

University of Denver

Digital Commons @ DU

Electronic Theses and Dissertations

Graduate Studies

1-1-2019

Critiquing Atomistic Individualism in Law: Rosenzweig's Beloved Soul as Open and Relational Subject

Lilith Zoe Cole
University of Denver

Follow this and additional works at: <https://digitalcommons.du.edu/etd>



Part of the [Law Commons](#), [Philosophy Commons](#), and the [Religion Commons](#)

Recommended Citation

Cole, Lilith Zoe, "Critiquing Atomistic Individualism in Law: Rosenzweig's Beloved Soul as Open and Relational Subject" (2019). *Electronic Theses and Dissertations*. 1649.
<https://digitalcommons.du.edu/etd/1649>

This Dissertation is brought to you for free and open access by the Graduate Studies at Digital Commons @ DU. It has been accepted for inclusion in Electronic Theses and Dissertations by an authorized administrator of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

Critiquing Atomistic Individualism in Law: Rosenzweig's Beloved Soul as Open and Relational Subject

Abstract

Positioned as a critique of rights-based justice, this project critically rethinks the American system of law by rooting its failures in its philosophical anthropology of atomistic individualism grounded in Locke, and recommends replacing that anthropology with an anthropology inspired by Franz Rosenzweig's *The Star of Redemption*. In particular, the project explores how Rosenzweig's "beloved soul" invites us to understand human individuality as open and relational, which might help pivot the law away from its current myopic focus on rights-based justice and the often unjust zero-sum modality that rights-based justice produces. Rooting law in open and relational individuality rather than Lockean atomism and abstractions changes the goals of law, encouraging it to embrace complexity and devise more complicated rulings that better reflect the complexity of human diversity within a pluralist democracy. I argue that this move from zero-sum to complicated (even messy) rulings, rooted in a shift in the philosophical anthropology that roots our legal system, is the best and only path forward to increased equity for minoritized and marginalized persons and groups.

To illustrate the difference this shift might make, I reconsider the U.S. Supreme Court ruling in *Masterpiece Cakeshop*. The rights-based approach frames and adjudicates the case as a question of competing rights. The outcomes within such a frame are limited. On the other hand, the open and relational frame of an anthropology drawn from Rosenzweig invites a messier, more complicated, but also more equitable and just set of outcomes without a winner or lose, e.g. disputants might be required to participate in a reconciliation conference that allows all parties to express and discuss with each other their different views of the conflict. In order to emphasize the importance of this kind of shift in our legal system, I draw on Talal Asad's genealogical critique of the secular and Winnifred Fallers Sullivan's critique of the First Amendment's religious freedom guarantees. In exposing both the public square and law as only apparently secular, their work helps me underscore the problem posed when majority religious values and prejudices are exempted from application of anti-discrimination laws generally and public accommodations laws specifically.

Document Type

Dissertation

Degree Name

Ph.D.

Department

Religious Studies

First Advisor

Theodore M. Vial, Ph.D.

Keywords

Franz Rosenzweig, Masterpiece cakeshop, Religious freedom, Secularization, Talal Asad, Winnifred Fallers Sullivan

Subject Categories

Law | Philosophy | Religion

Publication Statement

Copyright is held by the author. User is responsible for all copyright compliance.

Critiquing Atomistic Individualism in Law:
Rosenzweig's Beloved Soul as Open and Relational Subject

A Dissertation

Presented to

the Faculty of the University of Denver and the Iliff School of Theology Joint PhD

Program

University of Denver

In Partial Fulfillment

of the Requirements for the Degree

Doctor of Philosophy

by

Lilith Zoe Cole

November 2019

Advisor: Dr. Theodore M. Vial

©Copyright by Lilith Zoe Cole 2019

All Rights Reserved

Author: Lilith Zoe Cole

Title: Critiquing Atomistic Individualism in Law: Rosenzweig's Beloved Soul as Open and Relational Subject

Advisor: Dr. Theodore M. Vial

Degree Date: November 2019

Abstract

Positioned as a critique of rights-based justice, this project critically rethinks the American system of law by rooting its failures in its philosophical anthropology of atomistic individualism grounded in Locke, and recommends replacing that anthropology with an anthropology inspired by Franz Rosenzweig's *The Star of Redemption*. In particular, the project explores how Rosenzweig's "beloved soul" invites us to understand human individuality as open and relational, which might help pivot the law away from its current myopic focus on rights-based justice and the often unjust zero-sum modality that rights-based justice produces. Rooting law in open and relational individuality rather than Lockean atomism and abstractions changes the goals of law, encouraging it to embrace complexity and devise more complicated rulings that better reflect the complexity of human diversity within a pluralist democracy. I argue that this move from zero-sum to complicated (even messy) rulings, rooted in a shift in the philosophical anthropology that roots our legal system, is the best and only path forward to increased equity for minoritized and marginalized persons and groups.

To illustrate the difference this shift might make, I reconsider the U.S. Supreme Court ruling in *Masterpiece Cakeshop*. The rights-based approach frames and adjudicates

the case as a question of competing rights. The outcomes within such a frame are limited. On the other hand, the open and relational frame of an anthropology drawn from Rosenzweig invites a messier, more complicated, but also more equitable and just set of outcomes without a winner or lose, e.g. disputants might be required to participate in a reconciliation conference that allows all parties to express and discuss with each other their different views of the conflict. In order to emphasize the importance of this kind of shift in our legal system, I draw on Talal Asad's genealogical critique of the secular and Winnifred Fallers Sullivan's critique of the First Amendment's religious freedom guarantees. In exposing both the public square and law as only apparently secular, their work helps me underscore the problem posed when majority religious values and prejudices are exempted from application of anti-discrimination laws generally and public accommodations laws specifically.

Acknowledgements

My first go to my Dissertation Committee members who always went above and beyond to support and encourage me. My friends, biological family, and parish family were also instrumental in making sure I had whatever I needed to complete my task. And last, but certainly not least, my everlasting thanks go to the Rev. Dr. Jerome Berryman and Dr. Randolph G. Wagner, without whom I could perhaps have done it, but it would not have meant nearly as much.

Table of Contents

Abstract	ii
Acknowledgements	iv
Table of Contents	v
Introduction	1
Chapter descriptions	12
Chapter One: Religion and Law in the Public Square	15
Chapter Two: Rosenzweig’s New Philosophy & New Theology	55
Structural Overview	61
Going Deeper	66
Beloved Soul-Man’s Transformation	80
Communal Structures	87
Chapter Three: Open and Relational Subject.....	94
Relationality	96
Openness	99
Rethinking Masterpiece Cakeshop	106
Chapter Four: Revisiting Law and Religion in the Public Square	135
Conclusion	154
Bibliography	157

Introduction

The American legal system rests on the implicit assumption that adherence to the rule of law effects justice, secures religious liberty, and thereby fosters human flourishing. Both lawyers and non-lawyers use the legal system to resolve conflicts, redress harm, and even prevent loss. This is accomplished primarily through the individual rights advocacy model, which has in fact done much good in expanding rights and securing religious liberty. Despite the good accomplished through this model, however, both justice and human flourishing remain stubbornly elusive: too many individuals are unable actually to exercise their abstract rights in practice or participate as social or economic equals in their communities. As important as rights are to both liberty and equality, the exclusive focus on rights does not adequately capture the legal or social meaning of individuality. Only in the creative fiction of the Social Contract theory are individuals all free, equal, and independent, with like faculties and no natural subordination.¹ In fact, different faculties and a variety of structures of subordination reduce individual freedom, perpetuate forms of dependence, and reinforce inequity. Indeed, the focus on individuality as rights alone in some cases actually counteracts liberalism's core goals of securing both equality and liberty for all.

¹ Locke, Second Treatise, Chapter II and Chapter III generally.

This dissertation proposes that the problem is not law, or even the paradox at the heart of liberalism—the fact that assuring equality sometimes conflicts with liberty—but rather the law’s understanding of individuality. Embedded in and undergirding American legal theory and practice is a philosophical anthropology of individualism, based on Locke’s version of the social contract theory, in which independence predominates and tends toward abstraction. However, to be human is not simply to be an autonomous individual, prior to civil society as Locke proposes. Rather, to be human is to be open and relational; that is finite, imperfectible, particular, present, transformed and transforming, as well as constituted by and constituting other relationships. Even minimal flourishing, as the preservation of life, liberty, and property, requires law. Arguably, this is part of why Locke’s free, equal, and independent individual left the apparently idyllic state of nature to form civil society. Yet, grounded in Locke’s individual, law fails at even this most basic task. While law is required, law needs to be based on this broader understanding of individuality.

Positioned as a critique of rights-based justice, this project critically rethinks the American system of law by rooting its failures in its philosophical anthropology of atomistic individualism grounded in Locke, and recommends replacing that anthropology with an anthropology inspired by Franz Rosenzweig’s *The Star of Redemption*.² In particular, the project explores how Rosenzweig’s “beloved soul” invites us to understand human individuality as open and relational, which might help pivot the law away from its current myopic focus on rights-based justice and the often unjust zero-sum modality that

² Franz Rosenzweig, *The Star of Redemption*, trans. Barbara E. Galli (Madison, WI: University of Wisconsin Press, 2005).

rights-based justice produces. Rooting law in open and relational individuality rather than Lockean atomism and abstractions changes the goals of law, encouraging it to embrace complexity and devise more complicated rulings that better reflect the complexity of human diversity within a pluralist democracy. I argue that this move from zero-sum to complicated (even messy) rulings, rooted in a shift in the philosophical anthropology that roots our legal system, is the best and only path forward to increased equity for minoritized and marginalized persons and groups.

To illustrate the difference this shift might make, I reconsider the U.S. Supreme Court ruling in *Masterpiece Cakeshop*.³ The rights-based approach frames and adjudicates the case as a question of competing rights. The outcomes within such a frame are limited. On the other hand, the open and relational frame of an anthropology drawn from Rosenzweig invites a messier, more complicated, but also more equitable and just set of outcomes without a winner or loser, e.g. disputants might be required to participate in a reconciliation conference that allows all parties to express and discuss with each other their different views of the conflict. In order to emphasize the importance of this kind of shift in our legal system, I draw on Talal Asad's genealogical critique of the secular and Winnifred Fallers Sullivan's critique of the First Amendment's religious freedom guarantees. In exposing both the public square and law as only apparently secular, their work helps me underscore the problem posed when majority religious values and prejudices are exempted from application of anti-discrimination laws generally and public accommodations laws specifically.

