

Secular Law and the Realm of False Religion

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Today, notions of false religion and idolatry have disappeared from our legal vocabulary. We would be shocked to hear a modern Western court of law ban some practice as idolatry or refuse religious freedom to some community because of the falsity of its religion. Such reasoning belongs to the Taliban and its kin, but certainly not to secular liberal democracy. Nevertheless, the legal systems of liberal democracies also exclude certain practices from the realm of legitimate religion, even while these are considered religious by the people who practice them.

Secular law confronts a major quandary whenever it has to decide whether some practices or beliefs are religious. Being secular, law is expected to be neutral toward all religions in its judgment as to what counts as religion. Yet, when courts determine that some practices are not religious and, hence, do not fall under the scope of religious freedom, or do not deserve state funding or tax exemption, the failure to be religiously neutral seems inevitable. No court possesses an impartial scientific conception of religion; there are no shared secular criteria that enable one to identify and delimit the sphere of religion in a manner neutral to all religions. Consequently, in such cases, judges and other secular authorities are bound to smuggle in one particular theological conception of religion.¹ That is, a specific religious language becomes the metalanguage to discuss and decide on matters of religion in courts of law and serves as the standard to reject certain practices as not “truly” religious.

This essay examines this quandary by tracing key moments in its genealogy. The first section briefly illustrates the nature of the quandary of legal reli-

gion. The second section looks into the dynamic of the expansion of Western Christianity, where the distinction between the religious and the secular was originally drawn: an internal Christian distinction that characterized these two spheres in relation to a third, the realm of false religion and idolatry. Focusing on the creation of a legal regime of religious toleration in nineteenth-century British India, the third section argues that this realm of false religion has not really disappeared, but continues to play an essential but hidden role in the liberal state and its legal system.

The Quandary of Legal Religion

Secular courts of law across the world have had great difficulty in determining the scope of religion. Yet courts are compelled to take up this task in several types of cases: not only when groups claim exemption from specific laws or some other special status in the name of religion but also when civil authorities desire to ban certain symbols or modes of dress as religious intrusions into the neutral public sphere. Other authors have cogently described this problem, so let me briefly recount two examples.²

The first is the debate about Hindu law in colonial India. In the first decades of the nineteenth century, British rulers raised the question whether a series of native practices in India—from “widow-burning” to “hookswinging”—were *religious* or not, because native *religious* practices ought not to be disrupted by colonial government according to its toleration policy. To decide on this issue, British legal authorities referred to a body of Sanskrit texts, which they construed as the scriptures of “Hindu law,” and to the authority of *pundits*, whom they viewed as priestly interpreters of this sacred law. If a practice had scriptural sanction according to Hindu law and its *pundits*, then it ought to be allowed; if not, then it could be banned. This became the standard to determine when practices were legitimately religious or only apparently so.³

In *The Impossibility of Religious Freedom* (2005), Winnifred Sullivan analyzes another interesting example. In a trial about grave decorations in the city of Boca Raton, Florida, the court had to judge whether municipal cemetery regulations allowing only simple horizontal grave markers constituted a substantial burden on the plaintiffs’ free exercise of religion. The plaintiffs had marked the graves of their loved ones with a variety of “vertical” symbols and statues, and now the court was to decide whether these were religious. Eventually, the judge rejected the decorations as personal choices of the plaintiffs, without any basis in a larger authoritative system of religious beliefs. These practices were not *required* by their religions, but were voluntary and individual acts; hence the

cemetery regulations could not count as a substantial burden on free exercise.

Something peculiar happens in such cases. A group is told that some of its practices are not really religious, even though it took them to be so. By implication, these practices are secular and only wrongly viewed as religious; therefore, they can be regulated by the state. This kind of judgment faces a problem: disputes about who or what is truly religious are viable only *within* the framework of a specific religion. Take the breaking of bread. The question "Is this a religious practice?" hardly makes sense when it concerns crumbling bread to feed ducks in a pond. It is only against the background of liturgical practices and theological disputes about transubstantiation, sacraments, and the Eucharist that it becomes a sensible and answerable question.⁴ To take a position, one has to enter such theological disputes, interpret Scripture in a particular way, and assess the status of apostolic tradition. The same goes for other examples. Cases of this type transform courts into arbiters of religious truth who cannot help but to invoke theological criteria to come to a decision. To require of secular law that it verify the religiosity of practices is to condemn it to giving up its own secularity.

Another difficulty arises when we take into account the history of such attempts to distinguish the truly religious from that which is only apparently so. Turning to early modern Europe, one of the archetypal characterizations of idolatry was that it imposed things of human invention and choice as though these were necessary to religion. False religion introduced human fabrication as divine injunction. While the terms "false religion" and "idolatry" are not invoked today, the conclusion is similar in cases where modern secular courts of law have had to decide what counts as religion. They also argue that, legally, certain practices or beliefs considered religious by some people are not truly religious, but actually concern personal preferences or secular issues—that is, human inventions.

Is it the case that the conceptual realm of false religion and idolatry still remains present implicitly in our legal reasoning and practices, while the terms have disappeared from our legal vocabulary? Isn't this inevitable when one specific religious language is smuggled into courts of law as the metalanguage to decide on matters of religion? What does this tell us about secular law and its relation to Christian religion? In this chapter, I will suggest that the distinction between religious and secular practices derives from a conceptual mechanism internal to Christianity and depends on its prior distinction between true and false worship. Consequently, where secular courts of law identify "truly" religious practices, they also introduce an implicit model of false religion that restructures traditions in society.

