personal behavior; to then feel an emotion in the wake of such governance, or to feel compelled to articulate a story emerging from the curtailment of one’s liberty, is therefore merely the expressive realization that universal rights supersede individual needs.³⁴¹

The preceding paragraph suggests that situated and subjective outcries – that is to say, discrete narrations of physical harms or psychic burdens that emerge from lives lived in community under liberal governance – cannot always be recognized. There may be good reason for law- and policy-making entities to be skeptical of conflating the amelioration of individual injuries with emancipatory ends: alleviating the root cause of one person’s injury may create cascading effects that imperil the ability of others, either as groups or individuals, to realize the ideals of freedom and equality. The deliberate non-recognition of a felt injury can thus serve protective ends; for instance, and as will be treated in greater detail in the conclusion to this chapter and in Chapter Five, to deny a religiously-motivated outcry from those who would seek to circumscribe services available to same-sex couples could be understood not as a denial of religious freedom, but rather as a positive legal affirmation of anti-discrimination principles and a bulwark against the erosion of rights guaranteed to minoritized communities. This twinned action, of a denial of a request and an affirmation of constitutional ideals, reflects the idealized way post-secular liberal egalitarians like Habermas imagine reason to operate in the public sphere.

Indeed, for those who study the emancipatory potential of lived experience, Habermas exerts substantial gravitational pull: his theory of communicative action, and the ways in which it conditions the operations of the post-secular public sphere, not only provides a structural apparatus that – by design – encourages the expression of felt injuries and subjective outcries, but so too does it provide a dedicated channel through which to render the expression ready for deliberative scrutiny and – perhaps – ultimate adoption by the law- and policy-making institutions of liberal democratic states.³⁴² The Habermasian public sphere, in the words of Stephen Coleman, thus possesses the potential to demonstrate that “what democratic bodies *do* and how democratic bodies *feel* are not separate conditions,”³⁴³ in that it purposefully incorporates a diverse and dynamic polity into the institutional structures of governance and, in its most ideal formation, permits the experiences of the discrete and

³³⁸ In conveying this point, Scott engages with Judith Butler’s argument in *Gender Trouble* regarding the supposed ontology of sex and gender. Scott, “Evidence of Experience,” p. 779.

³³⁹ Scott, “Evidence of Experience,” p. 779.

³⁴⁰ Maxwell, *Public Trials*, p. 3. Bennett, *Claims of Experience*, p. 14. See also: Schiff, *Burdens of Political Responsibility*, p. 20.

³⁴¹ Schiff, *Burdens of Political Responsibility*, p. 21. Maynes, *Telling Stories*, p. 17.

³⁴² For more, see Chapter Three, fn 27.

³⁴³ Coleman, Stephen. *How Voters Feel* (Cambridge, UK: Cambridge University Press, 2013), p. 191. Emphasis in original. As cited in: Wahl-Jorgensen, Karin. “Questioning the Ideal of the Public Sphere: The Emotional Turn” in *Social Media and Society* (2019), pp. 1-3.

subjective self to shape the manner in which such structures will continue to operate. Understanding post-secular governance to be open to all and reflective of those who populate its institutions, Maeve Cooke further notes, will then allow “collective lived experiences to change, with the result that different kinds of reasons will stock the existing socio-cultural reservoir of meaning.”³⁴⁴ Public reason, on this account, is a form of ongoing narrativational emancipation that balances the wants of the few against the rights of the many.

It is this final move, in which the structural and discursive conditions of the Habermasian post-secular public sphere are cast as both “normative and bourgeois,”³⁴⁵ that feels too tidy given the arguments earlier advanced by Scott and Schiff. Although Foucauldian critiques of Habermas are familiar elsewhere in this dissertation, they are of particular salience when considering the emancipatory possibilities of narrativational storytelling in his works. For instance, even as Habermas envisions the “medium of talk”³⁴⁶ to be a pathway towards a richly robust and plural public square in which “expressing the reality of lived oppression” is a central component of a life lived in community,³⁴⁷ so too does he, following Lois McNay, presume narratives offered by injured individuals to be suffused with “inherent partiality and uninterrogated biases” – a suffusion that requires the circumscription of the outcry, its subjection to skepticism, and its denuding through an “arid proceduralism.”³⁴⁸ Far from collapsing the distinction between the *doing* and *feeling* of democratic states so as to render societies more inclusive over time, the procedural benchmarks Habermas installs in public reason – like cooperative translation – instead serve to craft a subtle, intersubjective form of power designed to prevent or lessen the incorporation of an outcry into the operations of government. This proceduralism, laced as it is with the latent Protestantism of Lockean secular liberalism, thus serves to insulate the state from the vagaries of religious belief – and ultimately subvert emancipatory narrativational aspirations.³⁴⁹

But let us pause. Over the course of this section, narrative has emerged as a promising yet complicated tool in the march towards emancipation from subject formation: on the one hand, it makes clear the affective consequences of liberal democratic governance for those who occupy minorized positions even as it, on the other hand, can be subsumed into the operations of governance itself, such that its transformative potential is dampened. If narrative is then interpreted through the post-secular lens offered by Habermas, this duality becomes even more challenging: processes of public reason in law- and policy-making institutions *require* the use of narrative in order to alter the conditions of political life, yet the language available to those who engage in cooperative translation carries with it a secular ontology that, in practice, separates religious belief from religious conduct – the very thing that could be the source of an individual’s injury. However, in the paragraphs and sections to follow, I argue that, rather than declare a stalemate, emancipatory hope still penetrates this power-suffused murkiness: that is to say, there is hope because the procedures of public reason lead into the heart of governance – and its affects – itself.

³⁴⁴ Cooke, Maeve. “Violating Neutrality? Religious Validity Claims and Democratic Legitimacy” in Calhoun, Craig and Eduardo Mendieta (eds). *Habermas and Religion* (Malden, MA: Polity Press, 2013), p. 253.

³⁴⁵ Habermas, *Between Naturalism and Religion*, p. 138.

³⁴⁶ For more, see Chapter Three, fn 26, citing to *The Structural Transformation of the Public Sphere*.

³⁴⁷ McNay, Lois. *The Gender of Critical Theory: On the Experiential Grounds of Critique* (New York: Oxford University Press, 2020), p. 3.

³⁴⁸ McNay, *The Gender of Critical Theory*, p. 17.

³⁴⁹ McNay, *The Gender of Critical Theory*, p. 4. See also: Hemmings, Clare. *Why Stories Matter* (Durham, NC: Duke University Press, 2011), p. 92.

Recall from the Introduction and Chapter Three that, for Habermas and his interlocutors, public reason informs the ideal to which just law aspires precisely because cooperative translation, in its regulation of interpersonal relations within institutional spaces, requires giving an account of “acceptable reasons for action” that can be both quickly binding and widely promulgated following interpretation, judgment, and opinion-authoring.³⁵⁰ In courtrooms and in administrative hearings, this process of reason-giving occurs within testimony, within depositions, and within the presentation of evidence – moments that center first-person narratives that are oriented towards the articulation of *how* an injury occurs, *why* an injury must be redressed, and *where* the law can be altered to prevent future injuries.³⁵¹ For critical legal theorists, particularly those who study the affects of reason-based governance on minoritized persons, the presence of narrational testimony within the inner logic of the law can serve as a site of rupture, a site in which the presence of power is at once illuminated and dismantled. To wit, Richard Delgado writes:

Stories help oppressed groups through their effect on the oppressor. Most oppression does not seem like oppression to those perpetrating it. It is rationalized, causing few pangs of conscience. [...] Artfully designed chronicles, allegories, and tales [...] can jar the comfortable complacency that is the principal anchor dragging down any incentive for reform. They can destroy – a type of willing death. [...] Storytelling within the law is an engine built to hurl rocks over walls of social complacency that obscure the view out from the citadel. The rocks all have messages tied to them that the defenders cannot help but read. The messages say, let us knock down the walls, and use the bricks to pave a road we can all walk together.³⁵²

Here, narrative illuminates the harmful contours of existent ontologies even as they upset their seeming fixedness, an upset that can have a near-immediate ameliorative effect. Indeed, if Delgado’s metaphors in the quote above are pushed further, narrational testimony arms the injured with a precisely aimed trebuchet and a parcel of boulders with which to dismantle the “bundle of presuppositions, received wisdoms, and shared understandings” that bind the limits of the law.³⁵³ But some cautiousness is needed. For Delgado, as for other narrative-driven critical legal theorists, it is not simply that words are hurled and land like bombs, but rather that – to be truly emancipatory – testimony must incorporate a willing interlocutor who “is moved by the other [and] hears that which cannot be presented in an acceptable register.”³⁵⁴

An emancipatory-oriented interlocutor tasked with hearing testimony at once echoes and departs from the figure of the translative interlocutor embedded within procedures of public reason. Previously, I argued that Habermas incorporated Kantian-inspired moral obligations into the operations of the post-secular liberal democratic state. This meant that, if religious individuals had

³⁵⁰ Habermas, Jürgen. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, MA: MIT Press, 1996), pp. 104, 119-120.

³⁵¹ Chakravarti, Sonali. *Sing the Rage: Listening to Anger after Mass Violence* (Chicago: University of Chicago Press, 2014).

³⁵² Delgado, Richard. “Storytelling for Oppositionists and Others: A Plea for Narrative” in 87 *Michigan Law Review* 8 (1989), pp. 2438, 2441.

³⁵³ Delgado, “Storytelling for Oppositionists and Others,” p. 2429.

³⁵⁴ Ahmed, Sara. *Strange Encounters: Embodied Others in Post-Coloniality* (New York: Routledge, 2000), p. 156. For more, see also: Ahmed, Sara. “An Affinity of Hammers” in *TSQ: 27 Transgender Studies Quarterly* 1 (2016), pp. 22-34. Lipari, Lisbeth. *Listening, Thinking, Being: Towards an Ethics of Attunement* (State College, PA: Penn State University Press, 2014). Lator, Kay. “Listening Intently’ to LGBTQI Lives: Diplomatic Narratives of Listening and Hearing in LGBTQI Rights” in 24 *Law, Text, Culture* 1 (2020), pp. 302-327.

not absented themselves from the public sphere by virtue of their right to retreat from asymmetrical burdens, they would be guaranteed an interlocutor who could identify and abstract a “secular kernel of truth” from faith-inflected requests. This kernel, in its isolated form, could then be evaluated within the broader law- and policy-making institutions for its adherence to or departure from universal ideals. For narrative-driven critical legal theorists, so too is an interlocutor – often figured as a judge, jury, lawyer, or even court reporter³⁵⁵ – required to engage with an injured individual. Yet in this reimagined interlocutory moment, the duty of the interlocutor is neither to translate nor to abstract; their duty is to instead, in language that recalls Schiff and Scott above, to dwell in the “particularity, ambiguity, and imprecision”³⁵⁶ offered by the narrator and to embrace the articulation of a contextual story that “stirs the imagination in ways that conventional legal discourse cannot,” thereby offering to themselves and the narrator “a respite from the linear coercion that characterizes much of the law.”³⁵⁷ A shift towards testimony enables, in other words, a new communicative ethics: it is one that resists the lure of prevailing discourses, listens for that which has not yet been recognized by dominant ideologies, and alters – collaboratively – what can be asked for within, and granted by, the law.

The preceding paragraphs attempt to tread a careful line: for although they recognize the usefulness of the paradigm of public reason for scaffolding the legal procedures needed to redress injury, they also argue that these procedures – tangled as they are with the thread-like nature of power – must be immanently resisted and transformed to realize true, lived emancipation. Through an engagement with the narrative-centered arguments offered by critical legal theorists, I suggest that such a transformation can be achieved through not only harnessing the inner logic of the law – such as its courtrooms, its sanctioned officials, and its requirements for interpersonal engagement – to offer an emotion- and context-driven account of injury that illuminates gaps in its protective duty, but also by consciously dwelling in what McNay earlier called the “inherent partiality and uninterrogated biases”³⁵⁸ of testimony, such that the intersubjective relationship between “the law” and its

³⁵⁵ Kim Scheppelle writes: “In law, both at trial and on appeal, all courts have is stories. Judges and jurors are not witnesses to the events at issue, they are witnesses to stories about the events. And when litigants come to court with different stories, some are accepted and become ‘the facts of the case’ and others are rejected and cast aside. Some of what is cast aside may indeed be false (and some of what is accepted may be too). But some of the rejected stories may be accurate versions of events that grow from experiences different from the experiences of those who are doing the choosing.” See: Scheppelle, Kim Lane. “Foreword: Telling Stories” in 87 *Michigan Law Review* 8 (1989), pp. 2082-2083.

³⁵⁶ Ewick, Patricia and Susan S. Silbey. “Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative” in 29 *Law & Society Review* 2 (1995), p. 198.

³⁵⁷ Delgado, “Storytelling for Oppositionists and Others,” p. 2415. See also: Abrams, Kathryn. “Hearing the Call of Stories” in 79 *California Law Review* 4 (1991), pp. 971-1052. Bennett, W. Lance and Martha S. Feldman. *Reconstructing Reality in the Courtroom* (New Brunswick, NJ: Rutgers University Press, 1981). Engel, David. “Origin Myths: Narratives of Authority, Resistance, Disability, and Law” in 27 *Law & Society Review* 1 (1993), p. 785. Lawrence, Charles III. “Listening for Stories in all the Right Places: Narrative and Racial Formation Theory” in 46 *Law & Society Review* 2 (2012), pp. 247-258. Massaro, Toni M. “Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?” in 87 *Michigan Law Review* 8 (1989), pp. 2009-2127. Polkinghorne, Donald. *Narrative, Knowing, and the Human Sciences* (Albany, NY: SUNY Press, 1988). West, Robin. “Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory” in 60 *New York Law Review* 2 (1985), pp. 145-211.

³⁵⁸ *Supra* note 48.

constituents is altered. The shift between actors in the courtroom, or in other law-inflected spaces, is not meant to signal an absolute endorsement of the narrative being told, but rather to signal that the dialogic participants are institutionally unequal, and that material and metaphysical injuries fall differently on different bodies – that those who come to a place coded as ontologically rational “drag behind them shadows and histories, scars and traces, often occluded in routine communication.” An openness to context, perspectivalism, and question-asking following a declaration of injury can thus foster interpersonal respect, social solidarity, and a resistance to abstraction.³⁵⁹ A return to the example that began this chapter – Smith as located in *Smith* – can help clarify how the powerful core of public reason operates, but also how narratives of injury can be occluded – and, ideally, recovered.