³ *Masterpiece Cakeshop v. Colorado Human Rights Commission*, 584 U.S. _ (2018).

While the classic secularization thesis posits the need for religion to be privatized in order for liberalism to take root, religion in the U.S. has always played a more prominent role than in European versions of liberalism. While infamously incapable of precise definition, protections for religious belief and practice embedded in the First Amendment seem to have allowed religion as well as liberalism to flourish in the U.S. Talal Asad and Winnifred Fallers Sullivan both argue that the reason this appears unremarkable is that the secular is itself a product of religion. Both agree that the secular and religion are intertwined. Asad focuses on the implications of this for the fiction that the public square is a religion-free or even religion-neutral space, while Sullivan focuses on the implications for apparently secular law, especially in the form of secular legal protections for religious belief and practice. In recent years, and particularly in the case of sexuality, religion has claimed a more prominent place in both political discourse and policy making. The consequent polarizing of both religion and politics confirms Asad's claim that religion will not stay in "its place," while also revealing the extent to which American Christianities are also indebted to Locke's understanding of individuality.

Rosenzweig's goal was to set out a "new thinking," a revolutionary alternative philosophical system, correcting errors in Idealist German philosophy, but his work also lends itself to the articulation of an expanded understanding of individuality grounded in openness and relationality. He understood the systemic task of philosophy as the reconciliation of radical subjectivity and worldliness, what we might also describe as the "postmodern epistemic double-bind; viz., how we can make rational judgments about

absolutes or ‘objective’ reality with our relative and ‘subjective’ knowledge.”⁴ Law also engages this double-bind as it resolves particular disputes within the framework of general legal precedent. Hegel’s work purports to resolve the double-bind with the resolution of all flaws in the thesis and the end of history. Ultimately unpersuaded by Hegel’s method of reconciling this dilemma, Rosenzweig turned to theology to ground his radical new thinking. His turn to theology constituted a temporal as well as an epistemological shift from logic to experience. As re-conceived by Rosenzweig, the new theology, which reveals that experience is actually the condition of the possibility of logic, is an equal partner with the new philosophy, neither superior nor subservient to philosophy, each necessary in demonstrating how humans can most constructively engage reality, i.e., how they can flourish. This equal partnership also suggests new ways of thinking about how the religious constitutes the secular, structuring its relations of power, its inclusions and exclusions, and how religion participates in the pluralistic public square on equal, but not privileged terms.

The alternative philosophical system Rosenzweig sets out in *The Star* is based on a radical reconception of the structure of reality itself, the “All.” For Rosenzweig, the All is not a universal or singular abstract; instead it is a diverse, interrelational multiplicity, composed of three elements, or “nothings” that cannot be further reduced or conflated: God, World, and Man. From each of these nothings, particular somethings emerge, beginning the transformation that brings them into relationship with each other, while remaining distinct, and ultimately giving rise to reality itself. Classic accounts of reality

⁴ F. LeRon Shults, *Reforming Theological Anthropology: After the Philosophical Turn to Relationality* (Grand Rapids, MI: William B. Eerdmans Publishing Co, 2003).

as a universal or singular abstract, whether denominated God or World or Man, require explanation for how difference can arise from the singular or the particular from the universal.⁵ Rosenzweig provides a more compelling account of the originary nature of difference and the relationship between the subjective and the universal. Where classic accounts leave difference as a problem to be overcome, Rosenzweig posits difference as part of the very structure of reality itself. His account necessarily grounds an alternative understanding of humanity in which difference and relationality are also constitutive of the human. To be human, from this perspective, is to be a particular individual, limited and finite, rather than a generic or universal being. This particular human is formed temporally, through speech, in community, through ritual structures.

Grounded as it is in Locke, the law's philosophical anthropology tends, as does the philosophy Rosenzweig critiques, toward problematic universals, abstractions, atemporality, and the pretense of a similarly pointless point of view. Looking at law through the lens of a philosophical anthropology based on Rosenzweig's critique, therefore, supports an understanding of justice as something more than the mere resolution of competing rights claims. Winnifred Fallers Sullivan explicitly critiques law's implicit assumptions. She argues that because Western law emerged from Christianity, it remains "replete with ideas and structures that find their origin in, and are parallel to, ideas and structures in religious traditions."⁶ Western law is therefore no more secular, in the sense of religion-free or religion-neutral than is the secular itself, and

⁵ Such explanations are often couched in language about the paradoxical necessity and freedom of God (Spinoza) or discussions of the source of evil (Shelling).

⁶ Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton: Princeton University Press, 2005), 153.

in spite of the explicit separation of Church and State in American law. Moreover, the law is capable of recognizing as religion only the form of religion from which law emerged, thus reinforcing the apparent binary of secular-religious, privileging the religious forms and persons the law recognizes. Thinking through the lens of the turn to theology in Rosenzweig, thus, also provides opportunities to confront and expose legally sanctioned religious privilege. This exposure may not eliminate the danger posed by religion, but it does provide a new basis from which to refute the demands for religious exemptions from anti-discrimination laws made by anti-secular religious fundamentalists who think they are under siege from the secular modern, when the individual rights advocacy model reveals itself as incapable of rejecting such claims.

Rosenzweig's work provides a unique contribution in its account of the structure of reality itself as the foundation of a different understanding of the nature of individuality. Other models account for relationality, but because he locates difference in the very structure of reality, Rosenzweig's work counters Locke's view that the individual exists prior to and independently of civil society. Individuality is indeed necessary for human flourishing, however, when law is based on rights alone, social conflicts are reduced to mere conflicts of individual rights. This distorts the conception of legal harms, as well of legal solutions. From this perspective, harm is legally cognized as perpetrated primarily by individuals against individuals, and capable of redress through individual action. From this narrow perspective, law cannot even cognize, much less respond constructively to, systemic inequity.⁷ An alternative philosophical anthropology

⁷ For example, in *McClesky v. Kemp*, 481 U.S. 279 (1987), the U.S. Supreme Court agreed that the death penalty was imposed in a racially discriminatory manner. However, that fact in itself did not benefit

that builds on Rosenzweig's account of reality provides theoretical and practical alternatives to the individual rights advocacy model of law, without undoing its nominal gains. Justice can be understood, not simply as the resolution of claims of competing individual rights, and not even primarily as fairness, which requires equality, but as equity, as freedom to participate fully with others in civil society.

The hyper-individuality increasingly characteristic of U.S. culture and law is actually a betrayal of the coherence of the individual. Rights in the abstract are rarely capable of actual exercise, and the recognition of abstract rights does not guarantee their practical exercise, nor redress the economic injustice that so often flows from their denial. Rights are contextual; they are created and exercised in community. Relationships of relative socio-economic equity among those who are different create trust and reduce bias, and thus promote human flourishing. Rights as legally recognized tend to be abstract and rarely entail meaningful economic redress. Socrates noted that extreme economic disparity undermines the flourishing of the polis;⁸ both the Hebrew Prophets and modern social science verifies his insight about the connection between economic equity and flourishing community.⁹

Over time, by converting all legal conflicts into competing rights claims, the individual rights advocacy model of law ultimately undermines communal structures and

the defendant, because he had not shown a specific act of individual discrimination against him. In other words, the Court accepted racial discrimination as normative in the system, and only actionable in remarkable cases.

⁸ Plato, *Republic*, 420b-422.

⁹ Authorities as diverse as Edmund Burke, Adam Smith, Roman Catholic Social Justice teachings, Amartya Sen & Martha Nussbaum, Wendell Berry, the World Economic Forum, local research initiatives and educational studies all confirm this link.

exacerbates economic disparity after it expands nominal equality. In his classic *A Theory of Justice*,¹⁰ John Rawls posits a natural limit to inequality, based on human self-interest, but cannot account for the presence of distinct ethnic or social groups. Equity has historically been used to reduce the harshness of the law. Traces of the separate system of equity, which originated “as an alternative to the harsh rules of common law and which were based on what was fair in a *particular* situation.”¹¹ Although separate courts of equity no longer exist, equity is still formally included in domestic relations law, allowing courts to consider principles of justice as fairness that don’t fit securely within the legal rules. This is especially important in domestic relations law as human relationships do not fit the legal categories designed to deal with rights or property. A paradigmatic example of how equity expands the law’s capacity to foster human flourishing is the “best interests” standard, used by courts to resolve disputes about children. When divorced or never-married parents disagree on parenting time or decision-making for their children, courts resolve the dispute by applying the standard of what is in the “best interests” of the children, rather than the individual rights advocacy model to resolve the competing rights of the parents. The best interest standard maintains relationships to the highest degree consistent with the children’s well-being. Equity is fostered where the open and relational subject thrives, and informs various possible alternative responses to *Masterpiece*.

¹⁰ John Rawls, *A Theory of Justice*, Third Ed. (Cambridge, MA: Belknap Press, 1999).

¹¹ Black’s Law Dictionary, entry for Equity (emphasis added).

So long as human diversity exists, conflicts will arise, even when difference is lived and understood as an inherent part of the All. Conflict will not be eliminated without eliminating difference, even if discrimination could be. Although some theorists and activists argue that law is a product of oppressive systems and therefore the elimination of law is a necessary part of the elimination of oppressive systems, my work takes the position that law is necessary to resolve conflict without resort to violence or elimination of difference; therefore, law is necessary for human flourishing. This is also consistent with my alternative philosophical anthropology in which openness is indicative of finitude and imperfectability, giving rise to an on-going need to reconsider how best to actualize liberalism's goals of equality and liberty in practice. This is always at issue, but never more so as shifting demographics problematize normative religious assumptions and thus, the secular. The conflict this creates is most acute where law, religious freedom, and sexuality/sexual diversity intersect, as in the case of same-sex marriage and the question of whether religious freedom entails the right to discriminate on the basis of sexual orientation in ways that are otherwise illegal.

