
RELIGIOUS REVIVAL AND PSEUDO-SECULARISM

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I. SECULARISM: A CONFUSED NOTION

It would be very difficult to assess in a unified way the various impacts of what is called “religious revival” on the related notions of constitutionalism and secularism. In order to begin to clarify the question, I would like first to define the concept of secularism I shall use in this article. Actually, the idea seems to be very ambiguous—and perhaps it is unmanageable—if one does not distinguish between at least two meanings of the term.¹ In the first sense, secularism means a personal orientation of life: a secular person is an individual who, in the basic choices he makes (in his “life plans,” as Rawls would have put it), does not refer to a transcendent or sacred, supra-human element. One can notice that modern life has often been defined as being dominated by a process of secularization in that sense: the idea is that people are less and less oriented by religions in their spiritual choices and their search of “wisdom.” Of course, such an idea, which was remarkably described by Max Weber, was also challenged, notably by Hans Blumenberg. Moreover, it applies more easily to Europe, where the “unchurching” of society is blatant, than to the United States. Ironically, European States support religion on a much more massive scale than the United States: there are established religions in some countries, churches are subsidized (except in some countries like France), private religious schools are funded in various ways, and religion is taught in public schools (again, with the notable exception of France). Such support of religion(s) by the States has of course had to be made compatible with the respective requirements of religious freedom and neutrality of the State (in the domain of spiritual orientations). But it remains that Europe is at the same time more secularized (atheism and agnosticism are much more present and legitimate than they are in the United States) and more supportive of religion than America. There are of course many explanations for such a paradox. Tocqueville said, when he was visiting Jacksonian America, that religion flourished there because it was separated from the State

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¹ For the following analysis, see GUY HAARSCHER, *LA LAÏCITÉ* (4th ed. 2008).

and thus was not dependent on the ups and downs of politics. The contrary, he said, was true for France, in which the Ancien Régime had been a mixture of social privilege, despotism and state church: Catholicism was so intrinsically linked to the hated absolute monarchy that the struggle for liberty and human rights had inevitably strong antireligious overtones.²

So the first meaning of secularism is immediately associated with the notions of atheism, agnosticism and philosophical materialism. Now when one speaks of a secular *State* and not of secular *persons*, the meaning of the term becomes quite different. In such a context, we do not speak of non-State actors who have the right to be religious or “secular” in the first, abovementioned, meaning of the word; rather we refer to the political entity which is supposed to represent the whole people, the *laos* as such. In that sense, a secular State can of course neither be pro-religious nor anti-religious. It must be neutral and based on a notion of ordered liberty. It must notably guarantee the free exercise of religion, provided the latter does not enter into conflict with the rights of the others or some compelling interests of the State, such as the requirement of religious neutrality. Here secularism is practically equivalent to the French word *laïcité*, although the devil is always in the details, and each notion has generated many controversies on both sides of the Atlantic. A secular State does not take position in spiritual matters; it does not intervene—to use in a slightly modified way a phrase coined by Justice Holmes—in the market of religious ideas. It does not refer its action to transcendent and superhuman entities as they are defined by the various denominations which coexist—and, one can hope, interact and cooperate—in civil society. One of the main reasons for this requirement is that in a pluralist society the religious landscape is necessarily fragmented. So if the State tries to justify its policies by starting the reasoning with premises that are only acceptable to a particular religious community, it will *ipso facto* not represent the whole *laos* (people) any longer. And of course, in a more radical way, if there is a State Church and the State discriminates against—or, worse, persecutes—religious dissidents, it will *a fortiori* not represent the people as such. But is the State—as it is notably the case in the United States—entitled to make non-denominational (that is, non-sectarian) references to God in general? This might be considered unacceptable by good citizens who are also nonbelievers and would rightly consider that the State, by doing so, does not represent the whole *laos*. (Of course, these problems are benign as compared to discrimination and persecution, which have always been associated with official Churches and the incestuous relationship between “politics” and “theology.”) So

² See 1 ALEXIS DE TOCQUEVILLE, *DE LA DÉMOCRATIE EN AMÉRIQUE* 403-04 (Garnier-Flammarion 1981) (1835).

the State is secular in that it acts without taking a stand in the religious controversies concerning the ultimate ends of human existence, that is, metaphysical questions. The State has to remain, so to say, in what the French call *le siècle* (from which the notions of *séculier* and *sécularisation* derive). It must only act in this world without entering into debates about the “other world.” Through that perspective, we can say that the Soviet Union was *not* a secular State, because it privileged atheists (“secular people” in the first sense of the term, as defined above) to the detriment of religious persons, as religion was considered to be a reactionary delusion. Such a State was not neutral, because it took a position in favor of irreligion and persecuted individuals who decided to go to church, to synagogue or to the mosque. A secular *State* does not privilege secular *persons* over believers. Neither does it intervene against atheists or agnostics. It is neutral in these matters.

In other words, a secular individual lives in “*le siècle*” (this world), in time and history, and does not believe in the “eternal.” He thinks religion is an illusion, and might even consider that it is a *dangerous* illusion, so that the world would be better off without religious people, priests, etc. Provided he does not prevent other people from thinking and acting differently, he has the right to think that religion is, as the young Marx said, “the opium of the people.”³ On the other hand, the State is secular if it does not refer its acts to a superhuman entity. It does not affirm that the latter exists or does not exist, and has nothing to say about its meaning, form, sacred texts, etc. That State remains in the secular realm but respects all creeds provided they can be accorded with the basic tenets of liberal democracy. Again, the devil is in the details, and many controversies have arisen and will arise in the future about these general definitional elements.