II. “To Reach the Full-Blooded Indian, Send Him a Full-Blooded Christian”³⁶⁰: Locating the Lived Experience of Smith in *Smith*

The stories told of *Smith* are neither complete nor wholly accurate. As I intimated at the outset of this chapter, the stories offered by academics, legal actors, politicians, and religious organizations of *Smith* center the efforts of an individual to fight the unjust denial of unemployment benefits as a result of Oregon’s classification of peyote as a controlled and criminalized substance. These stories further suggest that it was only through the enactment of the Religious Freedom Restoration Act (RFRA) that Smith – as an individual – was able to regain autonomy over and agency within his spiritual practices. Yet these stories – while not inaccurate – do not capture fully the spectrum of Smith’s experiences before the law. This section, following the arguments of the narrative-driven critical legal theorists in the preceding section, draws from legal archives – depositions, hearings, oral arguments, interviews, letters – to construct an image of Smith as a “situated and subjective” self that works alongside and against *Smith*’s accepted stories. An archival excavation of a situated self follows the inner logic of the law across time and jurisdiction in order to demonstrate how processes of self-reflective cooperative translation are embedded within the law and, in their embeddedness, carry with them a subject-forming power that participates within and reproduces a secular Protestant rationality. I argue that an attentiveness to seemingly discrete and insular intersubjective moments can illuminate a larger affective experience; an experience that I will argue, in future sections, lays the groundwork for not only Scalia’s appeal to *Reynolds* and Smith’s subsequent ejection from deliberative democratic life, but also the moments in which resistance to post-secular public reason, in the form of testimony, can occur.

To hear Smith tell the story of his encounter with the law is to hear a story that spans several decades and several court systems, but – as with many religious accommodation cases – Smith’s legal journey began with an administrative hearing. Additionally, and again as with many religious accommodation cases, Smith’s case never saw the built environment of a courtroom until its arrival at the Supreme Court. The complexity of Smith’s case rests, as Garrett Epps notes, “off stage, in the lives of the participants and in the hidden deliberations of the judges” and finds its meaning in the “dusty backroom of the Oregon Employment Division’s Roseburg office.”³⁶¹ It was there, in forgotten rooms and surrounded by a variety of legal actors, that Smith began to sketch the details of his life – and, in doing so, narrate the injuries that flowed from his lived experience. In this initial

³⁵⁹ *Supra* note 24.

³⁶⁰ Lakimodiere, Denise K. *Stringing Rosaries: The History, the Unforgiveable, and the Healing of the Northern Plains American Indian Boarding School Survivors* (Fargo, ND: North Dakota State University Press, 2019), p. 1. Quoting William Hobart Hare in *The Labors of Bishop Hare: Apostle to the Sioux*.

³⁶¹ Epps, *To an Unknown God*, p. 131.

moment, Smith sought to highlight what he believed an immediately remediable injury that would conclude his dealings with the law: namely, the loss of his job. Prior to his firing, Smith had been an intake counselor at a drug and alcohol rehabilitation facility and specialized in combining an Alcoholics Anonymous program with the Native practice of the sweat lodge.³⁶² A lifelong alcoholic himself,³⁶³ Smith had found that the practice of sweating allowed him to “cleanse the worldly impurities”³⁶⁴ that enticed him to drink; although sweat lodge ceremonies – particularly those practiced in the American Northwest – are often combined with peyote consumption, Smith did not initially participate in its use out of fear of relapse. However, after a series of revelatory signs that he understood to have “happened for a reason,”³⁶⁵ Smith partook of peyote. Shortly thereafter, his employers learned of his peyote use and, citing the facility’s policy that “prohibited the misuse and abuse of alcohol,” summarily fired Smith. Due to the nature of his termination, Smith was subsequently unable to receive unemployment benefits – a denial he believed was an easily-addressed administrative error that resulted from a misunderstanding of his right to religious freedom.

Smith initially articulated his claim to religious freedom through the language of workplace accommodation, such that the consumption of peyote was akin to declining to work on Saturdays in observation of the Sabbath.³⁶⁶ Yet as the Oregon Employment Division resoundingly denied Smith’s claim by casting his actions as a “willful violation of the standards of behavior that an employer has the right to expect of an employee,”³⁶⁷ Smith’s claim to religious freedom – and the narratives of injury from which the claim emerged – became more complex. Oregon’s rhetoric, he argued on appeal, represented a “continuation of being put down, of my people and our religion, of not being recognized by the newcomers.”³⁶⁸ In this moment, Smith’s use of the language of “recognition” pushes his claim beyond the confines of the workplace and into the domain of history: it ties his use peyote not only to his immediate spiritual practice, but also the broader processes of cultural and religious reclamation

³⁶² The sweat lodge is indigenous to the Northwest, including the Klamath Nation, and it is a “round, low structure, usually made of willow saplings, and covered with hides or blankets, which keep light out and heat in.” Outside of the sweat lodge, spiritual leaders light a sacred fire and heat stones in that fire until they are “red hot” – these stones are then placed inside the lodge, where water is ladled over them to produce steam. This process induced sweating which, when combined with prayers, was intended to “purify the body and the spirit.” Epps, *To an Unknown God*, p. 46.

³⁶³ Much has been written about the prevalence of alcoholism in Indigenous communities, with some public health statistics noting that alcoholism rates in Native reservations are often about 50 percent. Those who study this prevalence note its complex cultural origins, particularly its relation to systematic programs of Native displacement and dispossession in the 19th and 20th centuries. For more, see: Prue, Bob. “Indigenous Supports for Recovery from Alcoholism and Drug Abuse: The Native American Church” in 22 *Journal of Ethnic and Cultural Diversity in Social Work* 3-4 (2013), pp. 271-287. White, William. “The History of Recovered People as Wounded Healers” in 18 *Alcoholism Treatment Quarterly* 1 (2000), pp. 1-23.

³⁶⁴ Smith, Personal Interview.

³⁶⁵ As cited in: Long, *Religious Freedom and Indian Rights*, p. 73.

³⁶⁶ *Sherbert v. Verner* (1963). More will be said about the precedent set by *Sherbert* in the following section.

³⁶⁷ Smith, Personal Interview. This language is directly taken from the letter sent to him on March 22, 1984.

³⁶⁸ Smith, Personal Interview. As also cited in Epps, *To an Unknown God*, p. 111.

in Native communities in the wake of their subjugation to settler colonialism.³⁶⁹ To borrow from the parlance of the narrative-driven critical legal theorists treated in the preceding section, Smith rejects the ease with which the state appealed to abstracted ideals of employee behavior in favor of cultivating a deeply partial, and deeply particular, account of the scars that accumulate from the legacies of colonial governance. Almost immediately, Smith's use of "religious freedom" became much more complex.

Yet to understand this complexity, and how it sought to mount a challenge to the disciplinary power of public reason, it is first necessary to dwell a bit longer in Smith's initial reaction to Oregon's denial of his claim. When Smith argued that his firing served as a "continuation of being put down, of my people and my religion, of not being recognized by the newcomers," not only did he educe the history of settler colonialism, but he did so in language that marked settler colonialism as a project of political, legal, *and* religious force³⁷⁰ – a project that I would argue finds its genesis in the Enlightenment. For while I noted in Chapter Two that a number of post-secular critical theorists understood Locke's Enlightenment as one that embraced "subordination, marginalization, and inequality,"³⁷¹ such that the language of reason could be harnessed to craft docile bodies in hostile lands,³⁷² more can be said about this argument and its relation to religion. Indeed, in their respective works, Michael McNally and Jennifer Graber demonstrate that European and American governments justified the colonization of already-inhabited land out of a belief that Indigenous populations possessed no "true religion." McNally writes:

It was not the distinctive shape of Native American religions, but their complete absence, that characterized Enlightenment understandings of Native American cultures by explorers and later colonial administrators of various Euro-American powers. As the conquest and colonization process compelled moral and legal elaboration, this lack of "true religion," like the lack of law, government, and other marks of so-called civilization, rendered Native peoples savage and properly subject to domination and/or improvement.³⁷³

Here, true religion emerges as the mechanism that legitimates the "dispossession, colonization, and regulation"³⁷⁴ of Native communities. Furthermore, under such a mechanism, true religion imparts to a newly conquered territory a seeming sense of ordered governance that secures the liberal, Lockean promises of "life, liberty, health, and indolency of body"³⁷⁵ for its believers – an element of coercion

³⁶⁹ Graber, Jennifer. *The Gods of Indian Country: Religion and the Struggle for the American West* (New York: Oxford University Press, 2018).

³⁷⁰ In the edited volume *Ekklesia*, Paul Christopher Johnson, Pamela Klassen, and Winnifred Fallers Sullivan argue that the collapse of the distinction between "politics and law" (understood as the state) and "religion" (understood as the church) in the context of settler colonialism is evidence of something they call *churchstateness*. To speak of churchstateness is to speak of the ways in which politico-legal violence was used to justify settlers' supremacy in the name of a Christian god. Although I do not use this phrase, it nonetheless inspired this paragraph's argument. For more, see: Johnson, Paul Christopher and Pamela Klassen and Winnifred Fallers Sullivan (eds). *Ekklesia: Three Inquiries into Church and State* (Chicago: Chicago University Press, 2018).

³⁷¹ For more, see Chapter Two, roughly fns 23-28.

³⁷² Piatote, Beth. *Domestic Subjects: Gender, Citizenship, and Law in Native American Literature* (New Haven, CT: Yale University Press, 2013).

³⁷³ McNally, Michael D. *Defend the Sacred: Native American Religious Freedom Beyond the First Amendment* (Princeton, NJ: Princeton University Press, 2020), p. 34.

³⁷⁴ McNally, *Defend the Sacred*, p. 33.

³⁷⁵ Locke, *A Letter Concerning Toleration*, p. 18.

meant to civilize, and, ideally, convert, those living under its institutions. Graber argues that such programs of civilization and conversion were further substantiated in “doctrines of discovery” by the legal principle of *terra nullis*, which declared any lands not in possession of a Protestant Christian authority to be vacant and in need of cultivation.³⁷⁶ For Smith to speak of the “continuation of being put down” and of his religion “not being recognized by the newcomers” is thus to tie the felt nature of his current injuries to historical Protestant Christian practices of religio-cultural eradication and the contingent ideals of Enlightenment-era liberalism.

But there is, as ever, more at work in Smith’s efforts to link his contemporary lived experience to historical and ideological harms. As settler colonialists expanded westward under the authority of nascent liberal democratic governments and the blessings of a Christian god, they targeted for regulation the spiritual practices they deemed to be indicative of the false nature of Indigenous belief systems – one of which was the consumption of peyote.³⁷⁷ In the language of Locke, true religion was meant to be private, textual, and oriented towards the cultivation of an inwardly-focused relationship with one’s god; conversely, false religion was understood as communal, oral, and publicly celebratory. False religion was marked, in other words, by the practice of “indifferent things” that communicated little about the strength of one’s individual faith – and, under the auspices of a magistrate, indifferent things could be rightly regulated in light of the harm that they could pose to the commonwealth.³⁷⁸ In Chapter Two, I traced how this regulation revealed the latent Protestantism of Lockean tolerance and instilled in liberal democratic societies a power that could shape the material and metaphysical lives of those who populated them. In what follows below, I bring this argument to bear on the regulation of peyote under the religious authority of settler colonial governance – a regulation that will, in turn, illuminate much about the ability of Smith’s narratives of injury to surmount the procedures of public reason.

Peyote is a small, spineless cactus found mostly in northern Mexico and southern Texas. To prepare it for religious sacrament, its top is removed and dried, an act that is often referred to as creating the “peyote button.” This button may then be chewed or ground into granular form – and when the granules are dissolved in water, such that it can be consumed like a tea, it acts as a sacramental medicine.³⁷⁹ Those who ingest the sacrament report that it has a “very unpleasant, bitter taste that often causes indigestion or nausea [...] and can produce a variety of short-term somatic effects, such as an increase in blood pressure, pulse rate, respiration, perspiration, and motor activity.”³⁸⁰ These effects are also accompanied by psychic manifestations, like a “heightened sense of wakefulness and

³⁷⁶ Graber, *The Gods of Indian Country*, pp. 22-23. To complement Graber’s argument, and to add further evidence as to this doctrine’s applicability to the American context, McNally cites to *Johnson v. M’Intosh* (1823) in which Chief Justice John Marshall resolved a title dispute between two white men, each man having bought the same parcel of land in the Midwest – despite its historical possession by Native peoples. For more, see: McNally, *Defend the Sacred*, p. 34.

³⁷⁷ There is much to be said about the regulation of Indigenous faith practices, but it exceeds the scope of this chapter (and this dissertation). However, it is important to note that the Board of Indian Affairs did not target only the ceremonial consumption of peyote, but also other embodied public rituals like the Ghost Dance. For more on the regulation of the Ghost Dance, see: Wenger, *Religious Freedom*, pp. 101-142.

³⁷⁸ Locke, *A Letter Concerning Toleration*, p. 22.

³⁷⁹ Maroukis, Thomas C. “The Peyote Controversy and the Demise of the Society of American Indians” in 37 *American Indian Quarterly* 3 (Summer 2013), p. 161.