Christian Expansion and False Religion

Before the Enlightenment, Western Christianity configured the religious and the secular in relation to a third sphere, that of idolatry and false religion. This triad became crucial once early Christians had accepted that the *Parousia* (the Second Coming of Christ that would precede the Last Judgment) was not imminent and faced the problem of living *as Christians* in pagan society. They needed to address the question, what does it mean to be a Christian? In the period preceding the sixth century C.E., clerical authorities began to determine which practices in society should be rejected and which retained by Christians. Could they attend circus games and shows in theaters, participate in holidays, festivals, and other forms of entertainment? Could believers be astrologers, schoolmasters, and traders? Were they allowed to wear jewelry, dress, eat, and shop like pagans? It became crucial to decide which among these practices were neutral or indifferent to religion and which embodied false religion and idolatry.⁵

In medieval Europe, the *Libri Poenitentiales*, or manuals of penance, addressed similar issues. By identifying certain practices (for example, performing incantations, attending festivals, lacerating the face with a sword or with the fingernails after the death of a relative) as problematic and ignoring others as indifferent to religion, penitential law drew the boundary of the realm of false religion.⁶ Drawing this line became more important than ever during the Protestant Reformation, which saw a replay of the scenario, but with the crucial difference that now Catholic societies played the part of the earlier pagan society. Once again, the question was raised as to which practices were acceptable to the true Christian. The teachings and rites of the Roman hierarchy were condemned as idolatry and superstition, but so were all kinds of practices common to medieval society.

Reformed consistories reproved those who consulted “magicians” to cure their ailing relatives and those who played at “divination.”⁷ Dancing was associated with “idolatrous” Catholic customs such as votive festivals. Not only was Carnival suspect, so were donning costumes and masks, playing music, playing cards, and holding banquets. Folk customs relating to the cycles of nature were particularly disapproved of by pastors and elders. They also opposed the celebration of religious festivals, including Christmas, since the laity had to stop clinging to “the old superstition of observing feast days.” From France to Scotland, such practices were denounced as the celebrations of idolaters.⁸

Far from being unique to Calvinists, this obsession with idolatry also emerged in Lutheran jurisdictions. The popular *Teufelbuch* genre of the late sixteenth century conceived of all kinds of acts, emotions, and attitudes as in-

direct worship of the devil.⁹ People who worried about money or food were called idolaters of “the Worry Devil”; others were said to be victims of the “Hellish Spirit of Sadness” or the “Melancholy Devil.”¹⁰ Carnival was described as a pagan festival preserved by the medieval church to promote its own invented festivals.¹¹ In short, a plethora of everyday practices and feelings was considered idolatrous by the Reformers and banned by laws of ecclesiastic discipline.

Simultaneously, idolatry and false religion became matters of intense theological reflection. The Protestant theology of Christian freedom had built a solid wall between the eternal spiritual world and its temporal material counterpart. In the first realm, only Christ could rule and the soul ought to enjoy liberty from any human authority and laws; in the second realm, the sinful body had to be held in check by secular rulers and human laws.¹² False religion, it was said, violated the sacrosanct boundary between these realms. First, it directed its worship at visible and carnal objects, while true religion should have the invisible spiritual as its object of worship.¹³ Second, idolatry presented human laws and works as means to the justification of the soul, while Christ alone was “the Lamb of God who takes away the sins of the world.”

To take the example of the Mass, Lutheran and Calvinist creeds stated that the Mass was evil idolatry that encroached upon Christian liberty, because it presented human works as spiritual.¹⁴ More generally, they asserted, the article of Christian freedom should not be weakened:

For weakening this article and forcing human commands upon the church as necessary—as if their omission were wrong and sinful—already paves the way to idolatry. Through it human commands will ultimately increase and will be regarded as service to God equal to that which God has commanded; even worse, they will even be given precedence over what he has commanded.¹⁵

In other words, human works and laws became idolatrous when they were regarded as religious. They became *Menschsatzungen*—that is, human fabrications added to God’s revelation.

Protestants were also concerned about the theological contrast between things indifferent and things necessary to salvation. The latter concerned teachings and practices clearly prescribed in Scripture. The indifferent things, or *adiaphora*, on the contrary, belonged to the realm where humanity had been left free by the Lord. Such neutral indifferent things could never be imposed *in the name of religion*, because this was equivalent to idolatry: it amounted to enforcing human secular preferences, as though these were commanded by God and necessary to salvation.¹⁶

Naturally, there were many discontinuities between the several Protestant theologies of idolatry. Luther argued that the *prohibition* of images and other externals in worship was idolatrous, because this bound our consciences to things indifferent as much as their imposition did.¹⁷ Calvin and his followers, in contrast, argued that any addition of unscriptural human inventions to worship amounted to idolatry. As the Scottish reformer John Knox put it: "All worshipping, honoring, or service invented by the brain of man in the religion of God, without his own express commandment is idolatry."¹⁸ Importantly, these different positions shared one conceptual apparatus, which revolved around the drawing of the boundary between true worship, idolatry, and the realm of indifferent human practices.

Throughout the "confessionalization" of Reformation Europe, different confessions accused each other of idolatry and identified some of each other's practices as human inventions.¹⁹ In the first stage, many ceremonies and beliefs of the Roman Church were said to be "popery" or "popish idolatry": human fabrications enforced as commandments of God. The same charge was repeated once Protestant confessional churches had crystallized, and their doctrines, laws, and rites had become objects of opposition. Anticlerical Christians claimed that these churches had failed to free the believer from the burden of idolatry and that church doctrine and discipline still imposed false human additions to religion.²⁰ From the seventeenth century, this tendency to make Protestant religion ever more "spiritual" emerged in several denominations. The tendency culminated in deism, which rejected all dogmas and rituals that deviated from certain core principles of "natural religion" as superstitious and idolatrous human inventions.²¹

How do we account for this set of facts and disputes concerning idolatry? At one level, these indicate a contingent theological problematic within Christianity: there is the biblical injunction against worship of images in the first table of the Decalogue and the conviction that mere creatures never deserve the honor due to the Creator. But how do we explain that entire realms of practices were condemned as idolatry and contrasted to true worship and practices indifferent to religion? How could we make sense of the fact that this happened not just once or twice, but at many spatiotemporal locations in the development of Christianity?