In 2015, the United States Supreme Court found in *Obergefell v. Hodges*¹² that a legal right to civil same-sex marriage existed, enforceable in all states. Along with their extremely high view of marriage, the majority in *Obergefell* expressed unprecedented solicitude for opponents of same-sex marriage. Even prior to *Obergefell*, as states began to legalize same-sex marriage, some religious purveyors of wedding goods and services had begun to claim that the Constitution's guarantee of religious freedom allowed them

¹² *Obergefell v. Hodges*, 576 U.S. _____ (2015).

to refuse their goods and services for same-sex weddings. Thus, it seemed almost inevitable that following *Obergefell* these claims would be presented with new urgency until one reached the Supreme Court, seeking a definitive answer to the question of whether the law permits religious exemptions. The case that ultimately did come before the Court, *Masterpiece Cakeshop v. Colorado Human Rights Commission* began before *Obergefell*, and before same-sex marriage was legal in Colorado. The presenting legal question was one of public access, whether commercial vendors (of wedding goods and services) may discriminate against customers in violation of generally applicable laws, when their motivation to do so is religious. This precise question was ostensibly answered negatively in 1968 when the Court dismissed as “patently frivolous” the defendants’ claim of a right to discriminate on the basis of race in violation of the Civil Rights Act of 1964 because of their religious belief that the Act “contravenes the will of God.”¹³ In *Masterpiece*, however, the Court revisited the issue in *Piggie Park*, this time as the question of a conflict between the right to religious freedom and the right to same-sex marriage, and the justices who dissented in *Obergefell* continued to angrily reject the contention that discrimination on the basis of sexual orientation is the equivalent of discrimination on the basis of race. This shift is not surprising, as the exclusive legal focus on rights necessarily re-frames disputes over communal obligations as conflicts of rights. It may also be unresolvable in our current context.¹⁴

¹³ *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), footnote 5.

¹⁴ Since the Court issued its decision in *Masterpiece*, it has declined to reconsider several similar claims denied by state courts. In at least one case, the Court remanded the case to the lower court with instructions to reconsider their decision in light of the ruling in *Masterpiece*. Legal commentators argue that the only logical meaning this direction can have, given the non-opinion in *Masterpiece*, is that the lower courts should examine the record to assure that the religious claims were not viewed with hostility.

Masterpiece is suited in unique and important ways to demonstrating how the individual rights model of advocacy fails in its broader task. In failing to make a substantive decision, the Court thereby exacerbated the problem of public access and religious freedom, while also failing to address the ultimate concerns of religious individuals.¹⁵ The decision thus provides the perfect, timely vehicle to imagine how an open and relational philosophical anthropology grounded in Rosenzweig's construction of reality as an irreducibly diverse multiplicity might defuse anti-liberal religious fundamentalisms at the intersection of law, religion, and sexuality, especially by making space for compassion as the result of a shift from an epistemology of logic to one of experience.

Chapter descriptions

I begin Chapter One: Religion and Law in the Public Square, with an orientation to locate the dissertation within the tradition of critiques of liberalism's atomistic individualism, using 1) Asad's critique of the secularization thesis, especially his description of the legal subject and its capacity for agency; and 2) Sullivan's critique of law as not really secular; and 3) Locke's version of the Social Contract theory, especially its premise that individuality precedes civil society. I will also explain my use of Locke to think through the *Obergefell* dissents, in order to set stage for the introduction of

Doing so continues to leave open the substantive question whether discrimination in public accommodations is permitted when the basis of the discrimination is religious belief.

¹⁵ The owner of Masterpiece Cakeshop (Phillips) has continued to refuse to sell his baked goods to customers on the basis of their sexual orientation in violation of the public accommodations law. Although Phillips' lawyers hailed the decision as a victory for Phillips, a majority of the Court did not rule that he has a right to discriminate, only that he has a right to neutrality by the agency that decides his claim and that the Colorado HRC expressed hostility.

Masterpiece. Through a review of the major threads of traditional legal analysis in *Masterpiece*, I will demonstrate the shortcomings of the individual rights advocacy model of law. Having grounded us in traditional legal theories, Locke's individual, and the location of my project within the on-going conversation about secularization and modernity, I will turn to an exploration of Rosenzweig and *The Star of Redemption* in

Chapter Two: Rosenzweig: New Philosophy and New Theology. First, I will provide a broad overview of *The Star's* alternative system of philosophy, with special focus on how Man is transformed into Beloved Soul by God's love and turns toward the World as externalization of this love. Next, I will explore his epistemological framework that moves backwards from communal structures to experience to logic in a single temporal dialectic of past-present-future. I will end Chapter Two with a close reading of the transformation of Man into Beloved Soul, in order to provide us with the tools to construct a "thick account" of the alternative philosophical anthropology of openness and relationality. In Chapter Three: Open and Relational Subject, I will define and explain the alternative philosophical anthropology I am proposing. I will do this by building bridges between specific elements in Rosenzweig's All and the openness and relationality I argue is characteristic of individuality, in contrast to Locke's model. For each stage of the transformation, I will explain the meaning of these elements in non-theological terms and how this forms a different legal subject. I will close out the chapter with a re-analysis of *Masterpiece*, suggesting a range of alternative legal outcomes that might flow from the different philosophical anthropology grounded in Rosenzweig. The alternatives I suggest will range from avoidance of the case altogether because of a different tone in Obergefell, to application of a community "best interests" standard, to a restorative justice-like option

for religious vendors who seek to discriminate and same-sex couples and their allies to engage in facilitated discussions about beliefs and consequences. Finally, in Chapter Four: Revisiting Law in the Public Square, I will return to the question of the on-going relationship between religion and the secular in U.S. law. I will suggest that in addition to providing the ground for a philosophical anthropology which expands Locke's model of individuality as open and relational, Rosenzweig's counter to Hegel also provides new ways of building on Asad's genealogical insights about the apparent religious-secular binary.

Chapter One: Religion and Law in the Public Square

The questions addressed by *Masterpiece Cakeshop v. Colorado Human Rights Commission*,¹⁶ as well as the court's failure to answer those questions, are broadly symbolic of longstanding internal and external critiques of liberalism, from the most basic question of whether the twin goals of equality and liberty are not inherently irreconcilable to questions about the capacity of the nominal recognition of rights¹⁷ to redress systemic discrimination to the question of the place, if any, of religion in the public square. At the heart of these critiques, but often overlooked, lies the question of the nature of human individuality. John Locke, the "Father of Liberalism," grounded his liberalism in an individuality that he imagined preceded civil society. The legitimacy of government for Locke lay in the consent of such individuals, who voluntarily cede their right of self-enforcement in order to form civil society and to protect their remaining natural rights. Locke provides a limited explanation of why this choice would make more sense to individuals who are "free, equal, and independent" in the state of nature, "with like faculties and no natural subordination."¹⁸ Because the U.S. Constitution expresses

¹⁶ *Masterpiece Cakeshop v. Colorado Human Rights Commission*, 584 U.S. (2018).

¹⁷ By "nominal recognition of rights," I mean the recognition of rights in name, which is typical of anti-discrimination law. For example, Title VII is a federal law that prohibits employment discrimination on the basis of sex. Thus, the right to be free from discrimination on the basis of sex is "named" in the law, but the content and effects of this nominal protection remain at issue. Courts have already determined that it does not include protections against discrimination on the basis of pregnancy, and the U.S. Supreme Court will consider in its October 2019 term whether protection against discrimination on the basis of sexual orientation is included.

¹⁸ Locke, *Second Treatise*, Chapter II and Chapter III generally.

Locke's view of liberalism so directly, especially in its provisions for a separation between Church and State in the First Amendment's guarantees of the "free exercise" of religion and against government "establishment" of religion, U.S. Supreme Court justices routinely turn to Locke to ground or counter decisions about what the Constitution requires. While Locke grounds the idea that religious tolerance is dependent on the Church not having the power of the state, Madison's *Remonstrance* articulates the uniquely American version of secular liberalism, and indeed makes sense of the specific and sometimes contradictory form of the First Amendment's religious protections. At the root of this structure is Locke's free, equal, and independent individual whose existence and rights precede civil society, even the "first society" of husband and wife.¹⁹ Both the legitimacy of government and the rule of law depend explicitly on the natural rights possessed by this individual, which can only be added to by the consent of the majority. By centering autonomy and independence, Locke's philosophical anthropology tends toward abstraction, because actual humans are varied in faculties, interests, social location, and life chances. Thus, the first of a variety of legal fictions that drive liberal jurisprudence is the fiction of equality. In order to maintain this fiction, it is necessary to think of individuals in the abstract. The individual rights advocacy model of law is ideally suited to resolving disputes among such abstract individuals when their exercise of rights creates conflict. Abstraction grounds a variety of other legal fictions, as well. Several of these provide insight into the problem of abstraction, both how it enters the system and how it proliferates, limiting justice options for diverse and unequal

¹⁹ This aspect of Locke's argument is central to Justice Thomas' rejection of the idea of a natural right of civil same-sex marriage and will be explored in detail later in this chapter.

individuals. For example, the idea of the “reasonable man,” a generic person, lacking in any particulars that would distinguish him, his motives or his needs from others; Socrates’ impartial judge²⁰ who is theoretically restricted in relying on his own experience because he must not be swayed from logic in assessing and resolving claims—even when doing so increases justice; and perhaps most perniciously, the ideal that justice should be “color-blind,” which invariably indicates that a court has decided that actual racial differences are legally irrelevant. These and various others have emerged over time, some ancient, and some reflective of adaptation of the common law to the social contract in the common law of England to which U.S. law is heir. They serve a variety of legal purposes that may include consistency, convenience, and sometimes to achieve equity in otherwise harsh cases. However, they may not always serve particular individuals in need of legal protection or redress; in some cases, the particular individual gets in the way of the abstract idea of individuality on which law rests. Conflicts that arise from human diversity cannot always be resolved through the individual rights advocacy model because at the level of the abstract individual, the conflict does not or cannot exist. Even at the most basic level of flourishing—the Lockean government’s obligation to preserve life, liberty, and property—let alone where flourishing entails the fostering of diversity, meaningful social participation, and relative economic equity, the individual rights model of advocacy cannot always achieve its task. The individual capable of even minimal flourishing through law requires openness and relationality.

²⁰ Referring to Socrates’ description of the good judge, who remains paradigmatic of the value for impartiality in the law: Four things belong to a judge: To hear courteously; to answer wisely; to consider soberly; and to decide impartially.