³⁸⁰ Long, *Religious Freedom and Indian Rights*, p. 5.

euphoria with colorful visual hallucinations.”³⁸¹ The embodied experience of peyote has no long-term harmful effects and, in recent years, scientific journals have traced its power to alleviate alcohol addiction and substance abuse.³⁸² Historically, peyote ceremonies were – and are – meant to usher in healing and renewal, and to offer succor to those who are “beleaguered by loss and disease.”³⁸³

Scholars of Indigenous spirituality divide the consumption of peyote into two categories – the old peyote religion and the new peyote religion – to reflect the impact that settler colonialism had on its use in Native communities in the mid-to-late 19th and 20th centuries.³⁸⁴ The old peyote religion, as detailed in the previous paragraph, stresses the curative effects of peyote, particularly when it is consumed in outdoor ceremonies tied to harvest celebrations and set to dances accompanied by the beats of wooden drums, water drums, rasps, and gourd rattles.³⁸⁵ By contrast, the new peyote regulation possesses an internal structure reflective of the regulations imposed by the Board of Indian Affairs (BIA) as the United States expanded westward under the doctrine of *terra nullis*.³⁸⁶ As McNally details the observations of BIA commissioners:

Commissioner of Indian Affairs T.J. Morgan in 1890 identified peyote as an intoxicant and directed agents and Courts of Indian Offenses to prosecute its use or sale. Subsequent commissioners in the 1900s and 1910s singled out peyotism as a matter of major concern, viewing it through the lens of intemperance and also through the lens of ritual excess, of what they saw as a demoralizing “enthusiasm” that distracted Native people from the work of civilization. [...] As part of his effort to restrict [the supply of peyote], Pussyfoot Johnson [whom Theodore Roosevelt appointed to enforce regulations against alcohol on Native reservations] boasted that his enforcement unit had bought and destroyed nearly 200,000 peyote buttons. Officials at the Yankton Reservation in South Dakota didn’t stop with facilitating Johnson’s efforts to take down the supply chain. A series of agency superintendents reported in 1911 and 1912 that they were detaining tribal members who were merely present at the ceremonies until they signed “a statement to the effect that they will quit the use of peyote and its attendant practices.”³⁸⁷

Above, McNally tracks the encounters of the BIA agents – as they moved into the plains, across the southwest, and into the Pacific territories – with peyote and its consumption. From the time that it first appeared in their field reports in 1886, peyote was configured not only as a “serious threat” to the continued stability of the newly settled territories,³⁸⁸ but also as a practice they deemed a “heathen rite” that “menaced the morals of children.”³⁸⁹ This language, which combines the politico-legal project of settler colonialism with the Protestant skepticism reserved for false religion, situates peyote as a volatile substance that commands punitive regulation – and, in its regulation, thus becomes a site through which the struggle for and against colonial subjugation is fought. Yet as letters between

³⁸¹ McNally, *Defend the Sacred*, p. 54. Long, *Religious Freedom and Indian Rights*, p. 6.

³⁸² Epps, *To an Unknown God*, pp. 59-62.

³⁸³ McNally, *Defend the Sacred*, p. 55.

³⁸⁴ Long notes that “peyotism is considered one of the oldest continually practiced religions in the Western Hemisphere.” See: Long, *Religious Freedom and Indian Rights*, p. 6.

³⁸⁵ Maroukis, Thomas C. *The Peyote Road: Religious Freedom and the Native American Church* (Norman, OK: The University of Oklahoma Press, 2010).

³⁸⁶ Wenger, Tisa. *Religious Freedom: The Contested History of an American Ideal* (Durham, NC: The University of North Carolina Press, 2017).

³⁸⁷ McNally, *Defend the Sacred*, pp. 54-55. Citing to Maroukis, *The Peyote Road*, p. 44.

³⁸⁸ McNally, *Defend the Sacred*, p. 54.

³⁸⁹ Wenger, *Religious Freedom*, p. 101.

commissioners, field agents, and Native representatives crisscrossed the territories, a curious question emerged: whether Indigenous spirituality possessed elements in its practice that replicated the structures of Protestant Christianity, such that it – in its use of peyote – could “bring about the reformation of the Indian [...] in the Indian’s own way.”³⁹⁰

Contained within this question is a Janus-like sense of resistance and resignation. For many Indigenous communities, the authority of settler colonialism – in its overlapping political, legal, and religious posture – felt totalizing in its affect. Indeed, it was not simply that the BIA field agents were tasked with the enforcement of what were known as the “Civilizing Regulations,” but rather that, as their operations intensified, Protestant Christian missionaries were increasingly entrusted with programs of colonial reeducation. Through the forced relocation of Native children to parochial boarding schools, and through daily required attendance at Christian sermons, missionaries extended the bodily compliance coerced by the BIA agents to the souls of Native persons themselves. As Commissioner Hiram Price wrote in 1882: “In no other manner and by no other means can our Indian population be so speedily and permanently reclaimed from barbarism, idolatry, and savage life, as by the educational and missionary operations of the Christian people of our country.” Those who aided Native communities in their struggle for freedom from settler colonial rule – what Price called “using the arts of the conjurer to prevent Indians from abandoning their barbarous rights and customs – were subject to fines, forced labor, the loss of rations, and up to six months imprisonment.”³⁹¹ Precisely because the threats to body and soul were so great, Indigenous communities began to adopt (and adapt) the language of the BIA agents, and their missionaries, to chart a pathway towards relief; to attempt to be free from punishment was to wear the mantle of Protestant Christianity. Under the guise of Protestant Christianity, Native persons could then harness the language of religious freedom to not only demonstrate their knowledge of systems of western governance, but also to – incrementally – remove themselves from the watchful eyes of the settler colonialists. All that was required was adherence, either strategically or willingly, to the doctrines of Protestant Christianity.³⁹²

If Native claims of religious freedom were to succeed, Indigenous practices needed to either appear as much like Protestant Christianity as possible or they needed to be subordinated to Christianity entirely. To this end, tribal dances were rebranded as “social dances” and peyote became the mechanism through which God’s words could be realized. For instance, in 1921, members of the Omaha Nation in Nebraska incorporated as the “Peyote Church of Christ,” and their charter stated:

We recognize all people who worship God and follow Christ as members of the one true church. We believe in the sacrament and sacramental bread and wine, but in so much as the use of the same is forbidden to Indians, we of the people who cannot obtain or use the same have adopted the use of bread as Peyote and water as wine.³⁹³

For the Omaha Nation, drawing the parallels between practices of embodied Christianity and embodied Indigeneity was meant to buffer the claim that peyote consumption was, as Commissioner Sells argued above, a heathenish ritual dangerous to the most vulnerable. These parallels were meant to lessen – rather than heighten – the feeling that the use of peyote posed a significant threat to the rule of law; the consumption of peyote, under the auspices of the “new religion,” therefore signaled the readiness of the Native person to deepen their relationship with a Christian god and embark on a civilized, constitutionalized life. So persuasive was this argument that BIA field agents remarked that that the Peyote Church of Christ was a “true religion that fulfilled the work of God and the Son of

³⁹⁰ Letter of the Pawnee Chiefs to Commissioner Cato Sells. August 18, 1914.

³⁹¹ As cited in Wenger, *Religious Freedom*, p. 105.

³⁹² Wenger, *Religious Freedom*, p. 102.

³⁹³ Maroukis, *The Peyote Road*, p. 38.

God”³⁹⁴ – the strategic adaptation of peyote’s use had, in other words, moved Indigenous communities from the “false religion” to the “true religion,” a categorical distinction that could work against doctrines of *terra nullis*.

Yet the cultivation of the “new peyote religion” was not without costs. While those who argued that peyote fostered a connection to Christianity were able to move freely throughout the western territories to “preach” the religion of peyotism, the publicly somatic effects of peyote consumption continued to pose challenges.³⁹⁵ BIA field agents were ordered to buy and destroy peyote buttons, and Commissioner Pussyfoot Johnson extended the punitive regime of settler colonialism to private organizations when he convinced Wells Fargo Express to refrain from shipping said buttons under penalty of law.³⁹⁶ Although Johnson later retired from the BIA to join a temperance league, the collective expansiveness of the BIA’s efforts to circumscribe the distribution of peyote – which, despite its rhetorical connection to Protestant Christianity, was still marked as an indifferent thing – lingered. It became harder to obtain peyote in ways that were not categorized as criminal and subject to sanction and, with the retreat in its availability, the Protestant Christian core of the “new peyote religion” advanced. Christian references replaced references to peyote in sacramental songs, and Christianity became the primary lens through which the symbolism of peyote was interpreted. One new peyotist reflected: “The reason for drinking water at midnight is because Christ was born at midnight and because of the good tiding that he brought to the earth, for water is one of the best things in life and Christ is the savior of mankind.”³⁹⁷ Peyote – the substance that was to be mixed with that midnight water – was nowhere to be found and, in short order, the “Peyote Church of Christ” became the “Native American Church” – the very organization to which Scalia eventually ascribed Smith membership, but to which Smith himself never belonged.³⁹⁸

Taken together, the paragraphs above cast the regulative history of peyote under settler colonialism as one that is deeply tied to Protestant Christian ideology, such that peyote functions as a site through which the totalizing power of western secular liberal democracy was – and is – negotiated. In the remainder of this section, I argue that it is this history that Smith endeavors to call forward as a means to buffer the affects of cooperative translation and situate himself as an injured party in need of remediation. Yet as Smith narrates the nature and extent of his injuries to his legal interlocutors, I further argue that this history – infused as it is with Lockean principles of Protestant rationality – becomes the mechanism by which Smith’s claim is rendered unintelligible and substantiates Scalia’s eventual turn to the belief-action distinction. Recognizing *how* and *where* the regulative history of peyote emerges, retreats, and embeds itself within the inner logic of law, in other words, illuminates how testimonial narratives possess the potential to challenge the “powerful discursive relations of our time,” such that “new experiential frames that generate political transformation” could eventually be realized – even if, in the immediate moment, they meet interlocutory resistance.³⁹⁹

In Chapters Two and Three, and in the preceding section, I argued that Habermas inherits the power-laden legacy of Lockean secular liberalism when he crafts the institutional apparatuses of the post-secular state, such that translative moments – in their efforts to extract a “secular kernel of truth” from partial and particular accounts of the self and its needs – are moments in which subject-formation

³⁹⁴ Maroukis, *The Peyote Road*, p. 39.

³⁹⁵ McNally, *Defend the Sacred*, pp. 56-57. See also Wenger, p. 108, 121.

³⁹⁶ Maroukis, *The Peyote Road*, p. 40.

³⁹⁷ As cited in Maroukis, *The Peyote Road*, p. 41.

³⁹⁸ The Native American Church *also* did not regard Smith as a member and, according to Epps, the organization was “absolutely incensed at Smith’s use of peyote.” Epps, *To an Unknown God*, p. 197.

³⁹⁹ Million, “There is a River in Me: Theory from Life,” pp. 33, 37.

occurs and harms compound. In the context of the law, translatable moments – and the Kantian-like duty of the secular translators to find a kernel amidst a narrative of injury – can be found in hearings, depositions, and oral arguments; it is in these mundane legal moments, in other words, that power operates. Smith’s experience navigating the law can illuminate this argument further. Indeed, in the days and weeks following Smith’s argument that his dismissal from his job constituted a violation of his right to religious freedom, additional depositions were scheduled, hearings were commenced, and experts – at the behest of Oregon’s Attorney General – were assembled to assess the validity of Smith’s argument; these legal moments, in other words, were oriented towards establishing whether and how peyote served as a crucial conduit through which Native individuals realized their faith, such that they could be exempted from the laws that criminalized its use. Smith felt these translatable encounters to be overwhelming, noting: “At each turn, I was asked to prove my faith. I was asked to give reasons for why I needed to eat peyote in order to be a Klamath Native.”⁴⁰⁰ Yet as this process of reason-giving continued, Smith reached – in subtle, yet tangible, ways – for the histories of settler colonialism to substantiate not only his experience of injury, but also the centrality of peyote to Native spirituality. As he responded to an administrative official:

The ceremonies, they are new to me. I was raised in parochial school and did not connect with the culture – the spiritual answer for me is in the ether. It’s like I don’t even know what the questions are. My gut says well, your Indian god, your spiritual god. One morning, I went to work, there was an eagle feather on the ground. I interpreted this as an invitation to the peyote meeting. If I accepted the feather, how could I not go? So I went. I took a lot of peyote, came back, and they razzed me at the meeting in the morning. My supervisor asked if I had taken any peyote. I said, well yeah, that’s the sacred sacrament. I got fired.⁴⁰¹

Here, Smith offers a narrative of injury that connects the discrete (the immediate loss of his job) to the expansive (the historical practices of Protestant parochial education under settler colonialism). Moreover, as he is pressed to identify *why* peyote ought to be exempted from criminal regulations as a matter of religious freedom, Smith demurs: to locate a concrete mode or stable articulation of *being* Klamath is nearly impossible, precisely because programs of cultural eradication altered Native spirituality in ways that were experienced as totalizing. To recover the consumption of peyote as a spiritual practice, for Smith, is to engage in a process of psychic disentanglement from “the true religion” and to reclaim an embodied recognition for himself and his elders.⁴⁰² Smith’s acceptance of the eagle feather, on this account, thus becomes a way to free himself from an institutional regulatory regime that was rooted in BIA policies, found its nadir in parochial schools, and continued in contemporary Oregonian employment practices.

Yet even as Smith sought to imbue an attentiveness to settler colonialism in the procedures of cooperative translation, and to situate his required reasons within the subjective experience of being Native, his efforts went unrecognized. To wit, as Smith’s case progressed to increasingly higher courts, his case was consolidated with that of Galen Black, who was a non-Native member of the Native American Church. Black had desired to consume peyote both recreationally and religiously, and, like Smith, he had run afoul of Oregon’s criminal classification of peyote. For Smith, this move by legal actors to introduce non-Native voices into the translatable process of reason-giving hindered the capacity of his interlocutors – in their adjudicatory posture – to recognize the nuance of the injuries that Smith had sustained. He reflected:

⁴⁰⁰ Smith, Personal Interview.

⁴⁰¹ Smith, Personal Interview.

⁴⁰² Smith, Personal Interview.

The whole thing changed when Black got involved and when they started putting us together or setting this case up as a drug case. I realized that the state – David Frohnmayer [Oregon’s Attorney General] – was pushing us to use their language. When I met with Frohnmayer, things got heated. There was no understanding of my religion, my religion that they were attacking. I was told to stand down.⁴⁰³

In this moment, Smith bristles at the requirement to use “their language” – what he elsewhere called the language of the “white man” – to convey the character of his religious practice. For Smith, “their language” dampens his claims to religious freedom because Black possessed neither the same devotion to ancestral revelation nor the same history of settler colonial subjection; “their language,” in other words, sought to isolate a kernel of truth that could capture a singular core that spanned the consolidated cases. Abstraction was thus needed, and peyote became not a spiritual conduit conditioned by centuries of settler colonialism, but a modern substance possessive of the capacity to injure others – it became, in other words, the indifferent thing incidental to the practice of “the new peyotism” under the Native American Church. Frohnmayer recalled:

Why shouldn’t the argument that the internal religious reasons are sufficient for the state to cede regulatory authority over peyote succeed before the Court? The answer is this – that religions change. Once authority to regulate religious practice is ceded out of the government hands for all eternity, you have ceded away the possibility of regulating something that could become very dangerous. That is a killer argument! That is killer.⁴⁰⁴

In this quote, Frohnmayer both participates in the regulatory history of peyote consumption and extends its metaphysical and material affects to the present moment. By noting that “religions change,” he implicitly acknowledges that peyote consumption has shifted in its use and in its meaning across the modern history of the United States, but so too does he occlude the reasons for why this shift happened – no mention is made of parochial education, Protestant missionaries, or the commissioners who destroyed the supply of peyote buttons for Indigenous communities. Instead, he notes that the instability of peyote’s historical practice, an instability that is buttressed too by the positional differences that operate between Smith and Black, requires not a retreat of governmental regulation, but rather its increase. A killer argument, for Frohnmayer, is thus one that draws from the reasons given during translative processes to abstract an injured individual from his narrated context, isolates a secular kernel of truth that relates to a generalized function of the law, and then deploys this kernel in “their language” to regulatory ends.