To answer these questions, we have to move to another level of description, that of a theory of religion. Even though the multiple historical forms of Christianity have diverse characteristics, this does not prevent us from identifying those characteristics that render them into instances of religion. In the last two decades, the Indian thinker S. N. Balagangadhara has developed a theory that

not only clarifies this characteristic structure of religion but also explains how earlier theorists have failed to do so.²² As a religion, he argues, Christianity is a particular type of account, “an explanatory intelligible account of the Cosmos,” which represents the world as the embodiment of God’s will and thus transforms this world into an entity that carries meaning and is explicable by deciphering God’s will or plan.²³

For our current purposes, it is important to see how this theory explains the role of worship. Worship allows for the everyday reproduction of religion, because it is the act through which one recurrently confirms that God is the sovereign creator of the world, that His plan is expressed in the world, and that one’s own existence is part of His plan and in submission to His will. Collectively, worship creates and reproduces the Christian religious community as a group of people accepting some particular account as the revelation of God’s will and striving to live and act in conformity to His will.

At this point, the “Mosaic distinction,” as Jan Assmann has called it, enters the equation: since there can be *only one* sovereign whose will governs the world and *only one* account that truly reveals His will, distinguishing between the one true God and many false gods and between true and false religion becomes essential.²⁴ The act of worship should have only the true God as its object. It unites His followers and divides them from those who follow false gods. Empirically speaking, worship needs to demarcate the boundary of the community of believers, but this demarcation cannot happen just by pointing to the social environment that lies outside this community, since some degree of interaction and sharing of practices with others is inevitable. The rift between true and false religion compels one to strictly distinguish two kinds of acts from each other: one kind involves false worship with all its ramifications, and the other is indifferent to worship. Some acts are idolatrous in nature, and others are indifferent to religion. As Balagangadhara suggests, the notion of idolatry splits the realm outside of the Christian religious community into two spheres: the secular realm of things indifferent to religion and that of false religion.²⁵

Idolatry plays the role of a filter: something is secular, *if and only if* it is neither idolatrous nor truly religious. It constitutes the realm of the secular by defining the triad of the truly religious, the falsely religious, and the indifferent.²⁶ This filtering mechanism is well illustrated by Tertullian’s (160–220 C.E.) *De Idololatria*, which first distinguishes between the worship of God and devil-worship and next scrutinizes a variety of practices to decide whether these belong to the realm of idolatry. The followers of Christ could not participate in any heathen festivals and also not in the games and spectacles; magic, astrology, and miracle-working were cases of “formless idolatry”; any craft, profession, or

trade contributing to the equipment or formation of idols was also off-limits.²⁷ Finally, Tertullian could decide which practices were neutral: Christians could attend public and private ceremonies related to betrothals, weddings, and name-givings and could even wear a white toga at such occasions.²⁸ Similarly, in the Middle Ages, when entire nations converted to Christianity, the pope was asked to determine which of their practices had to be rejected after conversion. In the case of the Bulgars, for instance, he condemned the “incantations, jests, verses, and auguries” they performed before battle, but placed the wearing of trousers by women and the king’s custom of dining alone in the indifferent realm.²⁹ In such instances, the filtering mechanism of idolatry identifies those practices in the surrounding society in which members of the Christian community can participate and those which are to be rejected. In this way, idolatry constructs the secular realm and, at the same time, draws the external boundary of the Christian community.³⁰

While worship constitutes the practices that are obligatory, idolatry identifies those practices that are forbidden, thus opening the realm of the religiously permissible.³¹ By filtering out such neutral or indifferent practices, the mechanism of idolatry creates a secular world that is now defined by Christian religion. In other words, the secular realm is not the world that lies outside the Christian religious world and that has nothing to do with religion, but a *sanitized* realm of social practice cleansed from “false worship.” The religious-secular distinction is made by and within a particular form of Christian religion, in opposition to idolatry.

Historically, whenever idolatry became the subject of intense dispute in Christian Europe, this was not mere theological contingency. Such disputes point to the formation of a new secular world necessary to demarcate the boundary of a Christian religious community. This is why early Christian authorities became fixated on distinguishing the three realms of religious, indifferent, and idolatrous practices: they had to build a wall of separation between their own religious community and the world of false worship. The same necessity also explains why Reformers identified a variety of practices of medieval society as idolatry, and why, in the period of confessionalization, each confessional church began to perform the same operation on its social environment. Given the fragmentation of Western Christianity after the Reformation, this mechanism could be reiterated endlessly by each schismatic community. Each accused the others of violating the boundary between the religious, the secular, and the idolatrous.

However, this explains only part of the story. It does not tell us why *ever more* Christian practices and doctrines were identified as false human fabrica-

tions in religion. Here, we have to introduce another aspect of Balagangadhara's theory: as a religion, Christianity not only explains the world as the will of God but also accounts for itself as the act of self-disclosure in which God reveals His all-encompassing will to humanity. As such, this religion claims a truth that is both unconditional and universal in nature. As God's revelation to humanity, it has to be unconditionally accessible to all; as the revelation of His will, it is universally valid for all.