Locke's carefully structured argument from social contract theory makes clear the way in which the individual exists prior to civil society. Because the individual precedes civil society, the natural rights traditionally attached to the individual also precede, and are independent of, civil society. In the United States, some of these rights are protected in the Bill of Rights, whose adoption was controversial precisely because of the fear that the enumeration of some rights would work to exclude those not named. These natural rights cannot be taken away and are not dependent on the varying will of majorities,²¹ but this also makes adding rights dependent on the consent of majorities. All individuals in this original state of nature are free, equal, and independent, and remain essentially and theoretically so even after their entry into civil society. Because their freedom is insecure in the state of nature, they rationally and voluntarily relinquish a portion of their autonomy²² on the theory that the government is better suited to preserve life, liberty, and property of individuals than individuals themselves. Through this relinquishment of minimal autonomy, the individual consents to a common civil government and is thereby obligated to comply with subsequent laws adopted by the majority. The consent the individual offers entails an obligation to every other member of the civil society.²³ The individual who refuses to comply with just laws is no better off than in the state of nature, and obviates the benefits of civil society for everyone.

²¹ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

²² Locke use the term "executive" function, the right of self-enforcement of ones rights or redress for their violation, to express the idea I describe here as autonomy. As noted earlier, his explanation of why this is the logical choice is not entirely persuasive, although it implies a view of human nature as naturally competitive and insecure. This aspect will be explored in greater detail in the discussion of Asad's view of the anthropology of those permitted entry into the public square.

²³ Locke, *Second Treatise*, §94, §97.

Individuals who are innately free, equal, and independent can also function as equals before the law, and when their equal legal rights are infringed upon, redress is possible through the application of the individual rights advocacy model. Although modern notions of justice differ in some ways from classic models, liberal justice remains grounded in its ancient Aristotelian roots, dependent on two important and interrelated ideas: 1) that justice consists in giving good things to good people, and bad things to bad people, and 2) that justice requires those who are similarly situated be treated equally (and implicitly that treating people unequally is just when they are not similarly situated).²⁴ If individuals are not actually all free, equal, and independent, then they are not similarly situated for purposes of resolving disputes through the application of law. Equality is essential for the law to be able to redress wrong in a way that achieves or maintains Aristotelian justice. Thus, all fundamental differences of individuals create legal challenges. We see the evidence of the law's failure to resolve these challenges in a variety of ways, but especially in the different outcomes the individual rights advocacy model produces in cases of discrimination on the basis of race versus discrimination on the basis of gender. Allegations of discrimination on the basis of race trigger the highest

²⁴ According to Dworkin, for conservatives, "the possible acquittal of the guilty [is] not simply an inefficiency in the strategy of deterrence, but an *affront to the basic principle that the censure of vice is indispensable to the honor of virtue* [emphasis added]" (139). Thus, conservatives often view tolerating "vice" as undermining virtuous behavior. Ronald Dworkin, "Liberalism," in *Public and Private Morality*, ed. Stuart Hampshire (Cambridge, UK: Cambridge University Press, 1978). Evolutionary psychologist Jonathan Haidt's argues that six categories of moral foundations exist – care/harm, fairness/cheating, loyalty/betrayal, authority/subversion, sanctity/degradation, liberty/oppression – and conservatives resonate with all 6 but less so with the first two pairs, with which liberals resonate most strongly. He also explains that the sixth pair liberty/oppression was added to explain anomalous data gathered for the second pair fairness/cheating. Haidt's research clarified that liberals resonate more with oppression, while conservatives resonate with liberty. This is consistent with Dworkin's explanation of two modes of liberty. Jonathan Haidt, *The Righteous Mind: Why Good People are Divided by Politics and Religion* (New York: Vintage Books, 2012), Chapter Seven – Moral Foundations of Politics, pp. 150-179.

level of legal scrutiny, as race is considered irrelevant for virtually all legal purposes. Allegations of discrimination on the basis of gender trigger intermediate scrutiny, as gender is considered legally relevant in some cases, justifying disparate treatment. For example, there is no legally recognized basis for limiting jobs to whites, but there are legally recognized justifications for restricting women's access to some jobs, especially women of child-bearing age. Where differences are incommensurable, the application of the individual rights advocacy model cannot fully redress legal wrongs or resolve rights conflicts. The application of the individual rights advocacy model in such cases may actually exacerbate practical inequities, even when it achieves nominal equality, as also demonstrated in litigation seeking racial and gender equity.

Although the specific forms of the U.S. separation of Church and State and of constitutional protections for religious belief and against the government's establishment of religion owe at least as much to Madison as to Locke, the discussion of a Lockean anthropology for liberalism and liberal jurisprudence necessarily locates the discussion within broader discussions of secularization and the relations among modernity, religion, and the secular. Talal Asad's contributions are recognized as paradigmatic of a particular strand of current secularization debates central to on-going questions of liberalism, of how to understand the viability of the thesis in light of current circumstances and in terms of its particular connection to Europe and the U.S. as well as its dependence on Western understandings and definitions of religion. Dressler and Mandair identify three primary schools of thought: "(1) the sociopolitical philosophy of liberal secularism exemplified by Charles Taylor (and to some extent shared by thinkers such as John Rawls and Jürgen Habermas); (2) the "postmodernist" critiques of ontotheological metaphysics by radical

theologians and Continental philosophers that have helped to revive the discourse of “political theology”; and (3) following the work of Michel Foucault and Edward Said, the various forms of discourse analysis focusing on genealogies of power most closely identified with the work of Talal Asad.”²⁵

Asad argues that most secularization debates miss the main point, which is that the religious and secular cannot be meaningfully distinguished, the public square is both created and its exclusions shaped and sustained by a particular form of religion. Further, he asserts both that religion is itself not a stable category or single thing, and that whatever religion is it cannot be “kept in its place,” even though the modern nation-state is dependent on “clearly demarcated spaces that it can classify and regulate [including] religion, education, health, leisure, work, income, justice, and war.”²⁶ Winnifred Fallers Sullivan broadly agrees with Asad, but her critique focuses on the conceit of secular law as a realm separate and distinguishable from religion. Instead, law is only apparently secular, Sullivan argues, and, like the public square, is actually a product of religion, remaining subordinated to and submersed in religion.²⁷ Sullivan’s most provocative argument, that legally privileging religious conscience in contrast to equally sincere, but not religious, belief undermines the very religion it is ostensibly designed to protect is not at issue in this dissertation. As Sullivan notes, however, “religion takes place in a space

²⁵ Markus Dressler and Arvind-Pal S. Mandair, eds. *Secularism and Religion-Making* (Oxford: Oxford University Press, 2011), 4.

²⁶ Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford, CA: Stanford University Press, 2003), 201.

²⁷ Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton, NJ: Princeton University Press, 2005), 153.

structured and conditioned by law—secular law, the ‘rule of law,’ a law that enjoys an unprecedented hegemony,”²⁸ and this does help us to understand why the form of religious belief that the proprietor of Masterpiece Cakeshop claims generates such legal controversy when other kinds of religious claims do not. When conservative Christian politicians and scholars argue that the U.S. is a “Christian” nation, they are invoking the very constructs Asad and Sullivan problematize. Taken together, Asad’s and Sullivan’s contributions to the debate over secularism and liberalism help demonstrate why the conflict over religious freedom at the heart of *Masterpiece Cakeshop* is so useful in highlighting the need to reconsider the law’s default or underlying philosophical anthropology.

American liberalism appears to operate from the same premise about the empty or neutral public square as the place in which legitimate political discussion can and must take place, a la Rawls or Habermas. Those who operate from this premise may argue that for autonomous individuals in a pluralistic society to find and secure the common ground, a religion-free or at least religion-neutral, secular, public political space must exist. Only in such discursive space can policy be considered as a matter of a truly common versus sectarian good. Even in the overtly religion-friendly U.S., the neutral public square continues to be touted as an ideal condition of expansive pluralistic discourse. What appears then to be the growing political influence of politically and socially conservative Christians in the U.S. seems to represent the dangerous importation of untranslated partisan religious ideas into the public square, threatening the neutrality of that space. Some

²⁸ Sullivan, *Impossibility of Religious Freedom*, 153.

post-modern advocates of religion-friendly liberalism suggest that un-translated religious reasoning and secular reasoning can constructively interact in the public square, while classicists still insist that partisan religious ideas, by their very religious nature, will always operate coercively and, thus, that liberalism is fundamentally incompatible with overt religious political discourse. As American religious discourse concentrates on issues of sexuality, from gender equality to sexual orientation to gender identity and expression, these questions about the nature of the public square are not simply academic. They reveal the degree to which access to the public square has always been contested, rather than neutral, and that all are not equally welcome. Locke's philosophical anthropology of independent and autonomous individuality, and his argument for tolerance as requiring that religious power must be separated from state power, and implicit assumption that it can be, structures and organizes this model of the public square. Thus, the public square is not and never has been religion-free, but rather expresses this understanding of the religious as separable, as well as this model of individuality and its inherent abstractions. Those whose identity does not fit this model have never had significant access to the public square. So long as the society itself appeared relatively homogenous, this exclusion was unremarkable, as was the related refusal of courts to acknowledge the rights of minoritized individuals whose identity could not be homogenized.

Often compared to each other in political theory, the French practice of *laïcité* differs sufficiently from the American practice of religion-friendly liberalism that political conflicts over religion in the French public square can actually help to illuminate the claim that the square has never been either religion-free or religion-neutral, but rather

reflective of the structures of particular forms of Christianity. In the U.S., the form is of not only Protestant, but evangelical Christianity; in France, the organizing form is Roman Catholicism; while the current crisis of religious fundamentalism in the U.S. results from a surprising alignment of Roman Catholic and evangelical Protestant Christianities. In France, the similar crisis concerns political and educational intolerance for the wearing of the hijab in secular French schools. While containing characteristics unique to French colonial and immigration history, as well as relations within the European Union, these conflicts also involve philosophical anthropology, as well as the fact “that there is no natural distinction between the political and the religious, but a historical one resulting from decisions that are themselves political.”²⁹ As Balibar notes, although the wearing of the hijab is a question of personal agency and/or emancipation, it is also inescapably “a cultural, religious, and increasingly a political symbol . . . [which cannot be] abstract[ed] away from.”³⁰ In a way that is usefully parallel, sexual diversity in the U.S., especially the open acknowledgment of minoritized sexuality identity invokes questions of personal agency and/or emancipation which problematize normative assumptions about both identity and agency. Sexual identity in the U.S. is also increasingly a cultural and political symbol which cannot be “abstract[ed] away from.” In exactly these ways, such identities contravene the traditional exclusions of the public square. Shifting religious attitudes in the U.S., specifically growing religious acceptance of minoritized sexual identity, exacerbates the crisis and confirm the truth of Balibar’s claim that there is no

²⁹ Étienne Balibar, *Equaliberty: Political Essays*, translated by James Ingram (Durham, NC: Duke University Press, 2010), 213.