Frohnmayer’s jubilant determination that his argument possesses the capacity to “kill” the narrational endeavors of Smith represents the partial realization of Habermasian public reason: Smith’s situated self has been, through a discursive reliance on language that recalls the congealed ideology of Enlightenment-era liberalism, abstracted from its context and rendered as the appropriate object of governance. Indeed, in the intersubjective moments recounted above, cooperative translation conditions Smith’s ability to articulate the nature of the historically constituted harms that populate his lived experience, such that Smith’s linguistic efforts to draw parallels between parochial schooling and eagle feathers land not like bombs, but rather like clouds. Moreover, when Smith becomes agitated at the inability of his interlocutors to understand how peyote consumption is a contested site rife with overlapping regulatory schemes, and that appeals to its criminalization reinforce a settler colonial regime, this agitation becomes the mechanism by which the state’s power is consolidated: if there can be no stably secular kernel of truth that illuminates the need for peyote’s consumption, then there can be no remedy offered or recognition given. The procedures of the law – as Smith moves

⁴⁰³ Smith, Personal Interview.

⁴⁰⁴ Frohnmayer, Personal Interview. As also cited in: Epps, *To an Unknown God*, p. 209.

across hearings, jurisdictions, and consolidations – thus serve not to make the law “normative and bourgeois,” such that democratic governments can become openly responsive to the needs of their constituents, but rather retrench and legitimate the very harms that initiated the legal claim.

But why does this represent only a *partial* realization of Habermasian public reason? Although it is possible to argue that Frohnmayer’s articulation of his killer argument effectively and conclusively insulates the state from the perceived religious vagaries of Smith’s narrative, there is still more at work: the lingering non-resolution of Smith’s claim to religious freedom. Like his elders’ appeal to the embodied practices of Protestant Christianity to loosen peyote from the grip of state regulation, Smith uses “their language” of liberal democratic religious freedom to compel the state – over and above its intersubjective translative encounters – to reflect on the harmful nature of its practices. For although each successive appeal of his case creates new avenues for affective harm, Smith nonetheless persists: his search for a testimonial interlocutor, in other words, drives his engagement with the inner logic, the inner proceduralism, of the law.⁴⁰⁵ It is this energy that takes Smith to the Supreme Court – a location where, ultimately, Habermasian public reason is fully realized not only in Scalia’s adaptation of Frohnmayer’s argument in *Reynolds*’ belief-action distinction, but also in Smith’s exercise of his right to exit from deliberative, democratic life.

III. Scalia’s Belief-Action Distinction, Smith’s Asymmetrical Burden

Employment Division v. Smith occupies a fraught position in American political and legal consciousness. On the one hand, legal scholar Winnifred Fallers Sullivan suggests that although the American experiment with religious freedom originated nearly six centuries ago, “there is a sense in which the conversation began anew when the Supreme Court decided *Smith*.”⁴⁰⁶ Political philosopher Steven Shiffrin echoes this sentiment, noting that *Smith* launched an era in which the question of whether religious individuals could claim a right to equal treatment under the law “occupied a status similar to that of the question of racial equality in mid-twentieth century America.”⁴⁰⁷ On the other hand, many jurists claim that Scalia’s reliance on *Reynolds* is indicative of the Court’s more immediate view of *Smith* as a “routine summary of previous case law.”⁴⁰⁸ In support of this interpretation, jurists Christopher Eisgruber and Lawrence Sager argue that Scalia’s use of Justice Morrison Waite’s determination that “laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices”⁴⁰⁹ demonstrates the Court’s openness to free religious

⁴⁰⁵ Smith noted that, as the pressures to drop his case mounted, he thought: “Your kids are going to grow up and the case is going to come up one of these days and someone will say, ‘Your dad is Al Smith? Oh, he’s the guy that sold out. My kids are going to say, ‘That’s my dad, all right.’ I’m not going to lay that on my kids. I’m not going to have my kids feel ashamed. Even if we lose the case, they are going to say, ‘Yeah, my dad stood up for what he thought was right.’” Smith, Personal Interview.

⁴⁰⁶ Sullivan, “The World that *Smith* Made,” p. 233.

⁴⁰⁷ Shiffrin, Steven H. *The Religious Left and Church State Relations* (Princeton: Princeton University Press, 2009), p. 21. Shiffrin further cites to: Rakove, Jack N. “Once More into the Breach: Reflections on Jefferson, Madison, and the Religion Problem” in Diane Ravitch and Joseph P. Viteritti, eds., in *Making Good Citizens: Education and Civil Society* (New Haven: Yale University Press, 2001), p. 233.

⁴⁰⁸ Epps, *To an Unknown God*, p. 228.

⁴⁰⁹ *Reynolds* at 166 and 167.

expression – so long as the universal rights of all individuals to equal freedom and liberty are rigorously protected.⁴¹⁰

If the preceding section represented an archival and affective reconstruction of the figure of Smith as he moved through the law's procedural channels, then this section functions as its near-inverse: it constructs, through an engagement with the official legal history of *Smith* and its oral argument, an image of the Supreme Court as embedded within an anxious post-secular landscape that finds existential relief in Frohnmayr's killer argument. This image serves as a departure from the dual understandings of *Smith* above. For although I strive to acknowledge *Smith's* accepted interpretational framework, I also strive to forge a third path: a path that attends not solely to its use of precedent to inform (or not) its outcome, but instead to the manner in which its outcome is conditioned by forces that are not immediately apparent in its black letter language. Situating *Smith* alongside Smith, in other words, permits this section to trace the capacity of the law to serve as a repository for what Delgado earlier called "presuppositions and received wisdoms" – a capacity that, as I will argue, permits the recognition of Frohnmayr's translative efforts over and above the particularity of Smith. Thus, in what follows below, I assess *why* Scalia understood the belief-action distinction to be an appropriate solution to the perceived problem of late modern religious pluralism and *how* the belief-action distinction incorporates a latent Protestant Christianity, such that Frohnmayr's argument – itself an artefact of Protestant Christianity – can be immanently recognized and promulgated. It is the belief-action distinction, and the final material and metaphysical affects it has on Smith, that represents the full realization of Habermasian public reason.

Efforts to understand the Habermasian elements at work in *Smith* – beyond the translative processes that preceded its appeal to the Supreme Court – ought to begin where this chapter began. At the outset of this chapter, I traced Scalia's announcement of the decision in *Smith* from the bench and, in doing so, I noted that he articulated two fears: first, that a decision in favor of Smith would absolve religious citizens of their duty to contribute to and participate within a secular public square secured by enforceable criminal regulations and, second, that such absolution would infuse formally neutral laws with religious fervor. In this articulation, there is a decidedly modern worry that preoccupied Habermas in Chapter Three. Indeed, in the years that *Smith* was before the Court – roughly 1989-1990 – the United States underwent a rapid demographic shift. The collapse of the Berlin Wall spurred an increase in migration to western democratic states, the rise of global capital brought foreign companies and interests to American shores, and – perhaps most troubling – academics and public researchers declared the practice of secularism a failure. The sheer magnitude of this failure, such scholars suggested,⁴¹¹ could be seen in the empirical data detailing the renewed role of religion in the public sphere. These data demonstrated that even as membership in traditional

⁴¹⁰ Eisgruber, Christopher and Lawrence Sager. "The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct" in *University of Chicago Law Review* 1245 (1994).

⁴¹¹ For more, please see the Introduction to this dissertation and Chapter Two. Peter L. Berger, for instance, argued experiments with secularism have generally failed [and that] the world is as furiously religious as it ever was, if not more so." Craig Calhoun has likewise determined that the "prominence of religion today still has the capacity to startle secular thinkers who thought it was clearly designed to fade in the face of enlightenment and modernity." See: Berger, Peter L. *The Desecularization of the World* (Washington, DC: Ethics and Public Policy Center, 1999), p. 2. Calhoun, Craig. "Afterword: Religion's Many Powers," in Mendieta, Eduardo and Jonathan Vanantwerpen (eds). *The Power of Religion in the Public Sphere* (New York: Columbia University Press, 2011), p. 118.

western faiths like Christianity and Judaism remained steady, its popular value had decreased – even as the value ascribed to faiths like Islam, Buddhism, and Native spirituality increased.⁴¹²

As the character of American religious life shifted, so too did the positive public demands for political representation and legal accommodation shift. In their efforts to adjudicate what religious conduct could be recognized as an appropriate addition to a seemingly secular public square, judges – at local, state, and federal levels – began to favor the standards set forth in *Sherbert v. Verner* (1963) and *Wisconsin v. Yoder* (1972) over the century-old precedent established by *Reynolds*. Taken together, *Sherbert* and *Yoder* determined that it was only permissible to deny religious individuals the right to freely exercise their beliefs in a public setting if the government could identify a compelling, and narrowly tailored, reason for doing so. As judges lent their interpretative approval to these more modern precedents, religiously-motivated requests for exemption from generally applicable laws expanded exponentially. In short order, Catholic nurses sought relief from assisting with surgical procedures that would endanger the potential life of a fetus, Seventh Day Adventist steel smiths requested to not be placed on assembly lines that manufactured bullets, and Methodists won the right to end work-related calls with “have a blessed day.”

The legal worries induced by the turbulent socio-legal landscape of American religious life can be seen in Scalia’s announcement of the decision in *Smith* from the bench. He argued:

Precisely because ‘we are a cosmopolitan nation made up of people of almost every conceivable religious preference’ [...] and because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.⁴¹³

Uttered in nearly the same breath as his assurances that the Court could never presume to “determine the plausibility of a religious claim,”⁴¹⁴ this statement illuminates what work Scalia expects the belief-action distinction venerated in *Reynolds* to accomplish in a contemporary, post-secular setting. To regulate conduct, for Scalia, is to insulate not only the validity of an individual’s belief from undue examination by the state, but so too is it to insulate the state from undue influence from religious individuals. Popular efforts to “make the professed doctrine of religious belief superior to the law of the land,” Scalia concluded, “would permit every citizen to become a law unto himself.”⁴¹⁵ Continuing to adhere to the precedents established by *Sherbert* and *Yoder* would thus be to “court anarchy [which] increases in direct proportion to the society’s diversity of religious beliefs.”⁴¹⁶ *Reynolds*, on such an understanding, provides the jurisprudential tools to at once preserve the stability of the state and its formal institutions in a raucously active post-secular environment, even as the content of discrete religious beliefs are left seemingly untouched.

Scalia’s conclusion – that the belief-action distinction serves as an invaluable, and neutral, bulwark against the rising tide of public religious pluralism – is deeply contestable.⁴¹⁷ And indeed,

⁴¹² The Pew Forum on Religious and Public Life. “Religious Landscape Survey,” February 2008.

⁴¹³ Scalia, Announcement of Decision from Bench. Also cited in: Long, *Religious Freedom and Indian Rights*, p. 189.

⁴¹⁴ Scalia, Announcement of Decision from Bench.

⁴¹⁵ *Smith* at 879, quoting *Reynolds* at 145.

⁴¹⁶ Scalia, Announcement of Decision from Bench.

⁴¹⁷ The centrality of the belief-action distinction in *Smith* was not a foregone conclusion, which underscores Scalia’s anxieties about the shift in American religious practices. Even Frohnmayer was surprised by Scalia’s reach to *Reynolds*: “I had to wonder: ‘was I there?’ It didn’t sound like anything I had any involvement with. I never anticipated this decision. Did I think *Sherbert* would be discarded?”

many contemporary scholars of religion and the law have parsed the perniciousness of the belief-action distinction to great effect. For instance, in her engagement with *Reynolds*, Sarah Song notes that as Waite declared the First Amendment's support for religious freedom extended only to belief and not action, so too did he condemn polygamy as a "monstrous practice on par with human sacrifice."⁴¹⁸ This rhetorical move, she argues, "integrated the protection of [monogamous and Protestant] Christian marriage into the First Amendment" as it was deemed crucial "to the flourishing of democracy."⁴¹⁹ Song concludes that, as deployed in *Reynolds*, the belief-action distinction rendered the right to religious freedom contingent upon an individual's compliance with Protestant Christian values even as it endowed the Court with the power to adjudicate which faith-based public actions properly conformed to this standard. Similarly, in an analysis of a Floridian case at the turn of the 21st century, Winnifred Fallers Sullivan suggests that as religious individuals waged a legal battle over the right to erect vertical (rather than horizontal) grave markers in a Boca Raton cemetery, the judge's use of the belief-action distinction reinforced an elite and abstracted understanding of religion – an understanding that categorized the faith-based conduct of the plaintiffs as "mere personal preference" when the reasons for such conduct could not be verified through textual exegeses or longstanding social traditions.⁴²⁰ In making this argument, Sullivan notes that the presiding judge – in his engagement with each of the faithful plaintiffs, all of whom departed from orthodox religious practices – drew from his academic understanding of Protestantism to determine the validity of the plaintiffs' claims; when the markers were subsequently ordered removed, the plaintiffs expressed profound "spiritual loss" as they were no longer certain that their deceased relatives would welcome them in their afterlives.⁴²¹ Lastly, but not exhaustively, Andrew March contends that the belief-action distinction, particularly as applied to the legal regulation of blasphemy, pushes Islamic individuals to privatize their faith when speech acts possess the potential to injure.⁴²² Drawing in part from the intense political controversy surrounding Kurt Westergaard's illustration of Muhammad with a bomb in his turban, March argues that secular modes of governance are ill-equipped to take seriously the notion that violations of Islamic ethical traditions can be experienced as physical wounds to the body. The law's desire to transform public wounds into privatized harms, he concludes, is indicative of its willingness to tolerate religiously injurious speech in order to preserve democratic norms and ideals, often at the expense of non-Western or non-Christian faiths.⁴²³

Taken together, the scholarly engagements with and analyses of the belief-action distinction reveal a curious commonality: that when the law encounters public expressions of minoritized faiths, it relies on majoritarian understandings of religion to assess whether and how such expressions ought

It had just been reaffirmed in *Frazer*, for heaven's sake. The use of *Reynolds* came as a total shock. We hadn't briefed it, we hadn't argued it, we hadn't been questioned about it, and we hadn't suggested it. Scalia resurrected the *Reynolds* case from the dead, or at least we had thought it had been interred, anyway." This outcome also came as a shock to Smith, who later yelled at Frohnmayer: "Look what you did!" As cited in: Long, *Religious Freedom and Indian Rights*, pp. 196-197.

