

LAW, RELIGION, AND THE PURPOSE OF THE UNIVERSITY

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Americans are fond of unity talk: we see ourselves as “one nation, indivisible,” and in pursuit of “a more perfect union.” But much of our actual existence is characterized more by difference and disagreement than by unity. We lack agreement about the purpose of our country, the nature of the common good, and the meaning of human flourishing.

These differences are evident in our religious and legal practices. Religion asks the fundamental questions of human existence: why are we here, is there a God, what is good and what is evil, what happens when we die? We do not get to hedge our bets in answering these questions. Whatever we conclude, whatever we choose to believe, we all live into one and only one set of beliefs. As New Testament scholar Kavin Rowe asserts, “the human condition is such that you have to choose how to live from among options that rule one another out.”¹ And we make that choice trusting in things unseen: “we wager our lives, one way or the other,” because “we cannot know ahead of the lives we live that the truth to which we devote ourselves is the truth worth devoting ourselves to.”²

Law, like religion, raises fundamental questions of our existence. Law is the means through which we impose our beliefs on our fellow citizens. We do so not through gentle persuasion but through coercion rooted in the threat of violence. In the haunting words of legal scholar Robert Cover, “legal interpretation takes place on a field of pain and death.”³ All of our laws, even mundane laws like property taxes and speed limits, are given power by the credible threat of state violence that underlies them.⁴

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1. Kavin Rowe, *One True Life: the Stoics and Early Christians as Rival Traditions* 1 (2016).

2. *Id.* at 258. Rowe elaborates: “no matter how many criteria we find for living in one way or another, we cannot make them add up to a judgment about a true life before we live it. ‘Come join!’ is not the same as ‘Test and confirm!’ . . . There is really no place on which to stand that could secure us against the need to live one way or another in faith. And so we leap—or don’t.” *Id.* at 257–58.

3. Robert M. Cover, *Violence and the Word*, 95 *YALE L.J.* 1601 (1986).

4. *See, e.g.*, Stephen L. Carter, “Law Puts Us All in Same Danger as Eric Garner,” *Bloomberg*

Most legal and religious understandings are sustained by texts. The communities in which these understandings unfold are constantly and contingently arguing about the meaning and coherence of the words in those texts. In other words, the lived practices of law and religion—their quests for meaning and coherence—depend on interpretation. That interpretation typically stands somewhere between a rigid formalism that brooks no ambiguity and an open-ended pragmatism that admits no foundations. Most of us fall somewhere in between these poles of certain absolutes and absolute uncertainty. We have another name for this uncomfortable middle ground: we call it trust, or perhaps even faith.⁵

Trust, in both legal and religious practices, is the way we go on in the world. We all exercise trust, whether we have deep religious belief or no belief. We trust that God exists, or that God does not exist, we trust that certain acts are good or evil, we trust that we will or will not be judged for our acts in this lifetime or the next. The need for trust permeates the substance of law and religion. Take, for example, the idea of “justice.” Some people claim to know justice from religious precepts; others believe that it is knowable apart from religion, or perhaps that it comes from being on “the

View (December 4, 2014) (“Every new law requires enforcement; every act of enforcement includes the possibility of violence. There are many painful lessons to be drawn from the Garner tragedy, but one of them, sadly, is the same as the advice I give my students on the first day of classes: Don’t ever fight to make something illegal unless you’re willing to risk the lives of your fellow citizens to get your way.”). More generally, in a society so interconnected through capitalism, industrialism, and state surveillance, almost every social action rests in some way on structures and systems ultimately rooted in coercion. See generally ANTHONY GIDDENS, *THE NATION-STATE AND VIOLENCE* (1987). Nevertheless, the interconnectedness between law and violence does not leave us incapable of distinguishing between better and worse forms of law. See, e.g., Stanley Hauerwas, *Hauerwas on “Hauerwas and the Law”*: *Trying to Have Something to Say*, 75 L. & CONTEMP. PROBS. 246 (2012) (“The law is a morally rich tradition that offers a language otherwise unavailable for the conflicts we need to have as a society.”); REINHOLD NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY* 234 (Touchstone ed., 1995) (1932) (“An adequate political morality will recognize that human society will probably never escape social conflict, ...[but will counsel] the use of such types of coercion as are most compatible with the moral and rational factors in human society and by discriminating between the purposes and ends for which coercion is used.”).