Because of this truth claim, Christian religion knows of a *double dynamic of universalization*.³² It expands in two ways: not only through proselytization, whereby groups of people are converted to its specific doctrines and practices, but also through a moment of secularization, whereby it achieves universalization in fact by progressively losing its specific form. In any historical instantiation of Christianity, a tension and interplay develop between these two antipodal moments of expansion: in that of proselytization, the particularity of some form of Christianity is stressed, both in terms of doctrines and practices; in that of secularization, this particularity gives way to a drive to become more generic, which causes (this form of) Christian religion to cast off specific doctrines and practices, because these pose obstacles to its further diffusion in society.³³

After the Reformation, I would like to suggest, one of the forms taken by this moment of secularization was to identify certain aspects of confessional churches as idolatrous and claim that they are really human and indifferent and falsely imposed as God's will. In this way, these aspects were cast off from particular forms of religion and pushed toward the secular realm of indifferent things. This moment of secularization went hand in hand with identifying certain practices and doctrines as constricting and corrupting additions to religion. Often, this took the form of contrasting the true *spiritual* form of religion to its false material and political counterparts. Prototypes of the latter were Judaism with its ceremonial law and national restrictions,³⁴ and the Roman Catholic Church with its canon law and priestly hierarchy. Protestants argued that they were removing human accretions added to the pure core of divine revelation in a continuous process of degeneration of religion.

Hindu Law and False Religion

At first glance, there appears to be quite a stretch between the Reformers' intolerant notions of false religion and the regimes of religious toleration that emerged in early modern Europe. As several authors argue, however, the normative model of toleration formulated by early modern thinkers to cope with

the coexistence of several Christian confessions in one polity had deep roots in Protestant political theology.³⁵ In fact, it derived from a *generic theology of Christian freedom*, which said that political rulers had authority only over the secular realm and our material welfare and that they ought not to interfere in the religious realm of the soul's salvation.³⁶

Naturally, different confessions considered *different* sets of practices as true worship and idolatry; consequently, there was disagreement also on the scope of the secular realm. According to the principle of toleration, political rulers should abstain from judgment on these conflicting theological claims. Instead, they relied on a background consensus of what counted as secular and religious, which was acceptable to different confessions. But this background consensus also drew on the generic framework of Christian freedom to determine what is religious and what secular. One of the consequences was the agreement among many advocates of toleration that Catholicism could not be tolerated, because it was *not* religion, but only a political institution that falsely claimed to be religious.³⁷

Let me formulate this as a hypothesis: even where the state did not engage in explicit endorsement of any religious truth, the conceptual mechanism that allowed it to sift the religious (as the realm of toleration and freedom) from the secular (as the realm of state interference) always involved an *implicit notion of false religion*. It is almost as though, in this model of religious toleration, a secularized counterpart had developed to the filtering mechanism of idolatry. Whereas the explicit notion of idolatry had allowed the church to determine which practices in the surrounding society were secular and therefore acceptable to Christian believers, the implicit notion of false religion now enabled the state to establish which among all the practices considered religious by its subjects could indeed count as religion and ought therefore to be tolerated. Hence it could also decide which other practices could be regulated as secular superfluities and human inventions.

Of course, this is a tentative hypothesis. In what follows, we will examine its viability by analyzing a specific historical episode: the early-nineteenth-century attempt to set up a legal regime of religious toleration in British India. When Europeans began to conceive of the "Hindu religion" in India, all agreed that this was an instance of false religion, full of superstition and idolatry. Yet, once the British took control of Bengal in the late eighteenth century, they intended to create a government and legal system that would be tolerant of all religions and adapt itself to local customs. In a 1772 plan for the administration of justice in Bengal, the Committee of Circuit stated the following: "We have endeavoured to adapt our Regulations to the Manners and Understandings of the

People, and Exigencies of the Country, adhering as closely as we were able, to their ancient Usages and Institutions."³⁸ The ensuing legal system allowed for native subjects to be ruled by their own "sacred law" in questions of religion, inheritance, and contract.³⁹

Here, we are not looking to determine the motives behind this policy of religious toleration or their relative proportion. To some extent, it served the economic and political interests of the Company and was motivated in pragmatic terms; however, normative principles of toleration and religious freedom and the political debates in England about this issue also shaped colonial policy.⁴⁰ Of interest to us is *the conceptual form* taken by this British legal policy toward local traditions in India. Even though the private judgment of colonial officials might still reject native "religions" as false, and missionaries certainly retained the desire to eradicate idolatry, the government and its legal system did not allow for this distinction between true and false religion.

This did not entail that the British left indigenous traditions in India untouched. They approached the *dharmaśāstra* traditions as "sacred law," even though these treatises were not rules of law, but rather described customs of different groups and localities and contained a variety of reflections, sayings, and maxims for settling disputes. Instead of allowing the *dharmaśāstra* traditions to continue to play the same role in society as before, the British began to reform and codify them into a systematic, uniform and consistent body of law.⁴¹

The policy to retain "the laws of the Shaster" soon created problems for the administration of justice, as it was unclear what exactly this supposed sacred law of the Hindus consisted of. This manifested itself in two ways. First, the official policy of noninterference compelled colonial officials to determine which practices were truly religious and had to be tolerated. Take the example of "hookswinging," or *carak puja*, a ritual that involved suspending the bodies of devotees by iron hooks through the skin. Nicholas Dirks has noted that the judicial inquiries about the toleration of "hookswinging" in South India always centered upon two aims: "[To] establish first, that hookswinging did not have the proper sanction of religion at all and second, that in any case it was performed in the name of religion only to mislead the public and subvert religion itself" and to serve the interests of temple priests.⁴² For decades officials disputed whether "hookswinging" had scriptural sanction and religious significance. Was it really part of Hindu religion or merely primitive superstition abused by temple priests to manipulate believers? Any controversial practice—including *sati* (the immolation of a widow), female infanticide, assistance at the suicide of lepers, and so forth—could generate the same type of contro-

versy about its religiousness. In each case, *pundits* affiliated to the courts were consulted to determine whether the practice was sanctioned by their scriptures. If the decision was negative, the practice in question was relegated to the secular realm, where it became subject to criminal law and could be banned.⁴³