³⁰ Balibar, *Equaliberty*, 211.

natural distinction between the political and the religious. Indeed, the fact that it is often the more socially progressive and socially activist Christian communities in the U.S. that are more accepting of sexual and gender diversity further complicates the possibility of distinguishing between the political and the religious, as such groups engage the tactics and practices of political social movement organizing and activity.³¹

The particular strand of religious freedom counter-claims opposing this entry into the public square threatens to dismantle a central structure of anti-discrimination law, public accommodations laws, which assure that businesses engaged in sales to the public, such as restaurants, hospitals, hotels, retail stores, places of entertainment, and public transportation, etc. serve all customers equally.³² Asad's genealogy of the secular invites us to understand this strand of religious freedom claims as products and beneficiaries of the religious structures and forms that produced the secular as its discursive and epistemological other. As social attitudes and demographics have shifted, this mode of religion, and its epistemological prejudices have lost their hegemonic cultural force. Adherents of this increasingly marginalized mode of American Christianity, and their

³¹ See, e.g., Rebecca M.M. Voelkel, *Carnal Knowledge of God: Embodied Love and the Movement for Justice* (Minneapolis, MN: Fortress Press, 2017).

³² A group of Public Accommodations Law Scholars filed an Amicus Brief in support of Respondents (the Colorado Civil Rights Commission, Charlie Craig and David Mullins) in order to recount the legal history and importance of public accommodations laws and supplement the Court's general knowledge with their special expertise in this area of law. Understanding that these laws are grounded in the common law right of equal access is particularly important in order to dispel the attempts by Petitioner Masterpiece to portray these laws as of recent origin and designed primarily to combat racial segregation following passage of the Civil Rights Act of 1964. In their attempts to distinguish their religious opposition to same-sex marriage from racism, proponents of religious exemptions from these laws have portrayed them as being of recent origin, created as a product of Civil Rights era de-segregation efforts. The Amicus brief demonstrates that the pre-Civil War common law duty "dictated that '[t]hose who hold themselves out as ready to serve the public thereby make themselves public servants and have a duty to serve.'" Brief for Public Accommodations Law Scholars as Amicus Curiae, p. 7-8, *Masterpiece Cakeshop v. Colorado Human Rights Commission*, 584 U.S. ____ (2018).

unlikely allies, have reacted in ways that reveal the secular myth that the public square operates persuasively rather than coercively. As the disputes have been reified in disputes over identity, especially sexual identity, the resulting political and legal disputes further reveal ways in which the public square has always excluded those who don't fit the normative anthropology or epistemology.

Although most scholars agree that the secularization thesis in its original form is no longer viable, Asad argues that the real issue inherent in questions of secularization is not the continuing viability of the thesis in the face of religious significance. Instead, Asad argues that, because the religious and the secular interpenetrate each other, with neither being either a single or stable concept, we must explore how changes in the concepts of the secular and religion relate to changes in practice. Only through such a genealogical process can we understand the secular as Asad does, as a "concept that brings together certain behaviors, knowledges, and sensibilities in modern life."³³ He argues against those, such as Casanova, who seek to nuance the secularization thesis by proposing that some religious persons can participate the public square on equal terms with others in a proper secular context. For Asad, this still begs the real question of the mutually reinforcing power structures that produce the binary construct of secular and religious in the first place. In explaining why the public square is neither secular nor empty as theorized, Asad argues that its existence, shape, and organizing assumptions are products of religious thought-forms and structures. Sullivan's argument about the structure of law is similar. Thus, the problem is not that religion enters the public square

³³ Asad, *Formations of the Secular*, 25.

and the question not whether it can do so on terms sufficiently irenic to permit competing religious or secular ideas equal space/authority. Instead, in a similar vein to Sullivan's argument that the First Amendment is capable of recognizing and protecting only some kinds of religion, the public square excludes and must exclude those whose anthropology differs irreconcilably with the abstract Lockean individual. It is not so much that religion must be excluded, but that all ideas, all stories, all identities, and all concerns that enter the public square for consideration have already been, must be, reshaped into the form recognized by the structure of the square itself. Even, perhaps especially, the overtly religious is shaped and structured in order to find its place in the public square, e.g., stories of devout religious belief combined with personal agency. As Balibar notes, the paradigmatic French example is the question of the possibility of feminist Muslim women who wear the hijab. In the more immediate U.S. context, illustrative examples include the blending of individual and social/cultural rights which are at issue, e.g. in conflicts over the repatriation of Native American religio-cultural objects, the status of land-as-sacred and the conflict with commerce (frequently in the context of oil resources and transport), and the perpetually contested legal status of federally recognized Native American tribes as dependent sovereigns. These concerns, which emerge out of a dramatically different, non-Locke philosophical anthropology, cannot be translated into terms that fit within the structure of the public square. Because this structure assumes the binary character and meaning of sex and gender is essential to the structure of reality, the challenge posed to the by those whose with minoritized, non-binary sexuality and gender identity goes much deeper, and so unsurprisingly engenders a fiercer rejection.

For Asad, the theorized distinction between public life and private belief as the basis of legitimate public discourse is itself untenable, as religion infuses every aspect of the public sphere, refusing to stay within its “own” private space. He thus invites us to challenge the apparent binary of secular versus religious, and consider the ways both similarly organize and reify modern power structures. If Asad is correct in his insistence that “a modern autonomous life” requires particular kinds of law and, therefore, particular kinds of subjects of law,³⁴ then the modern legal subject is also the modern religious individual. Thus, if the secular legal subject is an independent and autonomous individual rights-bearer, then the modern religious subject is also an independent and autonomous individual, bearing religious rights. This is contrary to Durkheim, who theorizes that it is the weakening of communal religious bonds that gives rise to the development of the secular individual. Those Christians most aggressively seeking relief from laws prohibiting discrimination on the basis of sexual orientation do so by asserting their individual right to religious freedom, both as freedom from the claims of others to equal treatment/access, and as freedom to restrict the behavior of others which could undermine their religiously motivated exclusions. As legal subjects then, they owe their practical theological anthropology as much to Locke as they do to Augustine or Calvin.

Asad mounts his argument specifically against Jose Casanova’s definition of the secularization thesis in order to point out that, if modernity is synonymous with both social differentiation and the decline of religious belief and influence, then no form of religion can be acknowledged in the public square without undermining the very idea of

³⁴ Asad, *Formations of the Secular*, 253.

the secular, and thus the liberal modern. This is because Casanova's definition of secularization makes the very concept of the public square dependent on the claim that religion is distinguishable and private, relative to the secular. It also because religious practitioners themselves tend to undermine the notion that it is possible for sufficiently rational forms of religion to enter the public square on the same terms as non-religious ideas. Those most likely to insist on their right to advance unadulterated and untranslated religious ideas in the public square are also most likely to argue that their commitments are entitled to privileged consideration. Thus, Asad argues that on Casanova's reading of the secular, regardless of the rationality of a particular religion, the de-privatization of religion at all undermines the structural differentiation of social space on which the secular theoretically depends. Thus, the claimed ability to restrict the type of religious entrants to rational religions simply replicates the exclusions that created the secular public in the first place, because "the public square is a space *necessarily* (not just contingently) articulated by power."³⁵ Thus, it is not possible for religion-as-authority to enter the public square in any form without altering the discursive space irrevocably. On this model, secularists are right to be concerned that when religious ideas enter the public square they will seek privilege, because religious ideas are "founded on authority and constraint [which] has always posed a danger to the freedom of the self as well as to the freedom of others."³⁶ And thus, we should not be surprised that the apparent success of the secular liberal experiment would provoke a parallel backlash of apparently pre-

³⁵ Asad, *Formations of the Secular*, 184 (emphasis in the original).

³⁶ Asad, *Formations of the Secular*, 186. Note that Asad is not making this claim of authority himself, but describing the fears of secularists who similarly buy into the binary.

modern religious prejudice, but expressed as the public political. Nor should we be surprised that a legal impasse appears to have been reached, when the individual rights advocacy model and its logic govern responses to the conflict.

In his denial that a single or stable form of the religious or the secular exists, and his denial that the secular and religious subscribe to competing authorities, Asad refutes the claim that the secular can be identified simply as a counter- or anti-religious. He also explicitly rejects the similar claim that nationalism can be conflated meaningfully with religion. Just as he explores contrasts between Islamists and Arab nationalists in order to illustrate how they differ importantly in their core goals, mapping a similar contrast onto the difference between American nationalism and American Christianities might be possible and even insightful.³⁷ However, doing so is not necessary to affirm Asad's larger goal of problematizing the use of the secular as an organizing category that can be meaningfully distinguished from the religious. When religion and the secular are viewed as a binary, the fact that the secular state seeks to reform all of life makes it a counter-religious. In contrast, Asad invites exploration of how religion and the secular each create meaning in relation to the other. Because the religious and the political also implicate each other, and all social spaces are therefore political spaces, Asad argues that the challenge religion poses to the public square is a *political* challenge to the organizing principle of the secular—that “politics, economy, science, and so forth” are separable from

³⁷ Especially if sociologist Elizabeth Shively is correct in her claim that “Attitudes about sex have come to signal a person or group's attitudes about modernity itself. Arguments about gender roles, birth control, abortion, sex education, and LGBTQ rights have become central to the religious and political identity of American Christians.” Elizabeth Shively, “Christian ‘Purity’ Guru's Loss of Faith May Signal a Coming Reckoning For Conservative Christianity,” Re.Wire News. Aug 5, 2019. <https://rewire.news/religion-dispatches/2019/08/05/christian-purity-gurus-loss-of-faith-may-signal-a-coming-reckoning-for-conservative-christianity/>

religion. Hence, the legal impasse in a culture seeking to both expand rights connected to minoritized identities (like same-sex marriage) and to preserve traditional religious freedom is a political problem. From Asad's perspective, this should not be surprising, as the "space that religion may properly occupy in society has to be continuously redefined *by the law* because the reproduction of secular life within and beyond the nation-state continuously affects the discursive clarity of that [public] space."³⁸ Redefinitions in either the secular or religion necessarily entail redefinitions of the other; thus, as the form of religion that produces the secular narrows its focus on normative heterosexist identity and practice as definitive of both religious freedom and national identity, the likelihood of clashes between the secular and the religious in the public square increases.