5. See, e.g., Martin Krygier, *Law as Tradition*, 5 LAW & PHIL. 237 (1986) (describing constitutional interpretation as a tradition-dependent practice); H. JEFFERSON POWELL, *THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION* (1993) (similar); H. JEFFERSON POWELL, *CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION* (2008) (similar); STANLEY HAUERWAS, *UNLEASHING THE SCRIPTURE: FREEING THE BIBLE FROM CAPTIVITY TO AMERICA* (1993) (making similar claims about scriptural interpretation). For a comparative assessment of legal and scriptural interpretation, see JAROSLAV PELIKAN, *INTERPRETING THE BIBLE AND THE CONSTITUTION* (2004).

right side of history.”⁶ But claims about justice are ultimately uncertain.⁷ We cannot prove them like a mathematical equation or a lab experiment, and we cannot know how future generations will judge our justice claims.⁸

Our lack of certainty affects the most basic aspects of our lives. We experience the promises of marriage, friendship, and employment only to the extent that we, and those around us, live up to those promises on any given day. In our relationships with others, we trust, which means that we risk. In the words of theologian Lesslie Newbigin: “Personal knowledge is impossible without risk; it cannot begin without an act of trust, and trust can be betrayed.”⁹ This is especially true of those commitments that are not backed by legal obligations. But it is generally true of all relationships. And it is thus through trust—and risk, and faith—that we live out the particulars of both law and religion, in our relationships with one another.

Law and religion point to the deepest questions of our existence, and our relationships with each other. But law and religion in the world exist only in their particulars. We do not encounter “law” as such, but a liberal understanding of constitutional reasoning, or a conservative view of statutory interpretation. We do not experience “religion” as such, but Roman Catholicism, or Sunni Islam. There are no such things as beliefs, rituals, or adherents in “law” or “religion” in general. Rather, the particularized forms of law and religion are sustained by tradition-dependent practices—communities of people and institutions with histories that shape their purposes and values.¹⁰ These practices are constantly renegotiating both their internal norms and their relationships to the world around them.¹¹

6. See Barack Obama, XLIV President of the United States, Address to the Nation on United States Counterterrorism Strategy (Dec. 6, 2015) (“My fellow Americans, I am confident we will succeed in this mission because we are on the right side of history.”); Hillary Clinton, *Keep fighting for a more equal America*, CNN, June 3, 2016, <http://www.cnn.com/2016/06/03/opinions/equality-in-america-clinton/> (“Now we need to make sure America remains on the right side of history.”); Senator Harry Reid (@SenatorReid), TWITTER (June 26, 2015, 7:29 AM), <https://twitter.com/SenatorReid/status/614440385813856258> (“The Court ruled on the right side of history. I look forward to the marriage celebrations across the country in the coming weeks. #LoveWins”).

7. This is a pervasive theme in the work of Alasdair MacIntyre. See generally Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (1984) [hereinafter *After Virtue*]; Alasdair MacIntyre, *Whose Justice? Which Rationality?* (1988).

8. See Jay Nordlinger, “The Right Side of History,” *National Review* (April 18, 2011).

9. Lesslie Newbigin, *Proper Confidence: Faith, Doubt, and Certainty in Christian Discipleship* 14 (1995).

10. See generally *AFTER VIRTUE*, *supra* note 7.

11. MacIntyre characterizes our practices as tradition-dependent and argumentative. See *id.* at 222 (“When an institution—a university, say, or a farm, or a hospital—is the bearer of a tradition of practice or practices, its common life will be partly, but in a centrally important way, constituted by a continuous argument as to what a university is and ought to be or what good farming or what good medicine is.

The challenge of pluralism emerges out of these intersecting relationships across difference. We do not choose pluralism; rather, we encounter it in the world as we find it—a world of competing religious and legal claims.¹² The challenge of pluralism generates three possible responses: chaos, control, or coexistence.

Chaos is not sustainable in the long-term. It falls flat as a political possibility, leading ultimately to a violence that destroys lives. Hobbes called it “the war of all against all.”¹³ We have built norms, structures, and institutions to protect against chaos, but we can never take its absence for granted. We are rarely as far away from chaos as we’d like to believe.

Control finds its logical end in either theocracy or totalitarianism. Some people in our country are lured by this possibility of control. We have seen this in the nostalgia and nativism from some on the Right.¹⁴ We also see it in the moralistic assurances by some on the Left, who believe that opposing viewpoints are simply bigoted or ignorant and therefore worthy of suppression.¹⁵

I have been writing lately about the third possibility of coexistence, through what I call confident pluralism.¹⁶ Confident pluralism argues that

Traditions, when vital, embody continuities of conflict. Indeed when a tradition becomes Burkean, it is always dying or dead.”)

12. John Rawls famously wrote about “the fact of pluralism.” John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. L. STUDIES 4 (1987).