At this first level, we note how a generic Protestant notion of false religion operated implicitly here. According to this notion, idolatry consisted of practices and doctrines invented by human beings, without scriptural sanction, which were imposed as though they were religious. These fabrications were often denounced as the work of self-interested clerics. Even though the government and its courts of law approached Hindu traditions as religion tout court, without adding the predicate of falsity, the way in which they did so nevertheless smuggled in this theological distinction between true and false religion.⁴⁴ But this was introduced as though it concerned a distinction *internal to* Hindu religion. Some practices were accepted as truly religious, while others were rejected as illegitimate human additions to religion. The boundary between these realms was drawn along the lines of the division between the essentials commanded by God in Scripture and indifferent things that were falsely imposed as religious. Since the task of locating the precise boundary was displaced to the supposed scriptures and priests of "Hindu religion," the colonial legal system effectively transplanted this conceptual structure *into* the Hindu traditions.

Second, more generally, the question emerged of which rules were to guide judicial decisions in the domain of Hindu law. "There is hardly any question arising out of Hindoo law, that may not be either affirmed or denied, under the sanction of texts, which are held to be equal in point of authority," so concluded a man of great experience in the matter, Sir Francis Macnaghten, Supreme Court Judge at Fort William in Calcutta. In a work that would soon be distributed to all Bengal courts, he admitted that the plethora of contradictions, unintelligible passages, and conflicting authorities were extremely problematic. However, he affirmed that "their own is the only law to be administered to" Hindus, and that, by judicious selection and consistent application, "we may hope, in time, to cleanse the system of its aggregated corruptions, and to defecate the impurity of ages." By creating such a consistent system of rules, one could also avoid the partiality of native lawyers: "We shall then by a series of adjudications give consistency to the law, and leave the rights of a people unmolested."⁴⁵

Sir William Jones, another Supreme Court judge and celebrated philologist and orientalist, had already come to very similar conclusions in a 1788 letter to the Marquis Cornwallis, where he explained that judges could not "give judgement only from the opinions of the native lawyers and scholars," who deceived

them by quoting half-sentences from a single obscure text “as express authority, though perhaps, in the very book from which it was selected, it might be differently explained, or introduced only for the purpose of being exploded.” Jones called for a digest of Hindu law after the model of Justinian’s Pandects, which would be consulted by the courts as a fixed standard of justice, free from the impositions and fabrications of native lawyers.⁴⁶

Other colonial administrators proposed similar solutions to the perceived problem. In 1823, Governor Elphinstone of the Bombay Presidency concluded that there were only two potential solutions: either creating a new code founded on general principles, or compiling “a complete and consistent code from the mass of written laws and the fragments of tradition, determining on general principles of jurisprudence those points where the Hindoo books and traditions present only conflicting authorities.”⁴⁷ Given the attachment of the natives to their institutions, the second plan was the only viable option. In pursuit of this plan, the incredible variety and intricacy of customs and “caste rules” surfaced when administrators collected these in different parts of India.⁴⁸ Yet the conviction remained that all this derived from the degeneration of an original Hindu code.⁴⁹

This belief that Hindu law had degenerated was embedded in a more general orientalist image of Hindu religion as an originally pure doctrinal core, similar to Christian theism, which had been corrupted by human additions. In the words of one author: “The genuine principles of the Hindu religion inculcate the most sublime notions; though its rites are debased with idolatry and superstition.”⁵⁰ To make disappear all contradictions from Indian religion, a French orientalist recommended, one should return to the common point where each sect had started and examine the original principle, express it in its purity and then expose the aberrations that had ruined it.⁵¹ Indeed this approach was applied to Hindu law, which “in its pure and original state, does not furnish many instances of uncertainty or confusion. The speculations of commentators have done much to unsettle it, and the venality of Pundits has done more.”⁵² Now it was a matter of bringing back the pure and clear Hindu code.

Again, the same crucial shift occurred here. Missionaries and other critics had denounced Hindu law as the fabrication of Brahmin priests, who had feigned a divine revelation in order to prescribe it as God’s own law and thus transform the believers into “only *Machines*, which are mov’d by their *Priests*.”⁵³ In this sense, contemporary Hindu law exemplified false religion: it imposed human inventions as though these were necessary to salvation, human laws as though they were God’s will. In the eyes of the missionaries, the only possible approach to the native traditions of India involved a wholesale rejection of this

“heathen religion” and conversion to the true will of God—that is, their particular version of Protestantism.

While the colonial government did not approach Hindu law in the same way, it retained the theological distinction between truth and falsity at a fundamental level. The British never prohibited false religion or idolatry explicitly, but did conceive of “religion” in general—and “Hindu religion” in particular—in terms of the Protestant model of a set of scriptural rules that reflected the revealed will of God. However, the Hindu traditions and *dharmaśāstra* treatises did not behave like such a consistent set. When colonial officials and scholars tried to extract a consistent code, they rejected those aspects of these traditions that deviated from the Protestant model of religion as human accretions, impositions of native lawyers or priests. In other words, the process of codification was structured by this theological model of false religion and degeneration, much as the same theology had inspired demands for legal rationalization and codification in England.⁵⁴

This tendency to transplant Protestant-Christian structures into Hindu traditions could take several forms and never required explicit rejection of practices as idolatry. As Robert Yelle has shown, the British secularized Hindu law in similar ways by marginalizing the ritual aspects of *dharmaśāstra* traditions.⁵⁵ Even though these ritual aspects were described in *dharmaśāstra* texts, they were nevertheless disestablished and removed from editions and translations of Hindu codes. First, the British modeled their view of Hindu tradition on the Christian understanding of Judaism as a restricted carnal version of Christian spiritual truth. Next, they marginalized Hindu ritual as a set of irrational constricting ceremonies and laws, which could never truly be part of religion and law.