In order to sustain his broader point, Asad first provides an alternative anthropology of the secular. Rejecting both the claim of a simple binary opposition between the secular and religion, as well as the contention that the secular is a mere "mask" of religion, Asad reconsiders the nature and role of myth, violence, and certainty in the creation and maintenance of the secular as that which is distinct from the religious. Contrary to some accounts of both modernity and law,³⁹ Asad argues that "a secular, liberal state depends crucially for its public virtues (equality, tolerance, liberty) on political myth."⁴⁰ Neither myth nor religion constitute the illusory in contrast to the

³⁸ Asad, *Formations of the Secular*, 201, emphasis added.

³⁹ Sullivan, *The Impossibility of Religious Freedom*, 153, FN. 41, citing Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992), makes this point about myth and law in modernity.

⁴⁰ Asad, *Formations of the Secular*, 56.

secular “real.”⁴¹ Instead, reading religion as myth “constitutes” the secular by privileging secular time as “the” epistemological domain of history as history and as anthropology.⁴² Despite the apparent similarity of both Christian and liberal democratic mythic structures, the secular is not ultimately continuous with religion. Although the secular draws on Christian accounts of and projects for redemption through violence,⁴³ secular myth fuses “an optimistic project of universal empowerment with a pessimistic account of human motivation,” through the reframing of violence.⁴⁴ For Asad this fusion reflects the contradictory goals of democratic liberalism itself, combining 1) “the Enlightenment myth” of emancipation from religion through reason *for the elite* with 2) “the revolutionary myth of universal suffrage.”⁴⁵ In other words, Locke’s ultimately abstract individual is somehow to be able to engage in democratic majority decision-making, as well as to be able to protect minority rights, including religious rights.

In his alternative anthropology of the secular, Asad also argues that the characteristic feature of the secular is not its opposition to religion, but its insecurity.⁴⁶

⁴¹ Asad makes this point repeatedly, c.f. Asad, *Formations of the Secular*, 35, 191.

⁴² Asad, *Formations of the Secular*, 43.

⁴³ Rather than simply eschewing violence. For a similar critique of the myth that modern law reduces violence, see James Q. Whitman, “At the Origins of Law and the State: Monopolization of Violence, Mutilation of Bodies, or Fixing of Prices?” (1996). Faculty Scholarship Series. 653. https://digitalcommons.law.yale.edu/fss_papers/653

⁴⁴ Asad, *Formations of the Secular*, 62.

⁴⁵ Asad, *Formations of the Secular*, 61 (emphasis added).

⁴⁶ Asad, *Formations of the Secular*, 154. Asad initially proposes this in his comparative discussion of Benjamin and de Man. Subsequently, he mentions in passing that “In the seventeenth century, so John Pocock proposed, the self was beginning to be seen as contingent. The anxiety that that provoked was the context in which Locke’s political appeal to natural rights acquired added plausibility (footnote omitted).” Paradoxically, what characterizes the strain of American Christian evangelicalism which is most deeply invested in opposing the secular as a counter-religious is precisely its certainty. Indeed, it is an obsession

This insight flows from Asad's reading of two contrasting secular accounts of the secular, Paul De Man's "The Rhetoric of Temporality" and Walter Benjamin's *The Origin of German Tragic Drama*, which allows him to draw the conclusion that even secular formations of the secular differ. Just as there is no stable, universal definition of religion, there is also no universal, stable definition of the secular. Instead, the secular is "a concept that brings together certain behaviors, knowledges, and sensibilities in modern life," and it lacks stability in its historical identity.⁴⁷ Insecurity is thus the definitive characteristic of the secular, rather than the replacement of religious belief with scientific belief. At the end of the chapter "Reflections on Cruelty and Torture," Asad explores the ways in which violence is redefined in modernity, and in this context, again notes how the secular produces/is characterized by insecurity and instability. He explains that "detachment from passionate belief" is an element of "the entire secular discourse of 'being human'," because "only the skeptical individual—suspicious of his or her own beliefs as well as of others—can be truly free of fanatical convictions"⁴⁸ (although the skeptical individual cannot thereby be sincere). Therefore, the secular is inextricably bound to insecurity (and suspicion of others). This theme of insecurity runs throughout Asad's reconfiguration of the secular and its problems.

with certainty that most fully distinguishes this strain of Christianity from more progressive variations of Christianity.

⁴⁷ Asad, *Formations of the Secular*, 25.

⁴⁸ Asad, *Formations of the Secular*, 124 and 63. Although Asad is speaking specifically of religious beliefs in the context of sexual behavior, an argument can be made that extends this insight to fanatical political or nationalistic convictions as well.

Ultimately, for Asad, the secular is most usefully understood in the form of the specific liberal political form of the nation-state. Judicial process is “integral” to this political form as legal discourses define what it is to be human: “*sovereign, self-owning agent—essentially suspicious of others.*”⁴⁹ The essence of this human is that he is the bearer of certain inalienable rights, which law facilitates and protects “*by force.*”⁵⁰ Although Asad traces the concept of natural rights as characteristic of an individual’s “secular status” back to Latin Christendom and even “readings of Roman law,”⁵¹ like the Supreme Court, he invokes Locke for the proposition that inalienable rights are the essence of the human and that the individual possessing such rights owes “no allegiance” to anyone that would compromise his natural rights.⁵² Moreover, Asad argues that it is on the basis of the Lockean concept of the human being as “*sovereign, self-owning agent*” that “the secularist principle of the right to freedom of belief and expression was crafted.”⁵³ Thus, the specific form of religious freedom as liberal tolerance and the structure of the separation of church are themselves products of the secular. Without the secular, there is no religious freedom.

Sullivan also argues that the secular and the religious are connected, and that the religious refuses consistent definition or segregation. Like Asad, Sullivan enters the debate about the “existential crisis for secular liberalism” acknowledging the instability

⁴⁹ Asad, *Formations of the Secular*, 154, 135 (emphasis in original).

⁵⁰ Asad, *Formations of the Secular*, 256 (emphasis in original).

⁵¹ Asad, *Formations of the Secular*, 130.

⁵² Asad, *Formations of the Secular*, 134.

⁵³ Asad, *Formations of the Secular*, 135 (emphasis in original).

of formulations of the secular and their “inseparability from dubious projects of modernity.”⁵⁴ Problematizing the secular is not her goal, however. Rather, she argues that apparently secular law is incapable of protecting religious freedom, as actually practiced by most religious persons, and as contemplated by the First Amendment. She makes this argument by problematizing law as well as religion. Sullivan agrees with those who argue that religion cannot be clearly defined. What she adds is a critique of law’s self-representation, arguing that contrary to this self-representation, law is only apparently secular. In reality, “it is replete with ideas and structures that find their origin in, and are parallel to, ideas and structures in religious traditions.”⁵⁵ She argues that because law is the product of a certain type of religion, it can recognize as religion only that which has the structure of law, “[a]s if the law could take cognizance only of what could be construed as a competing set of norms, norms finding their authority in alternative religio-legal structure.”⁵⁶ Based both on her scholarship and on her experience as an expert witness in a religious freedom case, Sullivan argues that the law remains beholden to textual-legal forms of religion, or what she calls “religion ‘by law’,”⁵⁷ despite the fact that the mainstream of American lived religion. These forms include one or more of the following: authoritative sacred texts, classic formulations of doctrine and practice, consistently and comprehensively practiced.⁵⁸ Sullivan’s main claim, that “freedom and

⁵⁴ Winnifred Fallers Sullivan, Robert A. Yelle, and Mateo Taussig-Rubbo, eds. “Introduction,” *After Secular Law* (Stanford, CA: Stanford University Press, 2011), 1.

⁵⁵ Sullivan, *The Impossibility of Religious Freedom*, 153.

⁵⁶ Sullivan, *The Impossibility of Religious Freedom*, 111.

⁵⁷ Sullivan, *The Impossibility of Religious Freedom*, 147.

⁵⁸ Sullivan, *The Impossibility of Religious Freedom*, 147, drawing on the work of Daniel Pals.

equality are better realized, and liberty better defended, if religion, qua religion, is not made an object of specific legal protection,”⁵⁹ is not at issue here, but her related claim, that [e]ach time a decision is made to tailor law to account for difference, a question of equal treatment is presented,”⁶⁰ is at issue in the question of whether courts should permit religious objectors to same-sex marriage to violate anti-discrimination laws.

Sullivan’s thesis suggests a method for conceptualizing variations in First Amendment jurisprudence that differs from more traditional legal analyses. Sullivan argues that distinctions turn on the character of the religious practice at issue. Where religious practitioners cannot rely on the requirements of an authoritative text to justify their conduct, their claims are not “legally” religious, despite the prevalence of religious communal practice.⁶¹ She further argues that while legal accommodations for religion can be means of recognizing and thus, valuing, differences, they can also be a means of legally privileging “anti-egalitarian” traditions.⁶² Finally, Sullivan is among those who claim an inherent conflict in the First Amendment’s structure of protecting religious belief and practice. The First Amendment contains two provisions, the Free Exercise

⁵⁹ Sullivan, *The Impossibility of Religious Freedom*, 138.

⁶⁰ Sullivan, *The Impossibility of Religious Freedom*, 149.

⁶¹ Or the specifically religious significance of the practice as understood in other contexts. For example, Sullivan acted as an expert witness for Plaintiffs who argued that a city policy allowing horizontal, but not vertical memorials on grave-sites in a city-owned cemetery interfered with their exercise of religious freedom. Despite the fact that such burial practices are considered to be anthropological evidence of the religious beliefs of a community, and some of the Plaintiffs in Sullivan’s case identified as Jews, whose authoritative behavior-regulating texts do include burial practices, none of the Plaintiffs’ religious traditions specified methods for memorializing the dead. Thus, the state court that heard the case, as well as the state supreme court that reviewed the decision on appeal, both concluded that the city policy did not impermissibly interfere with the Plaintiffs’ religious practices.

⁶² Sullivan, *The Impossibility of Religious Freedom*, 149.

Clause, which restricts the government from prohibiting the “free exercise of religion;” and the Establishment Clause, which prohibits the government “establishment” of religion (generally understood as laws favoring religion over non-religion or one type of religion over another).⁶³ Sullivan argues that in some cases the recognition of a Free Exercise claim may trigger an Establishment Clause claim, that those whose religious freedom is recognized are receiving such favorable treatment by the government that is effectively “establishing” that form of religion over other forms that do not receive special recognition. This type of government favoring is arguably what the government is prohibited from “establishing” by the Establishment Clause of the First Amendment.