⁴¹⁸ Song, Sarah. *Justice, Gender, and the Politics of Multiculturalism* (New York: Cambridge University Press, 2007), p. 149.

⁴¹⁹ Song, *Justice, Gender, and the Politics of Multiculturalism*, p. 148.

⁴²⁰ Sullivan, Winnifred Fallers. *The Impossibility of Religious Freedom* (Princeton, NJ: Princeton University Press, 2005), p. 105.

⁴²¹ Sullivan, *The Impossibility of Religious Freedom*, p. 105.

⁴²² March, Andrew. "Speech and the Sacred: Does the Defense of Free Speech Rest on a Mistake about Religion?" in 40 *Political Theory* 3 (2012), pp. 1-28.

⁴²³ March, "Speech and the Sacred," p. 19.

to be permitted within the public sphere. From Mormon marriages to Santerían burial sites to Islamic embodiment, the belief-action distinction constructs a wall between the belief that religious conduct is necessary and the conduct itself, and it does so through repeated and immanent appeals to Protestant Christian norms. Put slightly differently, the wall the belief-action distinction constructs is one built of bricks that are themselves discursive repositories of religious ideology that can be, as argued in the preceding sections and in prior chapters, called forth to shape the lives of those who reside in its shadow. This form of governance, to borrow the words of Jeremy Waldron, thus “unfairly excludes and diminishes minority religious conceptions of moral life [...] thereby devaluing the subjective emotional worlds of certain persons.”⁴²⁴ As with practices of settler colonialism, the securement of ostensibly universal rights and liberties could then be said to be borne by those who are unable to access them.

But let us push this conclusion further. If the belief-action distinction functions as a discursive repository of Protestant Christian ideology that disproportionately targets persons of minoritized faiths, and if this repository appears as a neutral tool legal tool meant to curb this rising tide of expressive religious conduct, what might this not only reveal about what lurks in Scalia’s approach to *Smith*, but also its connections to Habermasian procedures of public reason? An initial answer to this question can be found in Scalia’s spoken response to the conditions of post-secular life. In the quote replicated above, for instance, Scalia argues that religious plurality ought to be understood as religious *divergence* that requires management, such that deviation from the belief-action distinction poses a threat to liberal democratic orders. In the language of Locke’s Enlightenment, to depart from the political prioritization of the “true religion” and its desire for interiorized cultivations of faith would be to invite the interfaith conflicts that plagued historically religious plural states – an imagined fate that then requires Supreme Court Justices to work as Lockean magistrates in order to discern what could be rightly understood as indifferent. But there is, again, more at work. For even as Scalia conjured an imagined future that could only be corralled through reliance on rhetoric that permeates settler colonial discourse, he also determined that those who would challenge the holding in *Smith* ought to parse – in a reasonable, “common sense” manner – the inclinations that would lead them to desire the invalidation of laws that “protect the interest of the public sphere.”⁴²⁵ It is this move, of an idealization of Protestant Christian norms and of affirmation of reasoned and reflective proceduralism, that moves Scalia from solely the domain of Lockean secularism to Habermasian post-secular public reason. Thus, it is not that the belief-action distinction, as excavated from *Reynolds*, would leave individual religious conviction unregulated, but rather, *pave* Scalia, that any attentiveness to the harm caused by such a distinction or the desire of an individual to exempt herself from its application would require a process of self-reflexive reason-giving, of comparing one’s understanding of one’s faith to the ontological ideology of secularized Protestantism.

Scalia’s participation in the language of reason-giving, and in his latent endorsement of the Protestantism of the belief-action distinction, laid the groundwork for Frohnmayer’s killer argument to be heard – and, ultimately, endorsed. Indeed, in the waning moments of oral argument, Scalia asked Smith’s attorney, Craig Dorsay, to respond to Frohnmayer, stating: “can the state say we don’t want Native Americans to use peyote [...] as it is harmful to people and children shouldn’t be brought

⁴²⁴ Waldron, Jeremy. “Toleration and Reasonableness” in McKinnon, Catriona and Dario Castiglione (eds). *The Culture of Toleration in Diverse Societies* (Manchester, UK: Manchester University Press, 2003), pp. 13-37. As cited in March, “Speech and the Sacred,” pp. 2, 5. For more, see Chapter Two.

⁴²⁵ Scalia, Announcement of Decision from Bench.

into this church and taught to use this thing [...] much like the practice of Mormon polygamy.”⁴²⁶ In this moment, Scalia replicates Frohnmayer’s abstraction of Smith’s situated and subjective self: indeed, in language that neatly mirrors the language used by BIA agents to configure peyote as a menace to vulnerable children, peyote emerges as an incidental conduit of faith and not a site of spiritual revelation or cultural reclamation. He expects from Dorsay, as Smith’s interlocutory legal representative, to proffer in “their language” a secular kernel of truth that would compel the reconsideration of “generally applicable laws and policies.”⁴²⁷ Dorsay’s response attempts to capture and convey the affect of Scalia’s translative endeavors in light of Frohnmayer’s argument:

States can come up with all kinds of reasons to outlaw all kinds of conduct [...] outside the context of religious service [...] and the evidence that polygamy was harmful in the 1800s may be different from the evidence that exists today [...] and maybe the statute [outlawing polygamy] would not be upheld in the present day.⁴²⁸

Here, Dorsay draws attention to the harm that could emanate from assessing the appropriateness of religious conduct – and the realization of religious freedom – through the lens offered by the belief-action distinction. Harm, Dorsay intimates, ought not to be solely assessed through broad-scale social analysis, but rather through discrete and context-driven attentiveness like that offered by Smith’s narrative of a life lived under settler colonialism; the law, he concludes, “is not neutral in its application and does affect particular religions and their practitioners.”⁴²⁹ This exchange is brought to a conclusion when Scalia states that he “suppose[s] you could say that a law against human sacrifice would, you know, only affect the Aztecs,” but even so, “generally applicable laws must prevail in disputes over harm.”⁴³⁰ Smith’s narrative, under Scalia’s consideration, thus emerges as legally unintelligible and religiously antithetical to the purpose of liberal democratic rule. Frohnmayer’s killer argument had prevailed.

When Smith returned to Oregon following the decision in *Smith*, he declared he would never go before the law again. The process of exerting his right to religious freedom, he determined, was akin to withstanding “an attack on [his] life, [his] faith,”⁴³¹ and, like those who had challenged the rule of Protestant Christianity by adopting its mantle, Smith’s efforts were not without personal cost. He reflected:

I was a bump on the log – a freak they expected to be in a headdress. They couldn’t have cared less about who I am. I was cast as a member of the Native American Church, but I do not consider myself a member of the church. I never did and I never will. My religion and my reasons for peyote use could not be recognized by the law. I was given a God – a God that I didn’t even understand.⁴³²

For Smith, the decision in *Smith* represented a compounding injury: despite his narrational efforts to detail the legacies of settler colonialism, and the need to reclaim the revelatory consumption of peyote as a process of psychic cultural reclamation, the Native American Church and the perspectives of Galen Black triumphed. Because he was rendered discursively unintelligible through cooperative translation at the local and federal levels, and because he was unable to surmount the layers of Lockean

⁴²⁶ Official Transcript of Proceedings Before the Supreme Court of the United States, November 6, 1989. Alderson Reporting Company, Inc., pp. 38, 40.

⁴²⁷ Scalia, Announcement of Decision from Bench.

⁴²⁸ Official Transcript of Proceedings, pp. 33-34.

⁴²⁹ Official Transcript of Proceedings, p. 39.

⁴³⁰ Official Transcript of Proceedings, pp. 40-41.

⁴³¹ Smith, Personal Interview.

⁴³² Smith, Personal Interview.

liberalism suffusing the inner logic of the law, Smith felt his only remedy was his right of exit. Indeed, the asymmetrical burden he bore from the repeated need to work against the desire for secular kernels of reason, he argued, led to repeated spiritual crises; he was given a God “he didn’t even understand” such that the wellbeing of the Protestant Christian commonwealth could be preserved against an imagined harm. In this way, *Smith* not only reinstituted settler colonial modes of governance in deeply felt ways, but also actively reduced what Habermas called “the polyphonic complexity of religious voices” by requiring, in its totalizing affect, Smith to exit from deliberative democratic communities.

IV. Testimonies of Emancipation

This chapter was motivated by a cross- and inter-disciplinary methodology of critique. By excavating the unofficial stories of *Smith* and Smith, I sought to illuminate the lived experience of advocating for religious freedom in post-secular liberal democratic states. More specifically, I endeavored to articulate how narratives of religious injury – which seek to enmesh individuals in their situated and subjective contexts – reveal the ways in which the inner logic of the law seeks to bend, but not break, in its efforts to maintain its stability and security, even if those efforts compound the injuries of governance. On my account, the procedures of cooperative translation initially appear as ameliorative, in that they engage with the narrative proffered by the injured party, but as concerns of partiality and biases creep in, a retreat to reasoned kernels of truth emerge. This process, furthermore, often replicates histories of dispossession and disempowerment, thereby casting the law and its actors as interlocutors unable to hear that which is routinely occluded. This process, put slightly differently, propels individuals from the public sphere, in direct contrast to its desire to be normative and bourgeois.

Up to this point, little attention has been paid to the promise I made at the outset of this chapter: that, even in moments of affective translative power, resistance can occur. Smith understood his right to exit as a moment of resistance: rather than continue to serve the regulatory regime of settler colonialism, he departed the country altogether. He, in effect, removed his body from the affective conditions of Protestant Christianity. But beyond a right of exit, which diminishes the capacity of the state to respond *in situ* to the harms that it itself has perpetuated, what possibilities exist? I argue that testimony, and its attendant obligation of listening and dwelling in ambiguity, could provide a pathway towards emancipation from lived experiences of injury. Imagine, for instance, that as Smith engaged with the law, his interlocutors asked him to expand on the affective experience of parochial education – and, in consultation with Smith, breathed additional life into the lived experience of peyote’s regulation. This attentiveness, especially in moments that contradict the received authority of the law, can root out *where* Protestant Christianity serves a subject-forming end and, in doing so, challenge its continued prioritization of religious freedom. Indeed, this transformation could have illuminated that the law’s concerns about the communal harm of peyote were not concerns that were arrived at *a priori* and analogous to practices of human sacrifice, but were rather – quite literally – institutionalized from the moment the words *terra nullis* was uttered.

This move, of resisting the lure to accepted modes of reason and rationality, can permit even softly uttered words or qualified analogies to dismantle Delgado’s wall. It also orients those who occupy positions of politico-legal authority to the injured party by imposing on them a duty of engagement, rather than abstraction; it situates the intersubjective pair, the interlocutory individuals, as equals in dialogue – an embodied resistance to lure to harmful histories of subjugation and oppression. To situate Smith, Frohnmayer, and Scalia as dialogic equals in knowledge and subjective experiences, in other words, could have prevented Smith from exiting the democratic community altogether. Testimony, in this idealized form, can challenge the pernicious power of reason and

cultivate a richer, more inclusive, commonwealth and excavations of lived experience from the archives of legal discourse can resist the sterilization of a courtroom.⁴³³

Yet this approach is not without its challenges. As I mentioned in the first section of this chapter, I noted that – at crucial moments – the refusal to listen to a narrative of injury can serve a protective purpose: namely, it can serve to affirm universal rights over and above particularized desires, especially in moments where an affirmation and remediation of an injury could have deleterious and injurious affects on already-minoritized populations. In the following chapter, I take up this challenge by engaging with the Supreme Court’s adjudication of the claims of Protestant Christian individuals to refuse service to same-sex couples – an engagement that suggests that testimonial practices do not always need to yield affirmation.

⁴³³ Simpson, Audra. *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Durham: Duke University Press, 2014), p. 9.

Tolerance after *Masterpiece Cakeshop v. Colorado*

The conclusion is that the realization of the objective of tolerance would call for intolerance toward prevailing policies, attitudes, opinions, and the extension of tolerance to policies, attitudes, and opinions which are outlawed or suppressed. In other words, today tolerance appears again as what it was in its origins, at the beginning of the modern period – a partisan goal, a subversive liberating notion and practice. Conversely, what is proclaimed and practiced as tolerance today, is many of its most effective manifestations serving the cause of oppression.
– Herbert Marcuse,
“Repressive Tolerance”⁴³⁴

Let it suppose it agreed upon, among ourselves, that all of us here are for “tolerance,” even if we have not been assigned the mission of promoting or founding it. We would be here to think what “tolerance” could henceforth be.
– Jacques Derrida
“Faith and Knowledge”⁴³⁵

In mid-July 2012 – more than twenty years after Al Smith exercised his right to exit a political community that placed an asymmetrical and affective burden on his capacity to practice the old peyotism – Charlie Craig and David Mullins entered a small bakery on the outskirts of Denver, Colorado, in search of a cake to celebrate their upcoming marriage. Although they planned to marry in Provincetown, Massachusetts, where marriages between two partners of the same sex were legal, they also planned return to Colorado for a reception with their closest friends and family. Masterpiece Cakeshop – the bakery recommended by their wedding planner as it was known to provide customized cakes for a variety of celebratory occasions – seemed like an ideal fit. Yet as Craig and Mullins settled into the tiny booth inside the bakery to await their consultation, Jack Phillips, the baker-proprietor of Masterpiece Cakeshop, stopped short: in clipped words, he stated that he would be unable to provide a cake to Craig and Mullins because he believed, in concert with his Christian faith, that marriage was a union between one man and one woman. Craig left in tears and, when his mother – Debbie Munn

⁴³⁴ Marcuse, Herbert. “Repressive Tolerance” in Wolff, Robert Paul and Barrington Moore, eds. *A Critique of Pure Tolerance* (Boston: Beacon Press, 1965), p. 81.