One can also add that the secular State, when it tries to justify its policies, must use what Rawls called “public reason”⁴ in the argumentative process. Namely, if the State reasons by using arguments which are not understandable to a part of the *laos* because

³ According to Marx:

Religion is the general theory of this world, its encyclopaedic compendium, its logic in popular form, its spiritual point d'honneur, its enthusiasm, its moral sanction, its solemn complement, and its universal basis of consolation and justification. It is the fantastic realization of the human essence since the human essence has not acquired any true reality. The struggle against religion is, therefore, indirectly the struggle against that world whose spiritual aroma is religion. Religious suffering is, at one and the same time, the expression of real suffering and a protest against real suffering. Religion is the sigh of the oppressed creature, the heart of a heartless world, and the soul of soulless conditions. It is the opium of the people.

Karl Marx, Contribution to the Critique of Hegel's Philosophy of Right, in DEUTSCH-FRANZÖSISCHE JAHRBÜCHER (1844); see also GUY HAARSCHER, L'ONTOLOGIE DE MARX (1980).

⁴ See John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 795-96 (1997).

they refer to supra-human concepts or figures that are not accessible to common sense, reason and experience, it will automatically create insiders and outsiders: a part of the people will understand the premises and accept or refuse the conclusions of the reasoning, while others will simply not be able to *enter* into the rhetorical process because the reasons used are “private” in the sense that they are only valid for a particular community—that is, they presuppose shared understandings that are just not accessible to outsiders.

But this leads us to the core of our discussion. If public reason is obviously the norm of all argumentations developed in the democratic process and the secular State, it is highly probable that those who want to push forward a religious agenda in the public discussion will *try to pay lip service to the requirements of public reason*. In a certain way, human rights and the values of liberal democracy can be considered to be the “entrance ticket” to the political community. If we suppose that an opponent of these values wants to be heard at least by a part of the *laos*, he will try to “translate” his “private” (communitarian) claims into the language of public reason. Sometimes the translation will work correctly: we may assume that some positions can be argued from a religious point of view as well as by using public reason. But in other circumstances the translation process will be much more perverse, in that the relationship of the concerned claim with secular and public reasons will be a bogus one. The less one has a deep understanding of what is at stake in the philosophy of human rights and liberal democracy, the more a manipulative “translation” will be effective—and therefore damaging. I would like to give in the following pages two examples of the strategy I call “perverse translation.” In that context, religion and “private reason” (that is, argumentation that is only valid for a specified religious group) work as a sort of Trojan horse allowing them to enter the “fortress” of secular and deliberative democracy.

II. BLASPHEMY LAW AND PSEUDO-SECULARISM

The first example concerns the old crime of blasphemy.⁵ We shall see that the process of perverse translation—which works, so to say, like a wolf in a sheepfold—is dedicated to transforming a defense of human rights (here, freedom of expression) into an advocacy of racism. Of course, the process leading from the first position to the second one is complex and devious, but at the same time a lot of people in civil

⁵ See Guy Haarscher, *Free Speech, Religion, and the Right to Caricature*, in CENSORIAL SENSITIVITIES: FREE SPEECH AND RELIGION IN A FUNDAMENTALIST WORLD 309-28 (Andras Sajo ed., 2006); Guy Haarscher, *Rhetoric and Its Abuses: How to Oppose Liberal Democracy While Speaking Its Language*, 83 CHI.-KENT L. REV. 1225 (2008).

society, as well as some state actors in the executive, legislative and judicial branches of government, buy—at least partially—the argument. Even before describing the process in detail, one can see that we are in the presence of a rather radical inversion of perspectives: in the beginning, a vulnerable individual who expresses dissident views on religion in a very combative or at least impertinent way is the victim of a non-secular State protecting an official Church by immunizing the latter from vigorous criticism. But in the end of the argumentative process, the positions are totally inverted: the former victim has become a “racist”—that is, a potential henchman—while the censor presents itself as a victim of “racism.”

Let us begin by saying that, in Europe, blasphemy laws are still on the books in several countries. Of course, in liberal democracies, they are very rarely applied, and the sanctions are very soft as compared to the penalties that used to be attached to such high crime (insulting and defaming God) a couple of centuries ago. But it remains that writings, movies, theater plays and works of art are sometimes censored under such legislations. More preoccupying is the fact that in countries where there are no blasphemy laws, we can find some apparently “innocent” legal provisions that lead to the same result—that is, censorship of expression in the name of religion. The reasoning is more convoluted in this context, but the result is the same.

One important question to be asked is how the European Court of Human Rights, which is the guardian, notably, of freedom of expression, has dealt so far with the problem. We shall see that the result of our investigation in that matter leaves us with—to speak in a politically correct way—mixed feelings. Since the beginning of the 1990s, the court has elaborated a sort of test that is supposed to allow it to deal with blasphemy cases in accordance with the general principles of the European Convention on Human Rights. Let us first remark that, in those countries where blasphemy laws exist, the legal reasoning leading to the conviction of offenders is rather simple and clear-cut: there are legal premises (anti-blasphemy provisions in positive criminal law) that make the job of the prosecution rather simple. But the question becomes more complicated once the convicted person or group of individuals brings the case before the Strasbourg Court under article 10 of the Convention (freedom of expression). The reason for such a complexification of the question is clear: the European Convention protects human beings (and sometimes legal persons), not superhuman entities. It guarantees the rights of humans who fall under the jurisdiction of one of the High Contracting Parties (member States), not the rights of God. It goes without saying that the Convention does not contain any provision criminalizing blasphemy or sacrilege. So in order to defend the position of a State which limits freedom of expression

under blasphemy statutes, one has to translate the claim into the language of the Convention (that is, the language of human rights).