Consequently, in several ways, the colonial legal system induced the Hindu traditions to *internalize* the Protestant-Christian division between the religious, the secular, and the falsely religious. The conceptual realm of false religion had been secularized in the sense that *it became an implicit criterion presented as though it were internal to Hindu religion*. All aspects of native traditions that did not fit into the codified model of Hindu law were rejected as illegitimate human additions to true “Hindu religion” or denounced as ceremonies and rites that had no role to play in real “Hindu law.” Thus, these aspects were relegated to a hidden realm of false religion. In this way, the institutions of secular law in colonial India contributed to the expansion of Protestant Christianity in its moment of secularization. Rather than eradicating Hindu religion and spreading the specific doctrinal content of Protestant Christianity, its formal structures were diffused in Indian society by being *infused into* Hindu traditions.

Conclusion

It remains to be seen how far this argument about the early phase of British colonial rule in India can be extended to other manifestations of the liberal state and its system of secular law. However, the widespread quandary of legal religion indicates that a similar process may be at work wherever secular courts of law have to decide what is and what is not religion. Where it concerns matters of religion, the language that liberal democracy speaks is a religious language that has become its own metalanguage. Secular law is one of the institutions through which this happens. But when such a theological language is used in courts of law to determine what counts as religion, then its concomitant notions of false religion also enter the picture.

By deciding that certain things, which are believed to be religious by some group, are actually not truly religious, our courts implicitly reject these practices as false religion. When this happens, they insert Protestant-Christian structures into the different forms of religion and tradition that exist in our liberal-democratic societies. Further research will have to show what the precise relation is between secular law and the dynamic of universalization of Christian religion, which has always manifested itself in drawing the distinction between the religious and the secular (and the falsely religious). It may well be the case that the realm of false religion never disappeared from secular law, but has merely gone underground.

Notes

The author would like to thank the editors of this volume, the anonymous reviewers, and S. N. Balagangadhara for helpful comments on earlier versions of this essay.

1. On this practice of smuggling metaphysical positions into "neutral" secular discourse, see Steven D. Smith, *The Disenchantment of Secular Discourse* (Cambridge, MA, and London: Harvard University Press, 2010), 26–38.

2. See, for example, Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton: Princeton University Press, 2007); Tim Jensen's chapter in this volume.

3. Nicholas Dirks, *Castes of Mind: Colonialism and the Making of Modern India* (Princeton and Oxford: Princeton University Press, 2001), 149–72; Lata Mani, *Contentious Traditions: The Debate on Sati in Colonial India* (Berkeley and Los Angeles: University of California Press, 1998); Jakob De Roover and S. N. Balagangadhara, "Liberty, Tyranny and the Will of God: The Principle of Toleration in Early Modern Europe and Colonial India," *History of Political Thought* 30 (2009): 111–39.

4. Bodo Nischan, "The 'Fractio Panis': A Reformed Communion Practice in Late Reformation Germany," *Church History* 53 (1984): 17–29.

5. Robert A. Markus explains these developments in *The End of Ancient Christianity* (Cambridge: Cambridge University Press, 1990). There were similar concerns about

idolatry as the boundary marker between Jews and Gentiles: "They included questions of what to do with some Gentile coins, whether to go to the baths, games and other activities, what food to buy, who you can eat with, how and where, who you can marry, amongst many other things." Mark Bonnington, "Fleeing Idolatry: Social Embodiment of Anti-Idolatry in the First Century," in *Idolatry: False Worship in the Bible, Early Judaism and Christianity*, ed. Stephen C. Barton (London and New York: T. and T. Clark, 2007), 107.

6. *Medieval Handbooks of Penance: A Translation of the Principal Libri Poenitentiales*, ed. and trans. John T. McNeill and Helena M. Gamer (New York: Columbia University Press, 1990), 41, 78, 198.

7. Raymond Mentzer, "Disciplina Nervus Ecclesiae: The Calvinist Reform of Morals at Nimes," *Sixteenth Century Journal* 18 (1987): 94.

8. Raymond Mentzer, "The Persistence of 'Superstition and Idolatry' among Rural French Calvinists," *Church History* 65, no. 2 (1996): 220–33; Michael F. Graham, *The Uses of Reform: 'Godly Discipline' and Popular Behavior in Scotland and Beyond, 1560–1610* (Leiden: Brill, 1996).

9. Bodo Nischan, "Lutheran Confessionalization, Preaching, and the Devil," in *Lutherans and Calvinists in the Age of Confessionalism* (Aldershot: Ashgate Variorum, 1999), 4.

10. Robert Kolb, "God, Faith and the Devil: Popular Lutheran Treatments of the First Commandment in the Era of the Book of Concord," *Fides et Historia* 15 (1982): 74, 79, 81–82.

11. Nischan, "Lutheran Confessionalization, Preaching, and the Devil," 8.

12. Martin Luther, "The Freedom of a Christian," in *Martin Luther's Basic Theological Writings*, ed. Timothy F. Lull (Minneapolis, MN: Fortress Press, 1989); Philip Melancthon, "Loci Communes Theologici," in *Melancthon and Bucer*, ed. Wilhelm Pauck (Philadelphia: Westminster Press, 1969).