This problem among others, and the limitations of the individual rights advocacy model of law, are demonstrated in *Masterpiece Cakeshop v. Colorado Human Rights Commission*. Masterpiece Cakeshop is a bakery in Englewood, Colorado which is open to the public and sells a variety of baked goods, including wedding cakes. The proprietor, Jack Phillips, identifies as a Christian who believes that God opposes same-sex marriage. In 2012, Charlie Craig and Dave Mullins tried to purchase a wedding cake from Masterpiece Cakeshop. Phillips refused, arguing that his refusal was on the basis of his religious objection to same-sex marriage, rather than on the basis of animus against gay and lesbian persons. Although Colorado did not recognize same-sex marriage in 2012, Colorado’s public accommodations law, the Colorado Anti-Discrimination Act (CADA) did prohibit commercial vendors open to the public, including bakeries, from refusing to sell their goods on the basis of the customer’s sexual orientation or marital status. As with

⁶³ The precise meaning of the religion clauses has always been at issue, which is not surprising, given Asad’s thesis.

public accommodations laws generally, CADA is a neutral law, which is generally applicable; in other words, it does not single out or target religion or religious practice specifically. In fact, CADA, like most public accommodations laws, contains explicit provisions exempting churches, synagogues, mosques, “or other place that is principally used for religious purposes.”⁶⁴ The First Amendment is designed to prohibit express restrictions on religious freedom, such as a law expressly restricting ritual slaughter or animals for religious purposes. In contrast, laws which have only an incidental impact on religious practice, like a requirement that children attend school until they are 16 years old, that impacts the Amish only, are treated differently. In the case of a merely incidental burden, the State needs only to have a “rational basis” in order for generally applicable laws to pass constitutional muster. Public accommodations laws are generally applicable and do not target religion specifically (except to exempt it in specified circumstances) and the state has a well-documented “compelling” interest in preventing discrimination, especially in public commercial space. Public accommodations laws like CADA are a vital aspect of the legal architecture the State uses to discharge its compelling interest in preventing discrimination, and the U.S. Supreme Court had already rejected the claim that religious motivations for prohibited discrimination were entitled to exemption from application of such laws.⁶⁵ Moreover, although the incident of discrimination occurred before the Court recognized the fundamental right of same-sex marriage in *Obergefell v. Hodges*, the case reached the Supreme Court after *Obergefell* was decided, and CADA

⁶⁴ COLO. REV. STAT. § 24-34-601(1) (2016).

⁶⁵ *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968).

already included both sexual orientation and marital status as prohibited bases for discrimination, broader than both the federal public accommodations law and many state laws.⁶⁶ For all these reasons, and based on the logic of the U.S. Supreme Court's own majority opinion, use of the individual rights advocacy model should have produced a substantive result, rejecting the baker's claim. Nevertheless, the Court declined to rule substantively, neither rejecting the claim, nor affirming that a right to an exemption from public accommodations laws exists for those who are religiously opposed to same-sex marriage. Instead, writing for the majority, Justice Kennedy ruled that regardless of whether such an exemption existed, Phillips had a right to a religiously-neutral evaluation of his claims, and that this right was violated when Commissioners made comments about religion being used as a pretext for prejudice.

According to Sullivan's scheme, the type of religious claim that Phillips made is capable of recognition in law, grounded both in an authoritative behavior-regulating text (the Bible) as well as normative religious practice (mainstream traditionalist Christian, Jewish, and Muslim teaching that God opposes same-sex relationships). Although the baker had the advantage, as Sullivan's religious freedom plaintiffs did not, of a biblical basis for his rejection of same-sex relationships, Craig and Mullins also had the Court's

⁶⁶ The Civil Rights Act of 1964, Title II, prohibits discrimination because of race, color, religion, or national origin in certain places of public accommodation, such as hotels, restaurants, and places of entertainment. Department of Justice website. <https://www.justice.gov/crt-22>. The National Conference of State Legislatures web-site indicates that as of April 8, 2019, 45 states have public accommodations laws (Alabama, Georgia, Mississippi, North Carolina, and Texas are the exceptions). All states with a public accommodation law prohibit discrimination on the grounds of race, gender, ancestry and religion. In addition, 18 jurisdictions prohibit discrimination based on marital status, 25 prohibit discrimination based on sexual orientation, 21 prohibit discrimination based on gender identity, and 19 prohibit age-based discrimination.

acknowledgment of their right to civil same-sex marriage.⁶⁷ Because religions differ in their acceptance of same-sex marriage, granting an exemption from a generally applicable law to those who do not accept same-sex marriage may give rise to a claim that the exemption constitutes an impermissible “establishment” of religion, because this set of beliefs is being privileged. The basis of their argument would be that because some religious groups support same-sex marriage on the basis of explicitly religious values and tenets, allowing those who oppose same-sex marriage on the basis of religious values and tenets to discriminate in ways the law prohibits constitutes amounts to government endorsement of one group of religious beliefs, thereby “establishing” that group as the official government religion. The variety of religious belief about same-sex marriage is displayed in the number and variety of religious organizations who filed Amicus briefs arguing against a religiously based exemption for the baker. These Amici included the majority of mainline Protestant Christian denominations, Jewish, and American Muslim religious groups.

In order to understand the importance of this non-ruling as representative of the limits of the individual rights advocacy model and the philosophical anthropology that informs both law and liberalism itself, we must start with an earlier Supreme Court case, *Obergefell v. Hodges*.⁶⁸ In *Obergefell*, the Court reversed previous decisions finding that marriage was a union between a man and a woman, in order to conclude that the fundamental right to marriage does include the right to civil same-sex marriage on the

⁶⁷ Although the majority opinion in *Masterpiece* theorizes strangely that because same-sex marriage was not yet legal in Colorado, Phillips might have thought Craig and Mullins “were doing something illegal.” *Masterpiece*, Slip op., at 6 citing to App. 76.

⁶⁸ *Obergefell v. Hodges*, 576 U.S. ____ (2015).

same terms as different-sex marriage. Despite its acknowledgment of this right, the majority also demonstrated an unprecedented deference to opponents of the decision. When combined with the Dissents' invocation of Locke and fear of backlash prejudice, the decision provides crucial insights into the Court's failure to reach a substantive decision in *Masterpiece*, especially as an inherent weakness in the individual rights advocacy model of justice. When understood in the context of the longer legal history that includes the decision in *Obergefell*, *Masterpiece* also implicates a range of conflicts located at the intersection of law, religion, and sexuality which constitute broader challenges to secular liberalism, and are similarly resistant to resolution through individual rights advocacy.

In *Obergefell v. Hodges*, a majority of the Supreme Court found for the first time (courts having rejected this claim in the past) that the fundamental right to marriage includes a right to civil same-sex marriage. Fundamental rights include natural rights found in the state of nature and rights necessarily implicated in natural rights (such as the right to privacy). Thus, the fact that at the time *Obergefell* was decided only 16 states and the District of Columbia recognized the legality of same-sex marriage, either as a result of judicial or legislative process,⁶⁹ did not undermine the majority's holding, as the right

⁶⁹ Some states that recognized a right to same-sex marriage did so based on state court rulings that state laws or constitutions required the equal treatment of same-sex and different-sex marriage. This is "judicial process." In the alternative, some states passed laws expanding the definition of marriage to include same-sex marriage. The latter is "legislative process." The number 16 represents Justice Roberts' calculation, cited in his dissent. However, according to Geoffrey R. Stone, by the time the Court heard *Obergefell*, "same-sex couples could legally marry in thirty-eight [38] states and the District of Columbia," largely as the result of judicial process, interpreting the U.S. Constitution. Stone does not provide a citation for this number, although a review of several on-line resources suggests it reflects multiple decisions by federal circuit courts overturning state court bans after the Court's invalidation of part of federal DOMA in *Windsor* in 2012. Geoffrey R. Stone, *Sex and the Constitution: Sex Religion, and Law from America's Origins to the Twenty-first Century* (New York: Liveright Publishing Corp., 2017), 511.

it recognized is so basic that it “depend[s] on the outcome of no elections.”⁷⁰ Although the definition and regulation of marriage is generally the province of states, and both definitions and regulation of marriage do vary by state, based on local values about specifics such as age of consent, degrees of kinship that preclude marriage, recognition of common law marriage, and waiting periods, most states also recognize most marriages validly performed in another state. At least they did until the advent of same-sex marriage. In the case of same-sex marriage, most states that did not recognize same-sex marriage themselves also refused to recognize as valid same-sex marriages lawfully performed in other states, despite the Full Faith and Credit Clause.⁷¹ The decision in *Obergefell* standardized the legality of same-sex marriage everywhere, much as the Court standardized the legality of inter-racial marriage in the 1967 case *Loving v. Virginia*; the Court in *Obergefell* also ruled that every state must recognize same-sex marriages lawfully performed in other States.

Despite its acknowledgment of the right of civil same-sex marriage in *Obergefell*, the majority opinion also expressed an unprecedented level of concern for those who would continue to disagree with its ruling recognizing the legal equality of same-sex and

⁷⁰ West Virginia, op. cit. and *Obergefell*, at 2606, citing West Virginia, and rejecting the contention that the Court should “proceed with caution – to await further legislation, litigation, and debate.” *Obergefell*, at 2605.