How does such a process of translation work? To put the problem in a simple and pedagogic way, let us say that instead of defending the rights of God, it is now a question of protecting the rights of *other individuals*. In other terms, a conflict between human rights (freedom of expression) and a non-secular State protecting an official Church and a God is (subtly) transformed into a “systemic” conflict, that is, a conflict *between* two human rights which are situated at the same level of the “pyramid” of norms. There is no definite hierarchy, particularly in the European Convention on Human Rights, between freedom of expression and freedom of religion. So if an attack on God can be “translated” into an attack on the believers that supposedly prevents them from freely practicing the religion of their choice, there will be a systemic conflict between two rights having the same legal value. When there is a tension between two non-hierarchized norms, the following consequence becomes unavoidable: one must “balance” one right against the other. So the problem becomes a question of exaggeration or of *hubris*, that is, in legal terms, an abuse of rights. If it can be proven that a speaker exercised his right to freedom of expression in an abusive way, that is, by preventing believers from practicing their religion, and therefore violating the right to freedom of religion of the others, then it will be acceptable under the Convention to limit the speech. Instead of using the language of blasphemy, that is, offenses to God, one will have used the language of human rights. Instead of limiting a human right in the name of a dogmatic religion supported by the State, one will speak of the limitation of an abusive use of a human right for the sake of defending *another human right*. If human rights must constitute a norm that is superior to other norms (among them religious commands), what will happen if a conflict is supposed to arise *between* two human rights such as freedom of religion and freedom of expression? As there is in the concerned matter no priority rule—to use again the language of Rawls—a balancing process will become unavoidable.

Now this might be considered a sound argument in that there *are* often *real* systemic conflicts between rights. Such tensions arise for instance between freedom of expression and privacy, the right to reputation (defamation), the right to a fair trial and the right to security (prevention of crime and protection of national security). These conflicts are well documented, and there is very rich case law on the subject, notably in the respective jurisprudences of the United States Supreme Court and the European Court of Human Rights. Indeed, the supposed conflict between freedom of speech and freedom of religion, which has a definite meaning in certain narrowly defined situations,

might very easily become a Trojan horse for religious dogmatism. Trying to transform the classical conflict between free speech and official religion into a systemic conflict between human rights precisely allows the opponent of human rights (the “wolf”) to enter the sheepfold of liberal democracy under the disguise of a sheep. That is, the dogmatic element has disappeared, it does not generate suspicions any more, as the same claim (suppressing the concerned speech) is satisfied *in the name of human rights themselves*. Now the pretended conflict is a *bogus* one: it is “a sham,” to borrow a phrase used by the United States Supreme Court in another context.⁶ If the “speech” is a book, or a theater play, or a movie, or a painting, nobody will be obliged to read or see it. The right to freedom of religion will only be violated in the hypothesis that the discourse becomes intrusive, is addressed to a captive audience, is expressed in the form of fighting words, etc. If just a work of art is at stake, no human right will be violated. So the present “systemic” conflict is wholly artificial, and it is precisely forged in order to, so to speak, erode the vigilance of individuals who will be taken off-guard, as they are confronted with an apparent and “normal” tension *between* rights.

Actually, this is only the first step of the transformation I mentioned before. Indeed, so far, there is no question of “racism.” The argument remains in the domain of religion: simply—if one may say so—the emphasis is moved from God to the believer, from the superhuman element to the terrestrial element. It seems to me that the reasoning of the European Court of Human Rights in blasphemy cases has not gone farther than such a translation. (But we shall see that other people will profoundly radicalize the argument.) Admittedly, the court has used a very debatable test: it is so problematic that it generates a lot of uncertainty. In the 1976 *Handyside* case,⁷ the court affirmed in an *obiter dictum* that shocking, offending and disturbing speech was protected by the Convention.⁸ Indeed, it is obvious that if only politically correct speech—that is, speech which does not disturb anybody—were protected, there would be no need for human rights

⁶ *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987) (“While the Court is normally deferential to a State’s articulation of a secular purpose, it is required that the statement of such purpose be sincere, and not a sham.”).

⁷ *Handyside v. United Kingdom*, 1 Eur. Ct. H.R. 737 (1976).

⁸ *Id.* The court stated:

Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (10-2) it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society.”

Id. at 754.

instruments: conformist speech does not create significant risks for the speaker. The right to freedom of expression only acquires its full value when what is at stake is the speech of a dissident, that is, someone whose discourse is shocking in that it is different from what the majority (or the minority in power) usually thinks or feels. In the *Handyside* case, the court rightly relates the affirmation that shocking speech is protected by article 10 of the Convention to the idea of tolerance. Being tolerant presupposes that something (here an “expression”) is disliked by a part of the population, *and* that the latter decides *not* to try to suppress it. The interpretation of freedom of expression by the European Court of Human Rights means that at least outward tolerance can be *imposed* by law and the tribunals.

This might have been the end of the story for States trying to make the Convention compatible with their respective blasphemy laws: the Convention does not protect God, and as far as believers are concerned, *Handyside* told them that they had to bear and tolerate offending, shocking and disturbing speech (which blasphemy obviously is). So when, in the 1990s, the court began to deal with blasphemy cases, some advocates of free speech were wholly confident that anti-blasphemy laws would be declared a violation of the European Convention. But it is exactly at this juncture that the court invented a test that allowed it to pretend to pursue the *Handyside* tradition *and* in some cases to validate under the Convention some decisions taken on the basis of blasphemy laws. In order to do that, the court had to invent a kind of speech that would be *still more offensive* than “simple” shocking speech as defined in the 1976 decision. So it would be possible to affirm that shocking expression is still protected, except if it is really exaggerated. Too far is too far. But what does that mean in legal terms? The court said that if speech is shocking, *and*, moreover, is *gratuitously* offensive, then it is no longer protected by the Convention (according to the way judges read it).⁹ But what is “gratuitous” in a shocking speech? The answer of the court is: a speech that does not contribute to a debate of public or general interest. So, if I correctly understand the subtlety of the criterion, an expression can be shocking provided the “shock” is in a way useful for the democratic debate. If the “exaggeration” does not generate such a benefit for the public in general, it will be considered gratuitous and, *ipso facto*, not protected by the Convention.