13. Thomas Hobbes, *Leviathan* (1651).

14. Ashley Parker, *In ‘Good Old Days,’ Donald Trump Says, Campaign Protesters Got More Than Just an Escort Out*, N.Y. Times (Feb. 27, 2016), <https://www.nytimes.com/politics/first-draft/2016/02/27/in-good-old-days-donald-trump-says-campaign-protesters-got-more-than-just-an-escort-out/> (quoting President Donald Trump who said, “[y]ou see, in the good old days, law enforcement acted a lot quicker than this. A lot quicker. In the good old days, they’d rip him out of that seat so fast.”); Peter Beinart, *The Republican Obsession With ‘Restoring’ America*, *The Atlantic* (Nov. 13, 2014), <http://www.theatlantic.com/politics/archive/2014/11/the-republican-obsession-with-restoring-america/382689/> (“[C]onservatives love the word ‘restore.’ In 2007, when he was planning his own presidential bid, Mike Huckabee wrote a book subtitled *12 Steps to Restoring America’s Greatness*.... In 2010, Glenn Beck organized a rally on the National Mall entitled ‘Restoring Honor.’ In 2012, Mitt Romney’s supporters established a Super PAC called, paradoxically, ‘Restore Our Future.’ Later that year, the Republican platform promised the ‘Restoring of the American Dream’ and the ‘Restoration of Constitutional Government.’ This June, Ted Cruz pledged to ‘Restore the Great Confident Roar of America.’”).

15. See, e.g., U.S. COMM’N ON CIVIL RIGHTS, PEACEFUL COEXISTENCE: RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES 29 (2016) (Statement of Commission Chairman Martin R. Castro) (“The phrases ‘religious liberty’ and ‘religious freedom’ will stand for nothing except hypocrisy so long as they remain code words for discrimination, intolerance, racism, sexism, homophobia, Islamophobia, Christian supremacy or any form of intolerance.”).

16. JOHN D. INAZU, CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE (2016). The summary of tolerance, humility, and patience draws from the text of *Confident Pluralism*. Importantly, I do not suggest that confident pluralism evades the friction and instability of difference. The recognition of our differences and the convictions that underlie them increases the risk of friction and conflict. *Id.* at 7. As Abner Greene writes, “we do better by recognizing difference as

we can and must live together peaceably in spite of deep and sometimes irresolvable differences over important matters.¹⁷ We can do so in two important ways – by insisting on constitutional commitments that honor and protect difference and by embodying civic practices in our speech and our relationships across difference.¹⁸ Instead of shutting out or shutting down those with whom we disagree, confident pluralism suggests that we find space for meaningful difference and the opportunity for persuasion.¹⁹ Confident pluralism focuses on three aspirations: tolerance, humility, and patience.

Tolerance recognizes that people are for the most part free to pursue their own beliefs and practices, even those we find morally objectionable. Easier said than done. As Bernard Williams has observed, the basic difficulty of tolerance is that we need it “only for the intolerable.”²⁰

But tolerance does not require embracing all beliefs as equally correct. Instead of an “anything goes” tolerance, we can embrace a practical enduring of difference. That does not impose the fiction that all ideas are equally valid or morally harmless. It does mean respecting people, aiming for fair discussion, and allowing for the space to differ about serious matters.

The second guiding principle is humility, which recognizes not only that others will find our beliefs and practices objectionable, but also that we can’t always prove why we are right and they are wrong—some of our most important beliefs stem from premises that others do not share. We act on these beliefs with trust and faith—there is no other possibility.

The third guiding principle is patience. Patience encourages efforts to listen, understand, and even empathize. That does not mean endorsement, or recognition, or acceptance. In fact, it may turn out that patience leads us to a deeper realization of the error or harm of an opposing viewpoint. But we can at least assume a posture that moves beyond dismissing others before we hear what they have to say.

Each of these aspirations requires us to acknowledge the depth of our disagreements. Without the ability or the avenues to air real differences, genuine dialogue occurs less frequently, and contested assumptions go unchallenged. Tolerance becomes a demand for acceptance, humility is supplanted by arrogance, and patience loses to outrage.

something we can’t get past.” ABNER S. GREENE, *AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY* 23 (2012).

17. Inazu, *supra* note 16, at 6–7.

18. *Id.* at 8–12.

19. *Id.* at 15.

20. *Id.* at 87 (quoting Bernard Williams, *Toleration: An Impossible Virtue?* in *TOLERATION: AN ELUSIVE VIRTUE*, ED. DAVID HEYD 18 (1996)).