13. Carlos Eire, *War against the Idols: The Reformation of Worship from Erasmus to Calvin* (Cambridge: Cambridge University Press, 1986).

14. See the Smalcald Articles, Part II, Art. 2, in *The Book of Concord: The Confessions of the Evangelical Lutheran Church*, ed. Robert Kolb and Timothy J. Wengert (Minneapolis, MN: Fortress Press, 2000), 301–5, and "Chapter 27: Of Rites, Ceremonies and Things Indifferent" of the Second Helvetic Confession, in *Creeds and Confessions of Faith in the Christian Tradition*, vol. 2: *Reformation Era*, ed. Jaroslav Pelikan and Valerie Hotchkiss (New Haven and London: Yale University Press, 2003), 521–22.

15. From the "Formula of Concord, Solid Declaration, Article X: Ecclesiastical Practices," in *The Book of Concord*, 638.

16. For illustrations of the debate on things indifferent, see Edward Bagshaw, *The Great Question Concerning Things Indifferent in Religious Worship* (London, 1660); Richard Baxter, *A Christian Directory, Or, A Body of Practical Divinity and Cases of Conscience*, vol. 4 (London, 1825), 488–89; Christian Thomasius, "The Right of Protestant Princes Regarding Indifferent Matters or *Adiaphora*," in *Essays on Church, State, and Politics*, ed. and trans. Ian Hunter, Thomas Ahnert, and Frank Grunert (Indianapolis, IN: Liberty Fund, 2007).

17. Eire, *War against the Idols*, 68–71.

18. John Knox, *Writings of the Rev. John Knox* (Philadelphia: Presbyterian Board of

Publication, 1842), 156. See Richard Kyle, "John Knox and the Purification of Religion: The Intellectual Aspects of His Crusade against Idolatry," *Archiv für Reformationsgeschichte* 77 (1986): 265–80.

19. *Confessionalization in Europe, 1555–1700: Essays in Honor and Memory of Bodo Nischan*, ed. John M. Headley, Hans J. Hillerbrand, and Anthony Papalas (Aldershot: Ashgate, 2004); R. Po-Chia Hsia, *Social Discipline in the Reformation: Central Europe 1550–1750* (London and New York: Routledge, 1989); Wolfgang Reinhard, "Zwang für Konfessionalisierung? Prolegomena zu einer Theorie des konfessionellen Zeitalters," *Zeitschrift für Historische Forschung* 10 (1983): 257–77.

20. On this anticonfessional dynamic, see Benjamin Kaplan, *Calvinists and Libertines: Confession and Community in Utrecht, 1578–1620* (Oxford: Clarendon, 1995).

21. Some seventeenth-century examples are: Lord Herbert of Cherbury, *De Veritate*, trans. M. H. Carré (Bristol: J. W. Arrowsmith, 1937), and *Pagan Religion: A Translation of De religione gentilium*, ed. J. A. Butler (Ottawa: Dovehouse Editions, 1996).

22. In his work, Balagangadhara shows convincingly that the "secular" academic study of religion and the many explanations of religion of the last three centuries have reproduced the facts, concepts, and claims of a generic Christian theological framework, rather than developing any independent theory of religion. To avoid adding complexity to the argument, I will not fully explain his alternative theory of religion and its implications here. See his "The Heathen in His Blindness . . .": *Asia, the West and the Dynamic of Religion* (Leiden: Brill, 1994).

23. This characterization ignores other properties contingent to the *Christian* religions, such as the central role of Jesus Christ as the revelation of God's will.

24. Jan Assmann, *The Price of Monotheism*, trans. R. Savage (Stanford: Stanford University Press, 2010).

25. Balagangadhara, "The Heathen in His Blindness," 498.

26. See Robert Markus, *Christianity and the Secular* (Notre Dame, IN: University of Notre Dame Press, 2006), 5–6.

27. Tertullian, *De Idololatria*, ed. J. H. Waszink and J. C. M. van Winden (Leiden and New York: Brill, 1987), 11.6–8, 43–45.

28. *Ibid.*, 16.1–2, 55.

29. Florin Curta, *Southeastern Europe in the Middle Ages, 500–1250* (Cambridge: Cambridge University Press, 2006), 170–72; Markus, *The End of Ancient Christianity*, 5–6.

30. From our present-day perspective, informed by the modern religious-secular dichotomy, it may seem as though there are really four categories at work here: true religion, idolatry, indifferent religious practices, and things that have nothing to do with religion—of which only the fourth is "secular," properly speaking. However, it is only *within* the framework of a specific religion that one could decide which practices were unrelated to religion, both true and false. Potentially, any practice could turn out to be relevant to religion and become secular to a specific religious community only through its filtering mechanism of idolatry. In this sense, all secular or indifferent practices were *religious* secular practices, because they had been so decided by a specific religion and its authorities. There was no secular sphere of things that have nothing to do with religion, generally speaking. Maximally, an ecumenical consensus could emerge among different religious communities about the scope of the secular.

31. As Talal Asad notes, modern Islamic thinkers also make the same type of three-fold distinction. Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford: Stanford University Press, 2003), 237.

32. This explanation of the double dynamic of universalization in Christian religion is necessarily concise. For a more extensive argument, see Balagangadhara, "The Heathen in His Blindness," ch. 11.

33. Paul's *Epistle to the Galatians* with its rejection of "the works of the law" and circumcision is an early manifestation of this moment of secularization in Christianity.

34. See Robert Yelle's chapter in this volume.

35. John Coffey, "Puritanism and Liberty Revisited: The Case for Toleration in the English Revolution," *Historical Journal* 41 (1998): 961–85; Andrew Murphy, *Conscience and Community: Revisiting Toleration and Religious Dissent in Early Modern England and America* (University Park: Pennsylvania State University Press, 2001), 11–16; Jeremy Waldron, *God, Locke, and Equality: Christian Foundations in Locke's Political Thought* (Cambridge: Cambridge University Press, 2002), 208–12.