So the court does not “translate” (and thus legitimize) *all* convictions under blasphemy laws into a systemic conflict between rights. *Some* of these acts of censorship will be considered a violation

⁹ See *Tatlav v. Turkey*, 42 Eur. Ct. H.R. 44 (2006); *IA v. Turkey*, 45 Eur. Ct. H.R. 30 (2005); *Wingrove v. United Kingdom*, 24 Eur. Ct. H.R. 1 (1996); *Otto-Preminger Institute v. Austria*, 19 Eur. Ct. H.R. 34 (1994); see also Guy Haarscher, *Rhetoric and Its Abuses: How to Oppose Liberal Democracy While Speaking Its Language*, *supra* note 5.

of the Convention, namely in the case when believers are supposed to be shocked *and* the “trauma” is useful for, let us say, the working of deliberative democracy. In other cases, the court will declare that the censoring State has not violated the Convention. It is only the latter category of cases that falls under the label of “perverse” translation: they allow the States to suppress expressions that are shocking *and* at the same time gratuitously offensive. If the speech reaches that level of offensiveness, the accusation of blasphemy will have been translated into a violation of the right of the others to freely practice their religion. So, to provisionally conclude the argument, we can say that the court accepts the “translation” only in specified cases, when the shocking element is exaggerated and the *hubris* is considered sufficiently radical to be legitimately checked by the power of the law. A State that has blasphemy laws on its books is obviously not properly secular. But the European Court allows it to acquire a democratic legitimacy in certain cases. In short, shocking speech is protected under the Convention, gratuitous offenses are not. From the point of view of a “Holmesian” attorney who would like to predict the decision of the judges in the present matter, there is a lot of legal uncertainty.

But there are other forms of translation that pose still more serious problems. So far, I have analyzed the necessity for the European Court to modify the justification of censorship, because the legal basis (the Convention) does not contain provisions forbidding blasphemy. The situation is *in abstracto* the same in European countries that do not have anti-blasphemy statutes. France is a good example on this point. In such a context, advocates of censorship for religious reasons must rely on other provisions and try—as the European Court does—to find in these a reason for convicting the offender. But the legal situation is different, and in a sense much more problematic, than in the case of the Convention. France has an 1881 statute on the freedom of the press.¹⁰ At the end of the nineteenth century, that law was rather liberal. It provided of course for the classical limitations to free speech, for instance defamation and insult. In the 1970s, the government of president Georges Pompidou wanted to struggle in a more efficient way against racism. It considered that such a policy—a quite respectable project as such—should also deal with the deleterious effects of racist *speech*. The 1881 statute on the freedom of the press was amended,¹¹ but this was done in a very particular—and in my eyes quite problematic—way. The articles concerning respectively defamation and insult were modified so that they now include a collective element: the amended law criminalizes insult or defamation of persons because

¹⁰ Loi du 29 Juillet 1881 sur la liberté de la presse [Freedom of the Press Law] (1881) (Fr.).

¹¹ The 1972 Pleven Act modified the 1881 statute on the freedom of the press by adding two articles about, respectively, collective defamation (art. 32) and collective insult (art. 33).

of their belonging to a notably racial, national or religious group. In particular, the scope of the law of defamation has been broadened—a process which always creates a problem for freedom of expression, as both norms obviously conflict with each other. As it were, we are in the presence of a zero-sum game: what one gives to one side must necessarily be taken from the other.

Now the main difficulty entailed by such a modification of the law is, according to me, the presence of the adjective “*religious*” in a statute dedicated to struggling against *racism*. In my opinion, there is a danger of confusion between a vigorous criticism of religion—which is obviously a “speech” of general interest, taking into account the long despotic history of non-secular States—and a racist attack on a religious community. In a sense, one can readily understand the reason why the word “religious” was used here. The categories created by the racist in order to justify his practices of discrimination, exclusion, persecution and much worse are by definition arbitrary: he selects a characteristic—a real or a bogus one, a trivial or an important one—then he rejects all individuals that possess it and are therefore *a priori* deemed inferior. So it is quite possible that a religious group is targeted by racists: religion often involves, for a community, a certain way of life that is different from the mainstream. Moreover, religion is in one way or another related to a claim to absolute, transcendent and sacred truth, so differences in that domain very often lead to antagonisms. Indeed, racists may—and often do—target religious groups, as they do stigmatize national or “racial” communities (the latter being notably characterized by the color of their skin). But on the other hand, religion—as opposed for instance to “race” or the place where one was born—is related to a choice. More precisely, it can at all times *become* an object of choice. People are born into a religious milieu, and in the world, the huge majority of individuals continue to be members of the “Church” of their parents and grandparents. But if they have the opportunity of experiencing other ways of life, they can reinterpret the traditions, criticize them, and even leave the “Church” of their childhood. So it is essential to distinguish between a belonging (religion) that can always—in favorable circumstances—become an object of choice, and a belonging (“race”) which is unchangeable and possesses for the individual the characteristic of a “destiny.” I put the word “race” in quotation marks because the concerned characteristic (for instance skin color) is trivial and has no link at all with cognitive and moral competence. But the racist thinks that there is a relationship, and he adapts his behavior to that dangerous illusion. Now the problem is the following: confusion can always be entertained between a legitimate criticism of religion (including blasphemy) and a racist attack on individuals because they belong to a religious group.