How do we guard against these tendencies and focus instead on cultivating tolerance, humility, and patience? Doing so will require institutions in which aspirations take shape as lived practices.²¹ This progression from aspirations to practices is essential to our political survival. Aspirations alone cannot indefinitely sustain a shared politics. They must eventually grow into habits and virtues that bind people together. And habits and virtues require shared practices sustained by institutions.²²

It is not clear to me that this country presently has such institutions. But if we are to discover them among us, the university is one possible contender. The vocations of teaching, learning, and writing bring with them the luxury of time. Teachers and students have the space not only to express disagreement in more than tweets and sound bites, but also to probe the reasons underlying our disagreement.

The possibility of confident pluralism in the university depends on a combination of people, place, and purpose.²³ Start with the people. The fact of pluralism, the observable nature of our deep differences, is evident in the people who comprise the university. Universities draw students and faculty from around the world. They come from different races, ethnicities, religions, faiths, and cultures. And despite the shortcomings of many universities to take seriously intellectual and religious diversity among their faculties, some do better with their students.

Place also matters. The university is, for the most part, a remarkably safe and stable environment. To be sure, the prevalence of sexual assault, and the less frequent but psychologically unsettling risk of campus shootings, both qualify this claim of safety in important ways. But students do not typically worry about violence from strangers, they do not wonder whether

21. The distinction between aspirations and practices is crucial. In *Confident Pluralism*, I described tolerance, humility, and patience as aspirations. I did so because, following MacIntyre, I understand practices to require tradition-based institutions that orient people to habits and virtues. *AFTER VIRTUE*, *supra* note 7, at 222. Aspirations cannot by themselves create and sustain civic practices. Jamie Smith makes a similar observation in a discussion of *Confident Pluralism*. See James K.A. Smith, “Reforming Public Theology: Neocalvinism and Pluralism” (2016) (questioning whether “a secularized, post-Christian, increasingly anti-religious society [has] the sources (formative communities) to engender the dispositions/virtues needed for ‘a modest unity’ and a tolerant pluralism”).

22. See *AFTER VIRTUE*, *supra* note 7, at 194 (“Practices must not be confused with institutions. Chess, physics and medicine are practices; chess clubs, laboratories, universities and hospitals are institutions. . . . [Institutions] are involved in acquiring money and other material goods; they are structured in terms of power and status . . . [but] no practices can survive for any length of time unsustained by institutions.”).

23. This is not true of every institution of higher education: schools have different constituencies, resources, and goals. It would be unwise to assume a one-size-fits-all blueprint for implementing the ideas of confident pluralism. The descriptions that I offer here fit best the well-funded and colleges and universities that presently occupy the top spheres of cultural prestige—four-year institutions with residential campuses and mostly “traditional” students between the ages of 18-22.

they will have food or shelter, and they do not go without healthcare. Even those students dealing with disruptive challenges at home find some momentary refuge in the university. Within the campus environment, students are better situated to pursue confident pluralism in part because they are not worried about the safety of their streets and sidewalks.

The university is not simply a place for students to be educated. It encompasses every aspect of life: eating, sleeping, exercising, socializing. It meets most basic needs, functioning as a community that is in many ways isolated from the world around it. Many students live on campus, and even those who live off-campus often cluster in groups. And smart people have spent a lot of time thinking about the benefits of this proximity. We can criticize the resort mentality behind some of the bells and whistles meant to attract students in an increasingly tight market. But there is something to the idea of carefully constructed shared spaces—of dorm commons, dining halls, campus coffee shops, gyms with smoothie bars, and other places to congregate.²⁴

Finally, and most importantly, we come to the question of purpose. The fact of our deep differences puts immense pressure on the coherence of our shared endeavor in the university. We can, of course, name general goals: educating students, pursuing scholarship, and for those of us teaching in professional schools, training practitioners. But can we identify anything more about the purpose of the university?

We find some guidance from Alasdair MacIntyre. In *Three Rival Versions of Moral Enquiry*, MacIntyre envisions the university “as a place of constrained disagreement, of imposed participation in conflict, in which a central responsibility of higher education would be to initiate students into conflict.”²⁵ This process requires participants “to enter into controversy with other rival standpoints, doing so *both* in order to exhibit what is mistaken in that rival standpoint . . . *and* in order to test and retest the central theses advanced from one’s own point of view against the strongest possible objections to them”²⁶ Or, in John Courtney Murray’s more succinct formulation, the university that understands pluralism is the place where