⁴³⁵ Derrida, Jacques. “Faith and Knowledge: The Two Sources of ‘Religion’ at the Limits of Reason Alone” in Derrida, Jacques and Gil Anidjar, eds. *Acts of Religion* (New York: Routledge, 2002), p. 21.

– called the next day to ask why Phillips had refused service to her son, he simply restated the tenets of his religious beliefs. Exasperated, Munn cried out: “I am a Christian too, and my God teaches us to love another, to not judge. How can you turn away two of God’s children?”⁴³⁶

A few short weeks later, Phillips was called to appear before the Colorado Civil Rights Commission. Indeed, following their retreat from Masterpiece Cakeshop, Craig and Mullins had engaged the counsel of the American Civil Liberties Union and, with the help of Ria Tabacco Mar,⁴³⁷ discovered that Phillips’s actions were likely in violation of long-standing Coloradan laws that prohibited public businesses from refusing service to individuals on the basis of their race, religion, or sexual orientation.⁴³⁸ Yet as Phillips stood before the Commission, he was resolute: his bakery, he argued, functioned as an artistic haven in which he “sketched, sculpted, and hand-painted cakes” that were meant to “honor God” and fill those who consumed his wares with “the light of Christ.”⁴³⁹ For while Craig and Mullins were welcome to purchase any of the ready-made items that lined the shelves of Masterpiece Cakeshop, the creation of a custom cake that celebrated the marriage of two gay men, Phillips continued, would represent the unjust usurpation of his artistic expression to serve blasphemous ends. The rites – and rights – of marriage, Phillips concluded, could only be fully enjoyed by cross-sex partners.

Spurred by this argument, the Commission commenced a wide-ranging investigation into Phillips’s bakery. As the investigation proceeded, and as Phillips was repeatedly called to testify before empaneled administrative judges, a curious pattern emerged: that rather than consider the specifically religious nature of his argument, Colorado officials preferred to analogize his behavior to practices of white supremacy. In a public hearing, and on the record, a commissioner stated:

I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the Holocaust, whether it be – I mean, we – we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to – to use their religions to hurt others.⁴⁴⁰

For Phillips, this comment represented the mischaracterization of his religious practices. He had, through the help of his lawyer – Kristen Waggoner of the Alliance Defending Freedom (ADF)⁴⁴¹ –

⁴³⁶ Munn, Debbie. “How It Feels When Someone Refuses to Make Your Son a Wedding Cake” in *Time* (October 27, 2017).

⁴³⁷ Tabacco Mar, Ria. “The Colorado Cake Case is as Easy as Pie” in *The New York Times* (December 5, 2017).

⁴³⁸ The Colorado Anti-Discrimination Act, which dates to the 19th century, specifically protects against discrimination based on sexual orientation by “a place of business engaged in any sales to the public and any place offering services to the public.” For more, see: Colorado Revised Statute §24-34-601(2)(a)(2017).

⁴³⁹ Oral Argument in *Masterpiece Cakeshop*.

⁴⁴⁰ *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (584 US ____ (2018)) at 1729.

⁴⁴¹ The Alliance for Defending Freedom (ADF) is a legal advocacy group that “advances the God-given right to live and speak the Truth. [It] contends for the Truth in law, policy, and the public square, and equip the alliance to do the same.” To date, the ADF has appeared before the Supreme Court fifteen times and wins roughly eighty percent of its cases. Nationwide, it has a network of nearly 8,000 barred attorneys that “protects everyone’s First Amendment freedoms,” although “many of [their] clients are Christians.” Although a deep analysis of the structure and scope of the ADF is beyond the immediate purview of this dissertation, its efforts to reshape not only the structure of legal

indicated in several depositions that he “loved all people as he loved God,” and welcomed all individuals in his bakeshop, but the compelled expression of support for practices he considered sinful harmed his efforts to live his life in concert with the tenets of his faith.⁴⁴² Despite Phillips’s protestations, the Commission found in favor of Craig and Mullins – and, over the course of the next five years, Phillips undertook a peripatetic legal journey that would eventually land him, in late fall 2017, before the Supreme Court.

The argument presented by Phillips and the ADF at the Supreme Court differed significantly from the argument that had been offered by Smith and Craig Dorsay nearly three decades prior. For while the specter of harm to the commonwealth still percolated in the discursive record of *Masterpiece Cakeshop v. Colorado Civil Rights Commission* as it did in *Employment Division v. Smith*, Phillips located his own harm not in legacies of religio-political settler colonialism, but in his inability to participate fully in the economic marketplace.⁴⁴³ To the Court, this argument was at once both novel and fanciful – and, as a result, oral argument proceeded before the bench in fits and starts, with the Justices’ words tumbling over one another in their efforts to discern, precisely, what kind of life Phillips desired.⁴⁴⁴ Yet as with his appearance before the Commission, Phillips was resolute and his desires were no secret: he wished to return to his bakeshop – to his dyes and to his frostings – such that he could be free from the compulsory requirement to serve all customers equally in the domain of customizable wares. He desired, in other words, to practice his faith alongside his artistry and, in doing so, be permitted to earn a living free from regulatory sanction.

The majority of the Supreme Court found Phillips’s argument to be persuasive. In language that recalled the reservations that had populated his majority opinion in *Obergefell v. Hodges* just a few years prior,⁴⁴⁵ Justice Anthony Kennedy hailed Phillips’s wish to be “obedient to Jesus Christ and his

education, but also the institution of the law itself, is the subject of an impressively-researched manuscript – a manuscript that suggests the future of religious freedom cases will look much like *Masterpiece Cakeshop*. For more, see: Hollis-Brusky, Amanda and Joshua C. Wilson. *Separate But Faithful: The Christian Right’s Radical Struggle to Transform Law & Legal Culture* (New York: Oxford University Press, 2020). The definitions in this footnote were pulled from the Alliance Defending Freedom’s website: <https://adflegal.org> (last accessed June 17, 2020).

⁴⁴² As cited in: *Craig and Mullins v. Masterpiece Cakeshop* (CR 2013-0008) at 4.

⁴⁴³ Arguing on behalf of Phillips, Waggoner stated: “The government is punishment him for peacefully living out his beliefs in the marketplace.” Oral Argument in *Masterpiece Cakeshop*.

⁴⁴⁴ In contrast to the oral argument in *Smith*, in which Scalia repeatedly invoked the specter of harm to the commonwealth through images of human sacrifice, snake charming, and more, the hypotheticals that permeated *Masterpiece Cakeshop*’s oral argument centered on whether makeup artists, hairstylists, architects, and Mexican restaurants – with secret recipes for *mole* – could also possess religious beliefs like those articulated by Phillips. At each turn, the Justices’ hypotheticals were met with laughter from those in attendance. For more, see: Oral Argument in *Masterpiece Cakeshop*.

⁴⁴⁵ In *Obergefell*, groups of same-sex couples challenged their states’ ban on marriage equality (or in the absence of an outright ban, their states’ refusal to recognize same-sex marriages that had occurred in other jurisdictions). The Supreme Court, in a 5-4 decision, held that the Fourteenth Amendment guaranteed the right to marry as a fundamental liberty. Although this decision was heralded as a groundbreaking case on the path towards an inclusive future, the decision itself was written in deeply conservative language, praising the social stability created through traditional norms of marriage. However, in separate and opposing opinions, both Justice Anthony Kennedy and Chief Justice John Roberts worried that the positive rights afforded to queer couples may then impose a burden on “the many good and decent people who oppose same-sex marriage as a tenet of their faith.” In recent

teachings in all aspects of his life,” such that he could honor “God’s intention that marriage [...] be the union of one man and one woman.”⁴⁴⁶ Yet even as Kennedy noted that “our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth,” so too did he acknowledge that Phillips’s sincere religious beliefs present “an understandable dilemma.”⁴⁴⁷ This dilemma, however, was not to be immediately resolved by the Court. Kennedy declined to interrogate Phillips’s claim that the broad regulatory power of anti-discrimination laws curtailed the spiritual and economic wellbeing of devout Christians, and instead castigated the Commission for failing to hear properly Phillips’s religious beliefs. “It was not unreasonable for Phillips to believe that it was lawful to decline” to serve Craig and Mullins, Kennedy argued, and this reasonableness should not have been met with “despicable hostility.”⁴⁴⁸ In short order, Kennedy granted Phillips the sole right to be exempted from generally applicable laws, but so too did he return him to the seemingly dubious care of the Commission – but this time with the admonition that the Commission remember that the Constitution “commits government to religious tolerance” and “bars even subtle departures from neutrality on matters of religion.”⁴⁴⁹

This chapter serves a generative and cumulative function. It endeavors to weave together the argumentative threads that have populated this dissertation, even as it seeks to harness *Masterpiece Cakeshop* as a means to illuminate what the future of American religious freedom may look like. Moreover, by interrogating discrete elements of the legal archive in *Masterpiece Cakeshop* – such as Phillips’s lived experience before the Commission and Kennedy’s exasperated appeal to religious tolerance – I argue that, in contrast to *Employment Division v. Smith*, this case deploys the use of testimony not to expand possibilities of religious freedom, but rather to advance a private regulatory regime that infuses a shared marketplace with Protestant Christian ideology. This argument unfolds over the course of three sections. The first section situates this chapter within the emerging bodies of scholarship on *Masterpiece Cakeshop*, while the second section brings these bodies of scholarship to bear on the language used by Phillips to describe his understanding of his labor; in doing so, I demonstrate that there is something more at work in this case than frameworks of either anti-discrimination principles or First Amendment jurisprudence can capture. The third section turns more fully to the role of the Commission in shaping the outcome of *Masterpiece Cakeshop*, such that it is possible to read Kennedy’s invocation of religious toleration as a desire to foreground testimony over the procedures of public reason. However, as I argue in the fourth and final section, this impulse does more harm than good: rather than expand the lived freedom of Craig, Mullins, or Phillips, it instead embeds the ideals of reasoned Protestant Christianity into private and public encounters. This embeddedness, I ultimately conclude, will shape the future of religious freedom for years to come.

years, this worry has come to the fore: indeed, the central holding of *Obergefell* has come under scrutiny as the Supreme Court reconsiders the constitutional groundings of substantive due process rights – a scrutiny that threatens to withdraw positive legal protections for vulnerable persons or minoritized groups. See *Obergefell v. Hodges* (576 US ____ (2015)) at 32. See also: Murray, Melissa. “*Obergefell v. Hodges* and Nonmarriage Inequality” in 104 *California Law Review* 5 (2016), pp. 1207-1258. Yoshino, Kenji. “A New Birth of Freedom? *Obergefell v. Hodges*” in 129 *Harvard Law Review* 157 (2015), pp. 147-179.

⁴⁴⁶ Justice Anthony Kennedy. Supreme Court of the United States, Washington, District of Columbia. June 4, 2018. Announcement of Decision from Bench.

⁴⁴⁷ *Masterpiece Cakeshop* at 1728.

⁴⁴⁸ *Masterpiece Cakeshop* at 1730, 1731.

⁴⁴⁹ *Masterpiece Cakeshop* at 1732.

I. A Narrow Decision? Approaches to *Masterpiece Cakeshop*

If *Employment Division v. Smith* was met with near-immediate outcry, *Masterpiece Cakeshop v. Colorado Civil Rights Commission* was met with a near-quiet whimper. Following the decision in *Obergefell*, which had established nationwide substantive due process rights for same-sex couples in the domain of marriage, academics and jurists alike tracked the movement of ADF-aligned religious freedom cases through the lower courts, wondering when – and under what conditions – the Supreme Court would move to resolve the perceived conflict between anti-discrimination laws and the right to free religious exercise.⁴⁵⁰ When the Court eventually granted review in *Masterpiece Cakeshop*, flurries of attention were directed towards its fact pattern⁴⁵¹ and, subsequently, its oral argument,⁴⁵² but so too was there a sneaking sense that – out of all of the cases the Court have chosen – the resolution in *Masterpiece Cakeshop* would be “as easy as pie.”⁴⁵³ Indeed, after Kennedy announced the majority opinion, court observers remarked that because he had “placed considerable emphasis on the disparaging statements made by members of the Colorado Civil Rights Commission,” and because he had declined to rule on whether principles of religious freedom permitted faith-driven business owners to exempt themselves from the generally applicable laws of public accommodation, *Masterpiece Cakeshop* represented a narrowly pragmatic – yet portentous – decision.⁴⁵⁴ Although the day would come when the Court would need to revisit the central holding in *Masterpiece Cakeshop*, so the feelings went, that day would not arrive imminently.⁴⁵⁵

Broadly construed, scholarly responses to *Masterpiece Cakeshop* tend to fall into two neatly demarcated categories. These two categories – marked by their attentiveness to either First Amendment jurisprudence or anti-discrimination principles – construct an image of *Masterpiece Cakeshop* that at once expands and contracts its capacity to control future outcomes. Yet rather than

⁴⁵⁰ At the time that *Masterpiece Cakeshop* was granted certiorari, a number of other cases were circulating. See, for instance: *Telescope Media Group v. Lindsey* (271 F. Supp. 3d 1090 (2017)). *Elane Photography, LLC v. Willock* (309 P.3d 53 (2013)). *Washington State v. Arlene’s Flowers* (389 P.3d 543 (2017)). *Brush & Nib Studio, LC v. City of Phoenix* (418 P.3d 426 (2018)).

⁴⁵¹ Posner, Sarah. “The Christian Legal Army Behind Masterpiece Cakeshop” in *The Nation* (November 28, 2017). Farrell, Henry. “These are the Conservative Legal Groups Behind the Masterpiece Cakeshop Case” in *The Washington Post* (December 5, 2017).

⁴⁵² Cole, David. “I Represented the Wedding Cake Couple. We Lost the Battle But Won the War” in *The Washington Post* (June 4, 2018).

⁴⁵³ *Supra* note 4.

⁴⁵⁴ Shaw, Kate. “Why Did the Liberals Join the Majority in the Masterpiece Case?” in *The New York Times* (June 5, 2018). See also: Clark, Elizabeth. “And the Winner Is...Pluralism?” in *SCOTUSBlog* (June 6, 2018). Epps, Garrett. “Justice Kennedy’s *Masterpiece* Ruling” in *The Atlantic* (June 4, 2018). Epstein, Richard. “The Worst Form of Judicial Minimalism – *Masterpiece Cakeshop* Deserved a Full Vindication for Its Claims of Religious Liberty and Free Speech” in *SCOTUSBlog* (June 4, 2018). Liptak, Adam. “In Narrow Decision, Supreme Court Sides with Baker Who Turned Away Gay Couple” in *The New York Times* (June 4, 2018). Tuttle, Robert and Ira C. Lupa. “*Masterpiece Cakeshop* – A Troublesome Application of Free Exercise Principles by a Court Determined to Avoid Hard Questions” in *Take Care* (June 7, 2018).