This is what happened in Paris a couple of years ago, although the strategy ultimately failed. After having republished the Danish cartoons out of solidarity with, notably, some threatened journalists, the director of the satirical newspaper *Charlie Hebdo* was—as it is well known—prosecuted under the modified 1881 statute on the basis of a complaint by some Muslim associations.¹² In particular, they used the provision about insult by arguing that the cartoons were an attack on Muslim individuals because of their belonging to a religious community. That argument was particularly absurd, as *Charlie Hebdo* is a leftist newspaper that has always been involved in the anti-racist struggle. Moreover, the cartoons contained nothing “racist”: they referred to terrorism and the instrumentalization of religion by violent politics. Admittedly, they contained blasphemous elements, as, notably, the Prophet was represented (which for many Muslims already constitutes a violation of a religious norm) with a bomb on his head. But such a vigorous criticism of fanatics could not be equated with a racist attack on persons because of their belonging to the vague, diverse—and immense—community of “Islam.” The difficulty was compounded by the support some right-wing groups gave to Philippe Val, the director of the newspaper. Of course, these extremists were ready to use whatever ideological “weapons” they could find in order to attack Arabs and Muslims, whom they hate. But such a strategy cannot lead to the identification of a racist rejection with a political and religious criticism. Fortunately enough, the Paris Tribunal de Grand Instance acquitted Val, but one must know that the arguments presented by the plaintiffs are quite popular in certain milieu—the Muslims of course, but also a part of the Left which seems to be ready to defend the poor and vulnerable, even at the price of being “soft” on religious fanaticism (they seem not to have learned much from the old indulgence towards Soviet despots).

We can thus see that criticism of religion can be labeled “racist” through the following argumentative process. First, blasphemy is an attack on God, but it also aggresses believers (we saw above that such a point had already been made before and by the Strasbourg Court). Secondly, such an attack is not simply “gratuitous” (not contributing to a debate of general interest). It is also *racist* in that, the argument goes, in order to attack a religious group in such a violent way, one necessarily must despise or hate “these people.” The offender entertains a sort of irrational fear—a “phobia.” The term “islamophobia” was coined in that context. So far, it has created much deleterious confusion. For instance, when an association wanted to celebrate the

¹² Philippe Val, director of *Charlie Hebdo*, was prosecuted at the request of some Muslim organizations before the *Tribunal de Grande Instance* (trial court) in Paris, for having republished the cartoons. The trial took place on February 7 and 8, 2007. On March 5, 2007, Val was acquitted.

300th anniversary of Voltaire's birth in Geneva, it planned to show his theater play *Mahomet* (which is virulently "blasphemous"). There were many pressures, and the play was not shown. The Muslim intellectual and preacher Tariq Ramadan was accused of having been the organizer of the *de facto* act of censorship.¹³ He answered that the attacks were motivated by islamophobia: not showing the play did not amount to censorship. Quite the contrary: it was an act of "delicacy." Who can be *against* delicacy? Ramadan notably said that Muslims were not yet "ready" to see such a play. But who obliged them to attend? If believers are not directly affected by any form of anti-religious speech, they will be in no position to claim that they are prevented from freely practicing their religion. The argument is just a *sham*, but the result has been attained: *censorship has become politically correct*, as bogus public reasons—reasons valid for the *polis*, or the *laos*, and not only for a specific community—have been given to make democratically palatable an act that simply expresses religious intolerance.

In these examples, we can see the double process that is at work in the attempt to legitimize censorship in the name of human rights and liberal democracy by using pseudo-secular and pseudo-public reasons. The less vigilant the citizens are, the more manipulable they will be.

III. CREATIONISM AND PSEUDO-SECULARISM

I shall now take a second example that clearly shows how the process of perverse translation works: the battle around Creationism in the United States.¹⁴ During the 1920s, the fundamentalist movement lobbied legislators of various States. The result was that they passed what were later called "monkey laws." These laws made it a crime to teach in public schools scientific biology, that is, Darwinism. In particular, a literalist reading of Genesis was supposed to show that the two basic theses of evolutionary theory, that is, common ancestry and natural selection, ran counter to the will and the law of God. The first one contradicted the thesis that man was specially created by God in his image and is essentially different from the animals which, in particular, do not have a soul that connects them to the transcendence. The second

¹³ A public reading of the play was planned to take place in 1994 in Geneva for the 300th anniversary of Voltaire's birthday. It was cancelled, notably under the pressure of Tariq Ramadan. Twelve years later, on Dec. 8 and 10, 2005, the reading finally took place. In 2006, *Le Monde* published an article stressing Ramadan's role in the 1994 events. See Hervé Loichemol, *Une fatwa contre Voltaire?*, LE MONDE, Feb. 15, 2006, at 18. The Muslim intellectual tried to justify himself in the same newspaper. See Marc Roche, *Tariq Ramadan Consultant de Tony Blair*, LE MONDE, Feb. 24, 2006, at 19.

¹⁴ For the following analysis, see Guy Haarscher, *Perelman's Pseudo-Argument as Applied to the Creationism Controversy*, in ARGUMENTATION: PERELMAN AND BEYOND (2009).

one was represented—and often caricatured—as being a brutal, “immoral” process that notably contradicted, when applied to social relations (which Darwin did not want to do), the theological virtue of charity. So the situation was intellectually crystal-clear, but it was “physically” dangerous for scientists. It would also become legally problematic in the first half of the twentieth century.¹⁵

The most famous example of such a frontal attack strategy was the 1925 Scopes trial. My aim here is not to enter into the historical details of the question, but to rapidly show how the situation became more and more confused as the opponents of scientific biology adopted rhetorical strategies that share many characteristics with the ones I described before concerning blasphemy. In 1925, Scopes, who had dared teach evolution in class, was convicted under the Butler Act,¹⁶ a statute forbidding the teaching of “antireligious” doctrines. In the following years, “monkey laws,” as they were called at that time, remained on the books in several states and evolution was not taught, at least in a systematic way. In 1957, the Soviets launched the Sputnik, and—be they right or wrong—public authorities thought that America was lagging behind the Communists in the crucial domain of technology at the time of the Cold War. They decided to strengthen the science curriculum in high school, notably in biology, which ran counter to the monkey laws that were still in force. Fundamentalists tried to impose the enforcement of the latter, and, in 1968, the United States Supreme Court—which since 1947 had been applying the Establishment Clause of the First Amendment to the states and local powers¹⁷—struck down all these statutes.¹⁸

Then Creationists began to use arguments that were more and more of the “wolf in the sheepfold” or “Trojan horse” type. First, they abandoned the idea of forbidding the teaching of evolution in public schools and adopted a new strategy, based on the notion of “equal time and emphasis.” They claimed that, as there was a controversy (of course, there is no *scientific* controversy to be found in that political debate), both conceptions should be taught in a fair way. Federal courts struck down the laws that were passed for that purpose, because putting on the same plane science and religion clearly violated the

¹⁵ See EUGENIE C. SCOTT, *EVOLUTION VS. CREATIONISM: AN INTRODUCTION* (2004).