24. As one college student quipped, “In a university with a student body diverse enough that students may feel that they have little in common, a literal common ground is needed.” Sarah C. Stein Lubrano, “The Productivity of Social Space: Harvard should replace its student center,” *The Harvard Crimson*, (Apr. 18, 2012), <http://www.thecrimson.com/column/exodoxa/article/2012/4/18/social-space-productivity/>

25. ALASDAIR MACINTYRE, *THREE RIVAL VERSIONS OF MORAL ENQUIRY: ENCYCLOPEDIA, GENEALOGY, AND TRADITION* 230–31 (1990).

26. *Id.* at 231.

creeds are intelligibly at war with one another.²⁷

These lofty ambitions are essential for the university, but the challenges are daunting. Author Greg Lukianoff elaborates:

Campuses still cling to speech codes and other restrictions on expression . . . , seemingly without understanding that these policies not only chill speech but also teach students that an open exchange of ideas might not really be such a good thing. . . . [And now] the tactics and attitudes that shut down speech on campus are bleeding into the larger society and wreaking havoc on the way we talk among ourselves.²⁸

Lukianoff pulls no punches: he thinks that campus censorship actually fuels the baser discourse that permeates the rest of society. How is that possible? He writes: “an environment that squelches debate and punishes the expression of opinions, in the very institution that is supposed to make us better thinkers, can lead quickly to the formation of polarized groups in which people harbor a comfortable, uncritical certainty that they are right.”²⁹

Lukianoff doesn’t place *all* of the responsibility on higher education. As he writes: “there is plenty of blame to be foisted upon the right wing, left wing, and every point in between, not to mention far-reaching social and technological changes.”³⁰ But now we come to one of his most important claims: “higher education is our best hope to *remedy* oversimplification, mindless partisanship, and uncritical thinking.”³¹

Many people in the university are making such efforts, but we have a long way to go. The past few months have seen renewed national attention to debates about safe spaces and trigger warnings. There are serious arguments on both sides.³² But I don’t think that we can say the university itself, or its classrooms are safe spaces.³³ One cannot read a single page of

27. John Courtney Murray, *We Hold These Truths* (1960), 125.

28. Greg Lukianoff, *Unlearning Liberty: Campus Censorship and the End of American Debate* 9 (2013).

29. *Id.* at 9.

30. *Id.* at 11.

31. *Id.* at 11–12.

32. Malcolm Harris, *What’s a ‘Safe Space’? A Look at the Phrase’s 50-year History*, FUSION (Nov. 11, 2015), <http://fusion.net/story/231089/safe-space-history/> (tracing the development of safe spaces); Richard Pérez-Peña, Mitch Smith & Stephanie Saul, *University of Chicago Strikes Back Against Campus Political Correctness*, N.Y. TIMES (Aug. 26, 2016), http://www.nytimes.com/2016/08/27/us/university-of-chicago-strikes-back-against-campus-political-correctness.html?_r=1.

33. See, e.g., Greg Lukianoff and Jonathan Haidt, *The Coddling of the American Mind*, THE ATLANTIC (September 20015), <https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/> (contending that the “ultimate aim” of those advocating for trigger

Nietzsche and be safe. One cannot be safe with the Bible, the Koran, Judith Butler, or W.E.B. DuBois. Texts that are written to challenge, unsettle, and transform are not meant to be safe.

This brings us back to law and religion. Both play a central role in unmasking our disagreements and unsettling our expectations. Religion asks us to take seriously the disagreements we have over some of life's biggest questions. Law allows us to live together in spite of that conflict and disagreement. Religion and law help us focus on the importance of language, the role of trust, and the gravity of what is at stake. They can lead us to choose coexistence over chaos or control. And they are particularly important in the university, which draws students and faculty from the world, which affords us a proximity of space and time with one another, and which models a kind of discourse that our students carry with them in their next steps.

If we can make the university a place for MacIntyre's constrained disagreement and Murray's warring creeds, we can help to initiate students into the kind of conflict through which they learn to live together rather than fracture through indifference, apathy, or violence. We can push each other toward a more generous dialogue across difference, and wrestle with difficult concepts without giving up on one another. We can navigate the challenges of pluralism with tolerance, humility, and patience. This country, now as much as ever, needs such places.

In doing so, we should keep in mind that we are also citizens in a political project larger than the university, where the stakes are much higher, the differences much starker, and the possibilities for dialogue often much smaller. The vision of confident pluralism—the choice for coexistence over chaos or control—is ultimately not just a vision for the university, but a vision for this larger political project. In the midst of our differences, over law and religion and so much else, we can discover a modest unity in our life together.

warnings and microaggressions “is to turn campuses into ‘safe spaces’ where young adults are shielded from words and ideas that make some uncomfortable”).