⁴⁵⁵ In 2022, the United States Supreme Court granted review in *303 Creative v. Elenis*, which possessed a very similar fact pattern to *Masterpiece Cakeshop*. In 2023, the argument advanced by the religious petitioner – Lorie Smith – was upheld. In future work, I would welcome the opportunity to extend my analysis in this chapter to *303 Creative*.

let these two bodies of scholarship control the method of analysis deployed in this chapter, I argue that – in the interstitial moments of *Masterpiece Cakeshop*’s legal archive – a third pathway through which to understand the case emerges: namely, a pathway that invites considerations on how religious individuals view their faith-based labor in the workplace. These considerations, I argue, represent resistance to the lingering affects of the belief-action distinction as seen in the previous chapter – and, moreover, lay the groundwork for interpreting *Masterpiece Cakeshop* not as a narrowly-decided and pragmatic preservation of institutional legitimacy, but rather as a vehicle for establishing a latently and privately regulatory form of conduct that seeks to tame the vibrancy of the post-secular (and post-sexual revolution) public square with the spirit of Protestant Christianity.

Masterpiece Cakeshop, Melissa Murray notes, “has almost uniformly been characterized as a collision between First Amendment values on the one hand and LGBTQ rights on the other – the classic juxtaposition of liberty and equality.”⁴⁵⁶ The distinction between these two camps are meant to emphasize the tensions that circulate between Phillips’s religious convictions and free speech rights, and Colorado’s commitment to anti-discrimination principles. For scholars of the First Amendment, Phillips’s argument that he was a “cake artist” in need of both religious freedom and free speech was nearly unprecedented. While other compelled speech cases – in which an individual alleged a constitutional wrong-doing because the government had required her to express a thought with which she disagrees – had come before the Court previously, very few had evinced the precise positionality of Phillips. Yet for scholars of the First Amendment,⁴⁵⁷ what was dangerous about Kennedy’s modest endorsement of Phillips’s argument was not its novelty, but rather its potential capacity to unleash an overwhelming tide of individuals – of faith or of no faith – petitioning the Supreme Court for exemption from anti-discrimination laws on the basis of compelled speech. For instance, Erwin Chemerinsky notes:

A restaurant owner could claim that forcing it to cook food for African Americans is impermissible compelled speech in violation of the First Amendment. Any business that wants to discriminate would be able to say that forcing it to provide services is compelling its expression. In fact, why couldn’t an employer say that it can hire only men to express a view about the type of work that should be done by the sexes or that women’s role should be in the home? Enforcing anti-discrimination law and forcing the employer to hire women would thus be impermissible compelled speech.⁴⁵⁸

Here, Chemerinsky argues that Phillips’s desire to be recognized as a cake artist endowed with the rights to enact his faith in places of public accommodation could challenge equal protection jurisprudence writ large. Allegations of compelled speech, he notes, could happen in any moment where an individual’s labor is harnessed to serve productive ends – and, as a result, spaces that had been formerly (or, at the least, ideally) open to all persons would become rife with discriminatory action. David Laycock concurs: if compelled speech arguments like that launched by Phillips continued to succeed, the Court would be “complicit in constructing a social environment teeming

⁴⁵⁶ Murray, Melissa. “Consequential Sex: #MeToo, *Masterpiece Cakeshop*, and Private Sexual Regulation” in 113 *Northwestern University Law Review* 4 (2019), p. 249.

⁴⁵⁷ Chemerinsky, Erwin. “The Ongoing Challenge to Define Free Speech” in 43 *Human Rights* 4 (October 2018), pp 1-15. See also: Laycock, Douglas. “The Broader Implications of *Masterpiece Cakeshop*” in 7 *Brigham Young Law Review* 1 (Summer 2019), pp. 157-204. Tedesco, Jeremy. “*Masterpiece Cakeshop* and the Foundations of Free Speech and Toleration” in 9 *Oxford Journal of Law and Religion* 2 (June 2020), pp. 271-287.

⁴⁵⁸ Chemerinsky, “The Ongoing Challenge to Define Free Speech,” p. 14.

with hostile comments and unequal treatment.”⁴⁵⁹ Liberties of free speech and free exercise, in other words, would create lived conditions of inequality.

If scholars of the First Amendment regarded *Masterpiece Cakeshop* with a sense of trepidation, scholars of anti-discrimination law viewed Kennedy’s opinion with a sense of possibility. Far more than a narrow decision that serves as a portent for things to come, *Masterpiece Cakeshop*, for Reva Siegel and Douglas NeJaime, represents an unqualified victory for anti-discrimination advocates. Signaling to the significant “passages of the majority opinion [that] repudiate longstanding arguments advanced by exemption advocates to affirm instead an approach to public accommodation law that limits religious accommodation to prevent harm to other citizens who do not share the objector’s belief,”⁴⁶⁰ Siegel and NeJaime determine that Kennedy – in his opinion – articulates a harm-based calculus meant to curtail the tide of compelled speech litigants feared by Chemerinsky and Laycock. Indeed, for although the Court, through the figure of Kennedy, listened deeply to the experiences and desires articulated by Phillips, he nonetheless declined to endorse – in a sweeping manner – the ability of devout persons to automatically refuse service to minoritized individuals or communities. The twinned nature of Kennedy’s approach to Phillips, Mark Movsesian notes, is indicative of a “capacious concept of equality” that worked against the “affronts to human dignity” desired by some practitioners of orthodox faiths.⁴⁶¹ *Masterpiece Cakeshop*, in other words, indicates to “federal and state courts, administrative agencies, and legislative bodies” that broad exemptions to anti-discriminatory laws would not be permissible as they would constitute a constitutional injury to equality.

Viewing *Masterpiece Cakeshop* through the lenses provided by First Amendment jurisprudence and anti-discrimination principles yields both worry and hope: worry that future cases will cite compelled speech doctrines to create a public sphere teeming with discrimination and hate-based animus, but hope that public accommodation laws will continue to serve as a bulwark against particularist desires to roll back legal, political, and social commitments to inclusive spaces. Given the novelty of this case, and given its capacity to restructure significant portions of American jurisprudence, focusing on whether – and under what conditions – *Masterpiece Cakeshop* will be affirmed or overturned in future juridical moments makes good academic sense.⁴⁶² Yet a concern nevertheless persists. For while the construction of the jurisprudential promises and perils of *Masterpiece Cakeshop* directs our attention to the challenges that will shape our shared and collective future in liberal

⁴⁵⁹ Laycock, “The Broader Implications of *Masterpiece Cakeshop*,” p. 169.

⁴⁶⁰ NeJaime, Douglas and Reva Siegel. “Religious Exemption and Antidiscrimination Law in *Masterpiece Cakeshop*” in 128 *Yale Law Journal* (2018), p. 202.

⁴⁶¹ Movsesian, Mark L. “*Masterpiece Cakeshop* and the Future of Religious Freedom” in 42 *Harvard Journal of Law & Public Policy* (2019), p. 714. See also: NeJaime, Douglas and Reva Siegel. “Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics” in 124 *Yale Law Journal* (2015), pp. 2516-2591. Sepper, Elizabeth. “The First Amendment and the ‘Unique Evils’ of Public Accommodations Discrimination” in 726 *University of Chicago Legal Forum* (2020), pp. 271-292.

⁴⁶² Winnifred Fallers Sullivan argues that Kennedy’s efforts to delimit the Court’s attention to Phillips as a discrete individual was because the case was not a “clean vehicle” for jurisprudential change in the domains of either equal protection or compelled speech. A clean vehicle, she continues, would have been any of the other cases that had been percolating at the lower court levels; because Phillips’s case possessed the rhetorical messiness of the Commission, she concludes, Kennedy acted to preserve the institutional legitimacy of the Supreme Court over and above the claims made by Craig, Mullins, and Phillips – and, in doing so, punt its central question to future Justices. For more, see: *supra* note 17. Sullivan, Winnifred Fallers. “Is *Masterpiece Cakeshop* a Church?” in *The Immanent Frame* (June 8, 2018).

democratic states, this attention – as with the attention paid to the legal principles undergirding *Employment Division v. Smith* in the previous chapter – has the impact of obscuring *how* and *why* Phillips makes the argument he does. In what follows below, I return to the figure of Phillips not to endorse his vision of how the public square ought to be constructed, but rather to articulate what might be missing from the official tales told of *Masterpiece Cakeshop*. By engaging with how he defines his labor as an extension of and a complement to his faith, and by assessing how this definition shapes and buffers his desire to participate in or withdraw from the marketplace, it is possible to see how Phillips endeavors to advance – in intersubjective moments that play out in places of public accommodation – a regulatory culture that prioritizes the tenets of Protestant Christianity.

II. The Regulatory Life of Cakes: A Return to *Smith*

To understand the figure of Phillips, and how his vision of his labor advances a latently regulatory regime, a brief return to *Employment Division v. Smith* is necessary. Indeed, in his majority decision, Kennedy – as noted by Siegel and NeJaime above – argues that public accommodations law is a central component to a life lived in community. In order to access the full rights and benefits of citizenship, he determines, individuals – from all walks of life – must have the expectation that, as they move throughout the public square, they will be treated in a manner similar to others. To deny religious individuals exemptions from generally applicable public accommodations law is, for Kennedy, to affirm its constitutional centrality. He writes: “It is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.”⁴⁶³ With this language, Kennedy – alongside the votes of the two dissenters, who expressly embraced this section of the Court’s majority decision⁴⁶⁴ – endorses the application of *Smith* to *Masterpiece Cakeshop* and, in doing so, limits the capacity of Phillips to, as Scalia argued in *Smith*, exempt himself from a duty to participate within and contribute to the public square in a manner that accords with the ideals of equal protection.

Yet there is more at work in Kennedy’s appeal to the language of *Smith* in the confines of *Masterpiece Cakeshop*. For instance, in the previous chapter, I argued that Scalia’s appeal to the belief-action distinction in *Smith* as derived from *Reynolds* possessed a latently affected power that rendered Smith subject to the settler colonial powers of the American liberal democratic state.⁴⁶⁵ Although this argument was attuned to the lived experience of Smith, and how his narratives of injury endeavored to expand the responsive capacity of the law, this affective power can be seen as percolating in *Masterpiece Cakeshop* – but only to a degree. When Kennedy and his fellow Justices prohibit Phillips from exempting himself from generally applicable laws that construct the conditions of equal treatment in the public square, Kennedy participates in and reproduces the affective quality of the belief-action distinction. He recognizes, following Chief Justice John Roberts’s argument in *Obergefell*, that “many good and decent people [...] oppose same sex marriage as a tenet of their faith,”⁴⁶⁶ but nonetheless circumscribes their capacity to participate in conduct that renders tangible this belief in the public square. Public accommodation laws, on this understanding, are strengthened *precisely because*

⁴⁶³ *Masterpiece Cakeshop* at 1727. As also cited in: Sager, Lawrence C. and Nelson Tebbe. “The Reality Principle” in 34 *Constitutional Commentary* (2019), p. 174.

⁴⁶⁴ Justices Ruth Bader Ginsburg and Sonia Sotomayor, dissenting in *Masterpiece Cakeshop* at 1748.

⁴⁶⁵ See, for more, Chapter Four, notes 113-117.

⁴⁶⁶ *Supra* note 12.

the belief-action distinction compels religious individuals to actively and reflexively delimit their faith-inflected conduct as a matter of collective wellbeing.

But, as mentioned in the introduction to this chapter and in the prior section, *Masterpiece Cakeshop* is peculiar in its jurisprudence. For although Kennedy and his fellow Justices could have, in a move reminiscent of Scalia's move in *Smith*, simply affirmed the constitutionality of non-exemption from generally applicable laws, Kennedy – alongside the concurrences of his brethren – permits Phillips's request for accommodation. Although more will be said about how this exemption functions as Kennedy's recognition of the possibilities of testimonial emancipation in the following section, I argue that there is something specific to Phillips's articulation of his injuries that compels the Court – at least in a limited capacity – to recognize the affective power of the belief-action distinction. Indeed, for when Phillips comes before the Court, he does so with an argument that expresses his desire to be free from compelled speech. The requirements of the laws of public accommodation, he argues, unjustly captures his body in service of “Colorado's pro-LGBTQ rights message,”⁴⁶⁷ a capturing that he believes signals his willing endorsement of a lifestyle he believes to be blasphemous. Yet rather than argue that he ought to be permitted to retreat from public accommodation altogether – recall that he argues, at crucial moments, that he “loves all individuals as he loves God”⁴⁶⁸ – he argues that the specific act of customization is an unjust appropriation of his labor. If he were, in other words, to be required to continue to produce cakes *specifically* for celebrations that challenge the central tenets of his faith, the belief-action distinction would compel him to sever his connection with his faith as he labors in service of the state – and, in doing so, render his body as the site of an affective power that, in his view, requires his explicit assent to “sexual conduct [...] at odds with his preferred sexual mores.”⁴⁶⁹

It is this argument – that his labor ought to be exempted from required acts of customization in recognition of its affective power – that not only finds purchase at the Court, but also works to install a nascent regulatory regime within the confines of his cakeshop. For instance, concomitantly with Kennedy's recognition of Phillips as a “devout Christian whose main goal in life is to be obedient to Jesus Christ and Christ's teachings in all aspects of his life,”⁴⁷⁰ the concurrences offered by Justices Thomas, Alito, and Gorsuch center not only Phillips's status as a Christian business owner, but also the expressive capacity of his wares. To wit, for even as Thomas recounts the extent to which Phillips's religious beliefs permeate his shop – he makes specific reference to its Sunday closings and his refusal to make Halloween goods, cakes with alcohol, or cakes with certain kinds of messages “including those that criticize God”⁴⁷¹ – so too does he note that “wedding cakes are so packed with symbolism that it is hard to know where to begin.”⁴⁷² This symbolism, Alito and Gorsuch write, moves the creation of a wedding cake solely from the simple act of “mixing flour and eggs”⁴⁷³ to something far more expressive: it “inherently communicates that a wedding has occurred, a marriage has begun, and the couple should be celebrated.”⁴⁷⁴ On such an account, the imposition of a *Smith*-like belief-action distinction onto the labor done by Phillips in service of a customizable wedding cake would not – in the eyes of *Masterpiece Cakeshop*'s concurrences – simply be the neutral application of anti-

⁴⁶⁷ Murray, “Consequential Sex,” p. 250.