¹⁶ “[T]he Butler Act . . . made it against the law to ‘teach any theory that denies the story of the Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals’ . . .” Lenny Flank, *Creationism/Id: A Short Legal History*, TALK REASON, Apr. 26, 2006, <http://www.talkreason.org/articles/HistoryID.cfm> (quoting the Butler Act, which was passed in Tennessee in 1925 and was repealed in 1967).

¹⁷ *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). The *Everson* case not only made the Establishment Clause applicable to states and local governments, but also inaugurated a very “separatist” series of decisions.

¹⁸ *Epperson v. Arkansas*, 393 U.S. 97 (1968).

Establishment Clause. So Creationists had already abandoned the language of confrontation for the sake of liberal democratic values such as fairness and acceptance of the plurality of controversial theses. They responded to the courts by wanting to establish equal time and emphasis for Darwinian science and Creation “science,” trying thus to hide the directly religious character of their doctrine and strategy. But in 1987, the Supreme Court finally struck down the statutes that had been enacted in that context.¹⁹

Creationists adopted various different strategies to try to circumvent the decision of the Supreme Court. For instance, sometimes they recognized that Creationism (or Creation “science”) *was* religion, but they added that it was the same for Darwinism: according to them, the latter was the embodiment of metaphysical materialism or secularism (in the sense of “atheism”), and could thus be considered to be another conception of the world that had no place in public school science classes. The strategy was not very efficient. The United States Court of Appeals for the Ninth Circuit rejected the thesis in 1994, and the United States Supreme Court refused to hear the case in 1995.

Then they adopted another argumentative strategy. The idea was to weaken the legitimacy of Darwinism (at a time when Darwin’s theories had been massively confirmed by recent discoveries in the realm of genetics). So Creationists proclaimed that evolution was “just a theory” (a phrase which obviously possesses derogative undertones). Theory is not fact, they proclaimed. From an epistemological point of view, the use of the words “fact” and “theory” was wholly inadequate, but it was easily understandable by the public at large. A fact was supposed to be “observed,” whereas a theory was considered to be at best a hypothesis, and sometimes even something like a hunch. The argument was also dedicated to showing that there are “gaps,” that is, non-observed elements, that make evolution “just a theory” and not a description and explanation of “facts.”

For instance, in a bill passed by the Washington State Senate, it was affirmed that “macroevolution,” that is, evolution from one species to another (as opposed to “microevolution,” which is evolution inside the same species), “has never been *observed* and should be considered a theory. Evolution also refers to the *unproven belief* that random, undirected forces produced a world of living things.”²⁰ This passage clearly shows that the strategy is aimed at weakening the scientific character of evolutionism. This is new in that now the religious right uses (pseudo)epistemological arguments, such as the distinction between theory and fact. It is not my aim in the present article to deconstruct the argument by showing the untenable character of such an

¹⁹ *Edwards v. Aguillard*, 482 U.S. 578 (1987).

²⁰ See Flank, *supra* note 16 (emphasis added).

epistemological position. I only want here to emphasize the fact that, for Creationists in their new guise, a theory is *less* scientific than the observation and establishment of facts. Indeed, the phrase “*just* a theory” is obviously derogative. We shall see later that a judge recently tested these epistemological claims.

In 1994, a Louisiana school board decided that a disclaimer should be read before the biology teacher began the presentation of evolution. This disclaimer shows how far Creationists go in the process of perverse “translation.” Indeed, the terminology of science and epistemology is used more and more. This is done, as we know, to support the claim that the debate takes place *inside* the realm of liberal-democratic values and has nothing to do with a controversy between freedom of scientific research and teaching on the one hand, and religious dogmatism on the other. “Science” is invoked (Creation *science*), but also justice and non-discrimination (if evolutionism and Creationism are sciences, both should be taught; if they are religions, both should be expelled from public school), and finally “theory,” “fact,” etc. But the Louisiana disclaimer goes even further: it invokes “the basic right and privilege of each student to form his/her own opinion,” and the necessity of “critical thinking.” Here the “wolf” is really installed in the “sheepfold”: the principle of autonomy (the right to form one’s own opinion and to express it) is used to allow parents and activist groups to intervene in the biology class. And the invocation of “critical thinking” only means that students should compare evolutionism to “the Biblical version of Creation.” In so doing, they will be trapped in a bogus either/or position, a false and manipulative “controversy.”

Some parents filed suit alleging that the disclaimer amounted to an establishment of religion that is forbidden by the Constitution. The United States District Court for the Eastern District of Louisiana declared the disclaimer unconstitutional, and the United States Court of Appeals for the Fifth Circuit upheld the decision, affirming in a non-equivocal way that the translation of the problem into the language of liberal-democratic values was artificial and sophistic: “[T]he primary effect of the disclaimer is to protect and maintain a particular religious viewpoint, namely belief in the Biblical version of creation.”²¹ The court added that the reference to the “exercise of critical thinking” was “*a sham*”²² (that expression had already been used by the United States Supreme Court in the *Edwards v. Aguillard* case²³). The Supreme Court

²¹ *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 346 (5th Cir. 1999).

²² *Freiler v. Tangipahoa Parish Bd. of Educ.*, 975 F. Supp. 819, 829 (E.D. La. 1997) (emphasis added), *aff’d*, 185 F.3d 337 (5th Cir. 1999).