36. Jakob De Roover and S. N. Balagangadhara, "John Locke, Christian Liberty and the Predicament of Liberal Toleration," *Political Theory* 36 (2008): 523–49.

37. Famous examples are John Locke, "A Letter Concerning Toleration," in *Two Treatises of Government and a Letter Concerning Toleration*, ed. Ian Shapiro (New Haven and London: Yale University Press, 2003); and John Milton, *A Treatise of Civil Power in Ecclesiastical Causes* (London, 1659).

38. *Extract of a Letter from the Governor and Council at Fort William to the Court of Directors, Dated 3d November, 1772, Transmitting a Letter from the Committee of Circuit, at Cossimbuzar, and a Plan, Framed by that Committee, for the Administration of Justice in Bengal.*

39. Sir Francis W. Macnaghten, *Considerations on the Hindoo Law as It Is Current in Bengal* (Serampore: Mission Press, 1824), v–vi; Sir Henry Sumner Maine, "The Sacred Law of the Hindus," in *Dissertations on Early Law and Custom* (London: John Murray, 1891), 1–2.

40. We have analyzed this elsewhere; see De Roover and Balagangadhara, "Liberty, Tyranny and the Will of God," 117–25. The standard account explains the Company's toleration policy in terms of economic and political prudence: see, for example, Penny Carson, "The British Raj and the Awakening of Evangelical Conscience: The Ambiguities of Religious Establishment and Toleration, 1698–1833," in *Christian Missions and the Enlightenment*, ed. Brian Stanley (Grand Rapids, MI: W. B. Eerdmans, 2001).

41. Nandini Bhattacharyya-Panda, *Appropriation and Invention of Tradition: The East India Company and Hindu Law in Early Colonial Bengal* (New Delhi: Oxford University Press, 2008); Bernard S. Cohn, *Colonialism and Its Forms of Knowledge: The British in India* (Princeton: Princeton University Press, 1996), 57–75; J. D. M. Derrett, *Religion, Law and the State in India* (London: Faber and Faber, 1968); Richard W. Lariviere, "Justices and Panditas: Some Ironies in Contemporary Readings of the Hindu Legal Past," *Journal of Asian Studies* 48 (1989): 757–69.

42. Dirks, *Castes of Mind*, 157–58.

43. See *British Parliamentary Papers* 1821, vol. 18, 24–26, 38–39, and 246–47 for some striking instances.

44. Dirks largely ignores the role of this theology of false religion in the "hookswing-

ing" controversy and instead emphasizes colonial notions of agency and free will and "low popular" and "high classical religion" (see *Castes of Mind*, 164–72). These notions derived from another concern: to demonstrate that the practice was "falsely" religious, one had to show that the participants did not autonomously and voluntarily follow injunctions from the real scriptures of their religion, but were manipulated by clerics who had added their own fabrications.

45. Macnaghten, *Considerations on the Hindoo Law*, iii, vi, xi–xii. See also Sir Archibald Galloway's concerns in his *Observations on the Law and Constitution of India* (London, 1825), 240.

46. *The Letters of Sir William Jones*, 2 vols., ed. Garland Cannon (Oxford: Clarendon, 1970), 795–96.

47. Elphinstone in Arthur Steele, *The Law and Custom of Hindoo Castes within the Dekhun Provinces subject to the Presidency of Bombay, Chiefly Affecting Civil Suits* (London: W. H. Allen and Co, [1827] 1868), preface.

48. See Steele, *The Law and Custom of Hindoo Castes*; and the notes on Harry Borradaile's work in "Bombay: Correspondence relative to the employment of Mr. Borradaile in the compilation and translation of certain works, 29 June 1829," in *Board's Collections* 53185, 1832–1833, vol. 1339.

49. There are parallels here with the debates regarding British common law during the seventeenth and eighteenth centuries that call for further investigation. Some authors described common law as an evolving body of law, with apparent inconsistencies that were interpreted and refined by the judges, underneath which lay a coherent, constant, immemorial, and pure system. Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Harvard: Harvard University Press, 2003), 246–70; J. G. A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge: Cambridge University Press, 1987), 30–70.

50. Anonymous, "The History of British India," in *The Asiatic Annual Register . . . For the Year 1799* (London, 1800), 3–4.

51. M. Lacroix de Marlès, *Histoire Générale de l'Inde Ancienne et Moderne*, 6 vols. (Paris: Emler Frères, 1828), vol. 1, 16–17.

52. W. H. Macnaghten, *Principles and Precedents of Hindu Law*, vol. I (Calcutta: Baptist Mission Press, 1829), iv.

53. La Crequinière, *The Agreement of the Customs of the East-Indians, With those of the Jews, and other Ancient People* (London, 1705), 136; see Charles Grant, "Observations on the State of Society among the Asiatic Subjects of Great Britain (1792)," in *British Parliamentary Papers—Colonies East India*, vol. 5: 1831–1832 (Shannon: Irish University Press, 1970), 34–35.

54. Assaf Likhovski, "Protestantism and the Rationalization of English Law: A Variation on a Theme by Weber," *Law and Society Review* 33 (1999): 365–91; Robert A. Yelle, "Bentham's Fictions: Canon and Idolatry in the Genealogy of Law," *Yale Journal of Law and the Humanities* 17 (2005): 151–79.

55. Robert Yelle, "The Hindu Moses: Christian Polemics against Jewish Ritual and the Secularization of Hindu Law under Colonialism," *History of Religions* 49 (2009): 141–71.