⁴⁶⁸ *Supra* note 12.

⁴⁶⁹ Murray, “Consequential Sex,” pp. 250, 251.

⁴⁷⁰ *Masterpiece Cakeshop* at 1728.

⁴⁷¹ *Masterpiece Cakeshop* at 1742. See also: Oral Argument in *Masterpiece Cakeshop*.

⁴⁷² *Masterpiece Cakeshop* at 1743.

⁴⁷³ *Masterpiece Cakeshop* at 1738.

⁴⁷⁴ *Masterpiece Cakeshop* at 1743.

discrimination values in service of public accommodation, but it would usurp the actions of Phillips to signal his active endorsement of marriage equality. Put slightly differently, if Phillips were *not* to be exempted from laws of general applicability, his cakes would speak without him present: those that encountered the cake would implicitly understand that, given the inherent symbolism of wedding confections, he believed the marriage to be permissible.

Yet even if the Justices recognize that the requirement that Phillips's participation within the laws of public accommodation is not a neutral requirement, they do not similarly recognize that Phillips's desire for exemption is also not neutral. Instead, as I intimated above, the Justices – and Phillips himself – configure a right to exit as a right to participate in the regulation the sexual conduct of others. As Murray writes:

Phillips's refusal and his request for an exemption from the [Colorado Anti-Discrimination Act] take on a regulatory cast. In the face of the state's embrace of gay couples, Phillips has drawn a line in the sand. By refusing to furnish a cake – and indeed, making clear that he is refusing because he does not wish to be complicit in something he views as *sinful* and *wrong* – Phillips is articulating his own vision of appropriate sexual conduct (one that does not brook homosexuality), and imposing consequences on the couple for their refusal to comply with these traditional heterosexual mores.⁴⁷⁵

Here, it is possible to distinguish Murray's argument on Phillips from that of the previous chapter's argument on Smith. For while I argued in Chapter Four that Smith exercised a Habermasian-like right to exit from communities that impose asymmetrical and felt burdens on one's spiritual life, Murray argues that Phillips's right of exit is not necessarily protective of one's beliefs: it is, to recall the language of Derrida from the Introduction to this dissertation, an act designed to cut. Curiously, by exempting himself from the regulatory confines of the belief-action distinction, so too does Phillips impose onto his would-be customers this same requirement: if his patrons wish to consume his artistry, they must demonstrate that their actions match his beliefs. It is in this imposition – in which Phillips requires his most visible, his most symbolic, customers to assent to the tenets of his faith – that Phillips uses the jurisprudential posture of *Masterpiece Cakeshop*, even in its seeming narrowness, to impart to others a regulatory norm of Protestant Christianity.

III. Testimonies of Tolerance

In the margins of his majority opinion, Kennedy signals an unease with both affirming the general applicability of laws of public accommodation and singularly releasing Phillips from the power of the belief-action distinction, an unease that recalls the earlier and similar unease of Chemerinsky and Laycock. To assuage this unease, and to stem momentarily the challenges brought by persons similarly situated to Phillips, Kennedy directs his attention towards the Commission. In clear and unflinching language, Kennedy argues:

To describe a man's faith as "one of the most despicable pieces of rhetoric that people can use" is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical – something insubstantial and even insincere. The commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defense of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of

⁴⁷⁵ Murray, "Consequential Sex," p. 252. For an argument that links the right to regulate others' conduct to the right to labor unfettered, please also see: Sepper, Elizabeth. "Free Exercise Lochnerism" in 115 *Columbia Law Review* 6 (October 2015), pp. 1453-1519.

Colorado’s antidiscrimination law – a law that protects against discrimination on the basis of religion as well as sexual orientation. The record shows no objections to these comments from other commissioners.⁴⁷⁶

In this moment, Kennedy suggests that the Court’s responsibility to adjudicate *Masterpiece Cakeshop* is – in large part – due to the irresponsibility of the Commission. He notes that the language used by a commissioner, and implicitly endorsed by its other members, mischaracterizes the argument advanced by Phillips: for even as he desires to claim for himself a right of exit from a society that endorses sexual conduct he abjures, he does not cast his request in language that specifically targets Craig, Mullins, or other would-be patrons. There is, Kennedy suggests, a particular sense of harm that emerges from one’s mischaracterization and misrecognition at an administrative hearing.

In the previous section, I argued that one way to understand the regulatory desires of Phillips was to adopt and adapt the interpretative lens offered by my engagement with *Smith* in Chapter Four. Here too is it useful to appeal to *Smith* once again. As I argued in Chapter Four, the processes of American law often require those who would petition for religiously-motivated accommodation in spaces governed by generally applicable laws to begin at administrative courts. Phillips – when he was brought to the Commission by Craig and Mullins – is no different and, as his peripatetic journey to the Supreme Court indicates, he was required to move throughout the inner logic of the law to advance his claim for religious freedom. Yet curiously, in his majority opinion, Kennedy argues that this process was specifically injurious to Phillips – a recognition not afforded to Smith by Scalia. As Kennedy writes:

Before the Colorado Court of Appeals, Phillips protested that [his] treatment reflected hostility on the part of the Commission toward his beliefs. He argued that the Commission had treated the other bakers’ conscience-based objections as legitimate, but treated his as illegitimate – thus sitting in judgment of his religious beliefs themselves. The Court of Appeals addressed this disparity only in passing and relegated its complete analysis of the issue to a footnote. [...] A principled rationale for the difference in treatment of those instances cannot be based on the government’s own assessment of offensiveness.⁴⁷⁷

Here, Kennedy argues that as Phillips sought to advocate for the accommodation of his beliefs before successive courts of law, he was routinely subjected to “judgment of his religious beliefs,” a judgment that originated at the level of the Commission and continued upwards through the Coloradan court system. But there is more at work in the quote above. Rather than simply say that the Commission operated from a position of animus, he argues that the hostility experienced by Phillips – so palpable that Kennedy felt its reverberations several years later – is rooted in the Commission’s inability to listen. Kennedy, in other words, understands the Commission to have disregarded its duty to act as a testimonial interlocutor.

If Kennedy’s castigation of the Commission is interpreted through the lens offered by testimony, it is possible to see that his argument represents a recognition of the power of translative reason. Although the claims that Phillips makes to the Court do not evince the same sense of spiritual misrecognition felt by Smith, Kennedy argues that the impulse of the Commission to reach for frameworks outside of Phillips’s own understanding of his religion does damaging work: for while Phillips’s religious beliefs require him to refrain from endorsing same-sex partnerships, his restraint ought not to be immediately abstracted and analogized to practices of enslavement or genocide.⁴⁷⁸ Such analogies impart material and metaphysical harm to Phillips, who – in his briefing to the Court

⁴⁷⁶ *Masterpiece Cakeshop* at 1729.

⁴⁷⁷ *Masterpiece Cakeshop* at 1730.

⁴⁷⁸ *Masterpiece Cakeshop* at 1730.

– reported that he had been, in the wake of his appearance to the Commission, been threatened with physical violence and religiously-inflected intimidation. Had the Commission acted in a properly testimonial posture, Kennedy concludes, the Court could have foreclosed any further legal challenges that sought exemptions from generally applicable laws – the Commission could have articulated an immanent, situationally-appropriate remedy to the harms experienced by Craig, Mullins, and Phillips and, in doing so, preserved the broader protective character of the law.

Even as Kennedy returns Phillips to the care of the Commission, and compels the Commission to practice testimonial interlocution and not translation, he does not suggest that the Commission ought to endorse the practices of Phillips. Instead, as I noted in the introduction to this Chapter, Kennedy urges the Commission to recognize that it – as a governing body – ought to understand its duty to act as a neutral entity, endowed with the powers of toleration.⁴⁷⁹ By invoking the language of tolerance even as he underscores the obligations of testimony, Kennedy thus rhetorically constructs the Commission as a Lockean magistrate – a construction that, as I argued in Chapter Two, serves to reinforce the primacy of Protestant Christianity as a matter of governance. As Lockean magistrates, the Commission would be permitted to determine what counts as “an different thing” incidental to the practice of an individual’s faith, and so too would it – following Locke’s requirement for individuals to privatize their faiths in order to secure a politically stable commonwealth – require those who wish to engage in publicly-oriented religious conduct to self-reflexively position oneself in relation to the ideals of the secular liberal democratic state. There is, on this understanding, an inherent conflict between Kennedy’s challenge to translation and his endorsement of toleration: if testimony is meant to supersede and dismantle the power of reason as a constitutive force, then to contextualize this testimony within the discursive domain of toleration is to both defang its transformative power and to reauthorize the authority of the state to require submission to Protestant Christian ideals from its constituents. Although Phillips subscribes to a Protestant Christian faith, a subscription that motivates both his engagement with the Commission and with Kennedy, he nonetheless rejects the requirement of self-reflexivity and the orientation of oneself to the public good in his desire to be exempted from the generally applicable laws: a rejection that, for Kennedy, requires the latent power of Lockean magisterial adjudication.

Taken together, the preceding paragraphs sketch an image of *Masterpiece Cakeshop* that is multi-layered and multi-faceted in its authority. On the one hand, Phillips’s argument that his labor ought to be understood as an extension of his spiritual commitments finds purchase before a Court that recognizes that the belief-action distinction could act on Phillips in a manner inconsistent with its previous holdings. On the other hand, Phillips’s ability to enact a private regulatory regime – to construct the patrons who visit his shop in his image – is conditioned by the Court’s endorsement of practices of toleration, such that Phillips, and those that follow in his jurisprudential footsteps, will be required to continuously engage in practices of self-reflexivity that buttress the governing power of the state in matters of public accommodation. He will, in other words, be required to present compelling reasons for why, and under what conditions, he ought to be exempted from laws of general applicability – a requirement that, despite Kennedy’s gesture to testimony, retrenches and reaffirms procedures of Protestant Christian reason in a post-secular state.

III. The Future of Religious Freedom

As I intimated above, the purpose of this chapter was twofold: to be both generative and cumulative. Through an engagement with *Masterpiece Cakeshop*, I sought to tease out how the arguments that have

⁴⁷⁹ *Supra* note 16.

populated this dissertation operate, both overtly and discretely, within contemporary religious freedom challenges. For although approaches to the jurisprudence of *Masterpiece Cakeshop* have centered considerations of anti-discrimination, free exercise, and free speech law, the interpretative lenses provided by the preceding chapters in this dissertation illuminate something much stranger: a Supreme Court that at once endorses the sweeping promise of testimony by urging administrative courts to adapt its adjudicatory procedures to be attentive to the context in which a claim arises, even as that transformative potential is limited by the discursive regime of toleration. In this moment, then, the Supreme Court – through the opinion of Kennedy and the concurrences offered by Thomas, Alito, and Gorsuch – removes itself from its participation in the reasoned procedures of subject formation, but affirms the need for smaller, more local courts to do so. This act, of aversion and of endorsement, suggests that the future of religious freedom claims will take place on a discursive field marked by intersubjective, regulatory encounters.

Tracing the figure of Phillips illuminates this intersubjective, regulatory quality. For while Phillips – and those that emulate his argument – will need to appeal to Lockean-like magistrates in order to live their life free from the power of the belief-action distinction, they are able to retreat to quasi-private spaces within which to condition, on an individual level, the behaviors of those they encounter. Far from being required to exit a political community – as Smith was compelled to do – those that have articulated their faith as an extension of the work are able to shield it from direct interference from the state. Yet this does not mean that Phillips himself is religiously free; instead, his ability to continue to practice his faith in concert with his labor is conditional upon his articulation of his beliefs in a manner that reasonably accords with the expectations of Lockean magistrates. His labor evades indifferent status only insofar as it remains in his cakeshop – he must, in other words, condition himself so that he may condition others. The promise of religious freedom is, as ever, delimited by the power of reason.

Afterword

This dissertation spanned time, jurisdictions, and methodologies. It engaged with a peculiar phenomenon of modern legal life: that, as religious individuals petitioned for the accommodation of their sincere religious beliefs, they encountered discourses of reason. As they navigated the reasoned expectations of the law, they experienced sustained sense of disempowerment and disenfranchisement: a sense, in other words, of non-recognition in their deliberative democratic community. From prisons to Indigenous land to bakeshops and back, religious individuals experienced felt injuries – injuries that not only affected their understanding of their religion, but also their relationship to their political, legal, and religious communities. I argued that the nature of these injuries was Foucauldian in nature, which is to say that they often emerged intersubjectively and through procedures of self-reflexivity, rather than hierarchically. Because of the slipperiness of reason, its power to regulate religious freedom emerges inconsistently, yet still palpably, across milieus.

When this dissertation began, the landscape of religious freedom claims was different – in kind, in its expansiveness – than it is today. Indeed, the expansiveness of religious freedom claims today nearly defies quantification; they emerge in moments of capital punishment, in moments of high school sport, in healthcare, in manufactories, in building regulations, in marriage ceremonies, in restaurants, in website designs, and more. Yet as religious freedom claims populate the courts, and as individuals continue to petition for accommodation, there is a temptation to act as Habermas: to say that, as the public square becomes increasingly religious, so too must the law recommit to its reasoned secularity. This is not to say that all religious freedom claims ought to be permitted – indeed, as was seen in the final chapter to this dissertation – the permission of some religious freedom claims over others can serve, perhaps accidentally or perhaps purposefully, a secondary regulatory function.

Yet it is to say that, as post-secular liberal democratic states continue to think about how best to cultivate lived inclusion and recognition, practices of listening and practices of testimony can also continue to generate greater sensations of justice. Some forms of harm, in other words, need to be redressed before freedom can be realized. As Miranda Fricker notes, those who are perceived as irrational – as possessive of “over-emotionality, illogicality, inferior intelligence, evolutionary inferiority” – are undermined as authorities on their lived experiences, sometimes “precisely because of the testimonial nature of the statements they make.”⁴⁸⁰ An epistemic alteration to others, on this account, can ameliorate injurious affect – and, to echo Richard Delgado’s contributions to Chapter Four, slowly dismantle the wall of reason that is its cause.

⁴⁸⁰ Fricker, Miranda. *Epistemic Injustice: Power and the Ethics of Knowing* (New York: Oxford University Press, 2007), p. 32.

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