²³ *Edwards*, 482 U.S. at 586-87 (“While the Court is normally deferential to a State’s articulation of a secular purpose, it is required that the statement of such purpose be sincere, and not a sham.”).

refused to hear the case, so the decision of the circuit court stands.

Actually, Creationists have already adopted still another strategy, which consists in trying to eliminate all references to religion and Scripture from the alternative conception they defend. In a certain sense, they want to correct the obvious defects of the Creation science strategy. So, for instance, they do not speak anymore of a Creator, but instead use the vaguer and more abstract notion of a “Designer.” The “Intelligent Design” (ID) movement was born in the end of the 1980s as another strategy dedicated to responding to the 1987 *Edwards v. Aguillard* decision of the United States Supreme Court. The latter ruling rejected equal time and emphasis for Creation science and evolutionism, but it affirmed that if scientific alternatives existed, they could legally be taught in class.

In order to avoid any reference to the Bible, ID advocates even present the Designer in certain versions of the doctrine as possibly being an Extraterrestrial.²⁴ The age of the Earth, as it was calculated by the previous Creationists on the basis of the succession of generations in the Bible—not more than 8000 years—is not mentioned anymore.²⁵ Even a certain form of evolution is now accepted. But it remains that the central idea is that, from the very point of view of a free scientific researcher, and supposedly without any religious assumptions and references to the Scripture, it is impossible to understand the existence and functioning of complex organs and organisms without presupposing an Intelligent Designer, whatever or whoever it/he can be and whatever that might mean.

In 2001, the United States Senate tried to add an amendment to the No Child Left Behind Act that was dedicated to improving primary and secondary education. The text stated that students should be prepared to distinguish between “testable theories of science” and “philosophical and religious claims . . . made in the name of science,” and be informed of the “continuing controversies” generated by the notion of evolution. The amendment was finally dropped in committee, but, curiously enough, some members of the religious right movement continued to pretend that it was part of the Act.²⁶

Then, in Ohio, a chemist, Robert Lattimer, criticized the dominance of evolution theory in the biology programs and argued in favor of teaching Intelligent Design as a “*scientific*” alternative to Darwinism. In so doing, he took advantage of the loophole I mentioned before in the *Edwards* decision. After the Discovery Institute, which is

²⁴ See SCOTT, *supra* note 15, at 116.

²⁵ Actually, some Creationists (so called “Old Earth Creationists”) do not read Genesis literally and think that the Earth is much older than what results from a literal reading by the “Young Earth Creationists.” See *id.* at 60-63.

²⁶ See Flank, *supra* note 16.

the main proponent of ID theory, had lobbied the State legislature, a bill was presented for a vote. Again, the purported aims of the statute were *prima facie* secular and referred to liberal-democratic values. The idea was “to promote academic freedom” and “neutrality” of the state in the domain of religion and non-religion. The teaching should be done “objectively” and “without religious, naturalistic, or philosophic bias or assumption.” Again, the students would be encouraged to “think critically,” which was directly related to the supposedly controversial character of evolutionism.

Of course, controversies exist in science—they are even the very engine of scientific progress: no scientific truth or method is definitive, and indeed there have been major controversies, for instance between Einstein and Bohr concerning relativistic physics and quantum mechanics. But in the present case, the controversy is a bogus one—a *sham*, to use the language of the Supreme Court. It was artificially created in reaction to the several judicial challenges Creationists have lost so far. The strategy failed in Ohio, and Intelligent Design was even explicitly excluded from the standards. “The intent of this indicator does not mandate the teaching or testing of Intelligent Design.”²⁷

So Creationists have adopted a supposedly more modest position. It is called “teaching the controversy.” Instead of trying to force Intelligent Design into class, they now use a negative rhetorical strategy. They want the alleged scientific problems and “gaps” in evolution theory to be taught: “[S]omehow, somewhere, something must be wrong with evolution.”²⁸ So members of the Ohio Board of Education devised a “model lesson plan” entitled “Critical analysis of evolution.” Again, the debate seems to be taking place in the domain of science and normal scientific controversies. Critical analysis is an integral part of the scientific process. But of course, such a reference to critical analysis is made in order to erode—at least in the minds of the students—the scientific character of evolutionist biology. The first version of the letter contained some references to Intelligent Design as an alternative to Darwinism, but they were dropped from the second one in 2003. Only the “teach the controversy” strategy remained, aimed at including supposedly “*scientific* criticisms of evolution”²⁹ without mentioning ID as an alternative (although these “criticisms” have been developed for years by the Discovery Institute).

In June 2004, The Board of Educators of the Dover School District in Pennsylvania decided that the biology teachers should read in the beginning of the classes the following statement:

The Pennsylvania Academic Standards *require students to learn*

²⁷ *See id.*

²⁸ *Id.*

²⁹ *Id.* (emphasis added).

about Darwin's Theory of Evolution and eventually to take a standardized test of which evolution is a part. Because Darwin's Theory is a theory, it continues to be tested as new evidence is discovered. The *Theory is not a fact*. Gaps in the Theory exist for which there is no evidence. *A theory is defined as a well-tested explanation that unifies a broad range of observations*. *Intelligent Design is an explanation of the origin of life* that differs from Darwin's view. The reference book, *Of Pandas and People*, is available for students who might be interested in gaining an understanding of what Intelligent Design actually involves. With respect to any theory, students are encouraged to keep an *open mind*. The school *leaves the discussion of the Origins of Life to individual students and their families*. As a *Standards-driven district*, class instruction focuses upon preparing students to achieve proficiency on Standards-based assessments.³⁰

It is worthwhile, before addressing the legal aspects of the problem, to briefly analyze the arguments presented in the statement. First, the Board says that the pupils will study Darwinism, which seems to be good news (for science, separation of church and state, etc.). But the reason for accepting the teaching of Darwinian evolution in the public classroom is given immediately afterwards: the "Pennsylvania Academic Standards" *require* it. So the statement gives, right in the beginning, the impression that a certain topic is taught *because it is imposed by an authority*, and not because of its intrinsic scientific value. The argument is the following: this is the law, so we are obliged to teach "that." Immediately after the first sentence of the statement, the doubts raised about the scientific character of Darwinism surface: it is a "theory," and, as Creationist and ID advocates always say, theory is not fact. There are "gaps," non-tested and non-observable elements of the theory. "Theory" is neither considered a scientific explanation of life valid at a certain period of time, nor a purely arbitrary ideology. If the latter were true, it would be totally impossible to understand why evolutionism would be imposed on the students by the authorities of Pennsylvania. If the former were true, there would not be any need for such a statement to be read to the students. So "theory" is something *in between*: less scientific than observed facts, but more scientific than a simple opinion (a *doxa*).

In my mind, the central rhetorical strategy underpinning the statement is the following: Darwinism is only a theory, that is, it is based on a certain number of observations but contains many gaps. There are—to use Perelman's terminology—good reasons to accept Darwinism as a "theory." But such a watered-down version of theory has the following, unavoidable consequence: by such a relaxed

³⁰ *Id.* (citation omitted and emphasis added).

standard, *Intelligent Design also is a “theory.”* So students should be informed of it—and the “reference book,” *Of Pandas and People*, should be left at their disposal.

The last paragraph of the statement mentions that “students are encouraged to keep an open mind.” As the devil is in the details, we must ask what such an apparently legitimate claim really means. It is explained in the following sentence: the “theory” shall not mention the origins of life, which shall be kept out of class and left to the pupils and their families. It seems strange to me that the reference to an “open mind” is immediately followed by the requirement that *some problems will not be addressed in class*.

But the main argument of the statement consists in emphasizing the notion of “theory,” a category that—as we saw before—can easily be referred to Darwinism *and* to Intelligent Design. So we can see that some former argumentative strategies are integrated into a new one. Now, (disguised) Creationists do not pretend any more that the conception they advocate is scientific (strategy of the “Creation science”). Neither do they claim that both Darwinism and Creationism are religions, so that they should both be “expelled” from public school. They adopt a middle-of-the road position: both Darwinism and Intelligent Design are supposed to be “theories” (with observed facts and “gaps”). If the authority of the legislature (which represents the transient opinion of a majority of politicians, or of judges and justices) mandates that evolutionary theory be taught, it would be fair to inform the students of the existence of *another “theory,”* that is supposed to have the same epistemological status as the theory of evolution. That theory is apparently a secular alternative to Darwinism. So it could be legally taught in class according to the *Edwards* decision. The claim is modest (after the statement is read, “normal” biology classes can begin) and in a certain sense it is wholly perverse: the courses are *a priori* delegitimized in the eyes of the pupils (or at least it is the expected result of the statement being read in class).

In December 2004, eleven parents sued the Dover Area District School alleging a violation of the Establishment Clause of the First Amendment. Judge Jones from the federal district court was confronted with contradictory claims (Is ID science or at least “theory?” What is “theory?” Is ID religion, Creationism in disguise?). He decided to hear as witnesses some great scientists from major U.S. universities. The result was clear and the December 2005 decision reflected it: the supposedly scientific arguments used by ID advocates were untenable as there were no peer-review articles, the data used were outmoded, the arguments had been rebutted a long time ago in the scientific community, and the “Designer” was—even if it could be identified with another entity than the Christian Creator—in all cases a supra-natural

being, which, by all generally accepted methodological and epistemological standards, has strictly no place in a science class, even as a vague presupposition (without a Designer, say ID proponents, you cannot explain the complexity of at least certain organs, etc.). Here are some particularly relevant passages of Judge Jones' decision:

Although Defendants attempt to persuade this Court that each Board member who voted for the biology curriculum change did so for the secular purpose of improving science education and to exercise critical thinking skills, *their contentions are simply irreconcilable with the record evidence. Their asserted purposes are a sham[.]* Any asserted secular purposes by the Board are a sham and are merely *secondary to a religious objective.* Defendants' previously referenced flagrant and insulting falsehoods to the Court provide sufficient and compelling evidence for us to deduce that *any allegedly secular purposes that have been offered in support of the ID Policy are equally insincere.* Accordingly, we find that the secular purposes claimed by the Board amount to *a pretext for the Board's real purpose, which was to promote religion in the public school classroom, in violation of the Establishment Clause.*³¹

The *Kitzmiller* case is so far the last one in a series of legal defeats experienced by the Creationist movement. Of course, the struggle is far from over: the religious right is still politically very powerful, and Jones' decision is only binding in one of the three Federal Districts of Pennsylvania.

IV. A FEW CONCLUDING REMARKS

We should not concentrate all our energies on the violent and frontal attacks on human rights and democracy: indirect attacks, that is, the "wolf in the sheepfold" strategy, can perhaps be still more damaging to the very fabric of liberal and democratic values. I have only given above two very important examples of such a rhetorical strategy. We can find it in many other domains, but I just wanted to briefly show the importance of the phenomenon. It is not enough to be ready to defend secularism. If one does not understand the complex elements that are at stake in the very definition of the notion, the opponents of an open society based on public reason will be able to make it more fragile by having resort—in a sophisticated and not directly visible way—to democratic values. Perhaps the dangerous transformation of a conflict between human rights and religious-political dogmatism is a characteristic of our time. Deconstructing theses that are the product of

³¹ *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005) (citation omitted and emphasis added).

what I call “perverse translation” seems to be a very urgent task today, at a time when the United Nations Human Rights Council does not deal with massive violations of rights, but tries to re-criminalize blasphemy under the guise of defending the rights of the others, particularly the rights of religious people supposedly endangered by the secular State (which, by the way, is probably the only hope for religious minorities).³²

³² See the heated controversy that led up to the second United Nations Conference Against Racism (“Durban II”) that took place in April 2009.