⁷¹ Article IV, Section 1, of the U.S. Constitution requires that: Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. U.S. CONST. art., § 1. Virtually all marriages validly contracted in one state were treated as valid in every other state until 1996, when Congress passed the Defense of Marriage Act (DOMA) specifically to exempt same-sex marriages from the full faith and credit act, by defining marriage for all federal purposes as the union of one man and one woman. This provided cover for states to pass their own versions of DOMA and/or to invoke public safety and health as justification for denying recognition. Stone argues that Justice Scalia’s dissent in *Lawrence v. Texas*, in which the Court invalidated Texas’ anti-sodomy law, by invoking the horrifying possibility that the Court would next be asked to validate same-sex marriages, also fostered the mood that led to the passage of federal and state DOMA’s.

different-sex marriage. The majority opinion went out of its way to emphasize that the decision was not intended to “disparage” persons who object to same-sex marriage on the basis of “decent and honorable religious *or philosophical* premises.”⁷² This concern for dissenters is both rare and broad. Not only did the Court explicitly recognize the legitimacy of continuing religious dissent, itself unprecedented, the Court also specifically extended its consideration to those whose objection to same-sex marriage is based on grounds other than religious conviction.⁷³ The majority opinion made a point of assuring both religious organizations and persons, as well as “those who oppose same-sex marriage for other reasons,” that the decision would not prevent them from continuing to advocate against same-sex marriage, almost inviting further litigation to limit the right it had just established.⁷⁴ Despite the majority’s repeated and unusual acknowledgment of the continuing legitimacy of dissent from its ruling, Chief Justice Roberts complained that “the most discouraging aspect of [the] ruling is the extent to which the majority feels compelled to sully those on the other side of the debate,” insisting that they had been portrayed as “bigoted.”⁷⁵

Both Chief Justice John Roberts and Associate Justice Clarence Thomas invoked Locke as the basis of their arguments against judicial recognition of a fundamental right

⁷² *Obergefell*, at 2602 (emphasis added).

⁷³ Although the dissent focused on marriage as a religious as well as a social institution and the threat to religious liberty the decision posed. E.g., *Obergefell*, Roberts, C.J., Dissenting “Today’s decision, for example, creates serious questions about religious liberty.” At 2625; and Thomas, J. Dissenting, “Aside from undermining the political processes that protect our liberty, the majority’s decision threatens the religious liberty our Nation has long sought to protect.” At 2638.

⁷⁴ *Obergefell*, at 2607.

⁷⁵ *Obergefell*, Roberts, C.J., Dissenting, at 2626.

to same-sex marriage. Justice Thomas argued that the liberty interests articulated by Locke in his justification of legitimate government are negative liberty interests, that is, the right to be free *from* government intrusion into one's personal affairs, rather than the right to a claim on government to provide rights. Justice Thomas also argued that because the society of husband and wife precedes civil society,⁷⁶ the right to marriage in its traditional different-sex form is a natural right inherent in the state of nature. Natural rights of this kind are not dependent upon government grant or the consent of the governed, they exist independently of civil society, and cannot be waived. Because Justice Thomas was not persuaded that the natural right to marriage includes the right to choose a partner of any gender in the same way it includes the right to choose a partner of any race (*Loving v. Virginia*),⁷⁷ he used Locke (rather than an explicitly religious argument⁷⁸ against same-sex relationships) to argue that the only legitimate liberal means of extending the right was legislative. For Thomas, the right to same-sex marriage is not part of the natural right to marriage which free, equal, and independent individuals brought into civil society from the state of nature. Thus, the social contract requires that in order to be binding upon other individuals in society such a right must come from the

⁷⁶ The majority cited Cicero for this proposition, while Justice Thomas cited Locke.

⁷⁷ The majority decision in *Obergefell* cited this decision, as well as several other cases in which restrictions on marriage were struck down, as relevant to its finding that the right to marriage includes the right to same-sex marriage despite the fact that there was no historical precedent for the recognition of such relationships. Although the question of whether these cases are indeed similar to the limitation of different gender partners remains a subject of social debate, it is not necessary to address this question here, beyond explaining the logical premises of Justice Thomas' argument from Locke.

⁷⁸ Although as noted above, he did also express concern about the implications of the decision for religious liberty.

consent of the governed, i.e. through the passing of new and expanded laws or the judicial interpretation of existing state laws or constitutions.⁷⁹

Many versions of the social contract theory exist, but Locke's is comprehensive, it informed the work of the Founders, and both Chief Justice Roberts, and Justice Thomas invoke Locke specifically in the reasoning of their dissent from the majority in *Obergefell*.⁸⁰ *Obergefell* is significantly related to *Masterpiece* not simply because the latter explores ramifications of the former for providers of wedding goods and services, but for two reasons unique in Constitutional jurisprudence. First, despite the extravagance of the majority's view of marriage—statement such as “[c]hoices about marriage shape an individual's destiny”⁸¹ and “marriage is a keystone of our social order”⁸²—and advocacy of the right of same-sex couples to marry and to nation-wide recognition of their marriages, the decision also goes to excessive lengths to assure those who oppose same-sex marriage, whether on religious or non-religious grounds, that they will not be stigmatized and their counter-advocacy will not be limited because of the decision. Second, this legally bizarre combination appeared to invite further legislation, just as

⁷⁹ Neither Chief Justice Roberts nor Justice Thomas address the question of why state court interpretation of existing state legislation to include the right of same-sex marriage is any less problematic than the U.S. Supreme Court's similar interpretation of the 14th Amendment to the U.S. Constitution, although both broadly acknowledge the democratic legitimacy of this at the state level.

⁸⁰ And to distinguish their dissent from a simple opposition to same-sex marriage as a policy choice. Each of the four dissenting justices made a point of explaining that their dissents were not a reflection of their personal views of same-sex marriage itself, only on whether it was part of the fundamental right to marriage or something that should be left to individual states to decide. Only Justice Thomas made the case in Lockean terms, although Justice Roberts also invoked Locke for the proposition that the liberty guaranteed by the U.S. Constitution, which includes religious liberty, is a negative liberty – the right to be free *from* government intrusion in one's private affairs or limitations on one's religious conduct.

⁸¹ *Obergefell*, at 2599.

⁸² *Obergefell*, at 2601.

Justice Thomas noted in his dissent: “It appears all but inevitable that the two [marriage as religious institution and civil legal right] will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples.”⁸³ Indeed, he reiterated this concern in his *Masterpiece* decision, indicating that the situation in *Masterpiece* is the kind of conflict he had feared, and reiterating concerns that Chief Justice Roberts and Justice Alito had expressed in their *Obergefell* dissents. Citing Chief Justice Roberts, Justice Thomas revisited the concern that those who oppose same-sex marriage would be stigmatized as “bigots,” and citing Justice Alito, he reiterated the concern that the decision in *Obergefell* would be used to “stamp out every vestige of dissent” and “vilify Americans who are unwilling to assent to the new orthodoxy.”⁸⁴ These concerns are all the more surprising, given the majority’s assurance that those who oppose the majority decision. Despite this repeated expression of concern, the majority in *Masterpiece* continued its excessive care not to denigrate the motives or character of those who oppose same-sex marriage—noting for instance that “Phillips’ dilemma was particularly understandable”⁸⁵—and in fact penalized the Colorado Human Rights Commission for failing to take the same care, by reversing the Commission’s decision.

Although the incident that led to *Masterpiece* actually began before the Court recognized the right to same-sex marriage, *Masterpiece* nevertheless takes up the Court’s apparent invitation in *Obergefell* to revisit the open question of whether and how

⁸³ *Obergefell*, Thomas, J. dissenting, at 2638.

⁸⁴ *Masterpiece*, Thomas, J., concurring, slip op., at 13-14.

⁸⁵ *Masterpiece*, slip op., Opinion of the Court, at 11.

religious objections to same-sex marriage would be accommodated. The *Masterpiece* decision reversing the Commission’s decision by a vote of 7-2 contained five (5) separate opinions: 1) the majority opinion, written by Justice Kennedy, and joined by Chief Justice Roberts, and Justices Breyer, Alito, Kagan, and Gorsuch; 2) a concurring opinion by Justice Kagan, in which Justice Breyer joined; 3) a concurring opinion by Justice Gorsuch, in which Justice Alito joined; 4) an opinion by Justice Thomas, in which Justice Gorsuch joined, concurring in part and concurring in the judgement; and 5) a dissenting opinion by Justice Ginsburg in which Justice Sotomayor joined. As previously noted, the majority declined to rule on the question of whether Phillips’ religious beliefs entitle his bakery to an exemption from the public accommodations law. The majority opinion directed that future similar cases “must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.”⁸⁶ Kagan and Breyer wrote separately to emphasize their belief that the “Jack” cases, in which three bakers refused to bake cakes with religious anti-same-sex messages and were not found to be in violation of the public accommodations law, could be distinguished, contrary to the position Justice Gorsuch expressed in his separate opinion that these cases confirmed the Commission’s anti-religious bias. Nevertheless, Kagan and Breyer joined the majority opinion, finding the fact that the Colorado Court of Appeals did not explain the distinction “disquieting” rather than grounds for joining the dissent. Gorsuch agreed with the majority’s reversal of the lower court order, but wrote to assert his belief that Phillips

⁸⁶ *Masterpiece*, slip op., Opinion of the Court, at 18.

was entitled to an exemption on religious freedom grounds, and also that the baked good at issue was not a “wedding cake,” but a “cake celebrating a same-sex wedding,” thus rejecting Kagan and Breyer’s argument of a valid distinction between the bakers the Commission didn’t sanction and Phillips. Thomas wrote separately to set out his theory that Phillips had raised and proved both a free speech claim as well as a religious freedom claim. He also wrote to make the point that the rejection of Phillips’s claim by the Commission was representative of the general tendency to disparage religious conscience. Ginsburg and Sotomayor argued in their dissent that although there was “much in the [majority] opinion with which [they] agree,” they could *not* agree that “Craig and Mullins should lose this case.”⁸⁷ Although Craig and Mullins were actually parties to the case, the legal issue was theoretically whether an exemption to the public accommodations law exists for those vendors whose objection to same-sex marriage is religiously motivated, and not whether Craig and Mullins won or lost. Such phrasing in a news article, especially given the legal complexity of the case, would not have been surprising, but from Justices Ginsburg and Sotomayor the phrasing reflects the tendency of the individual rights advocacy model to reframe all conflicts as rights conflicts, and as competitive conflicts in which one party must lose in order for the other to win. As indicated by the language of the dissent, this tendency can reshape the thinking of even experts who know better. Although the government—in this case, the Commission, in criminal cases, the People—ostensibly represents a collective, communal interest in

⁸⁷ *Masterpiece*, slip op., Ginsburg, J., dissenting, at 2.

discrimination-free public spaces, from the perspective of individual rights advocacy, the government merely stands as proxy for what remain essentially individual rights.⁸⁸

Of the five Justices who joined in the majority opinion, agreeing with the general premise that “[religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law” and that “Gay persons may be spared from ‘indignities’ when they seek goods and services in an open market,” three wrote separate opinions effectively refuting these inclusive positions.⁸⁹ The majority opinion also acknowledged that if the exemption requested by Phillips

were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.⁹⁰

Two others (Kagan and Breyer) wrote separately and not only affirmed that “a vendor cannot escape public accommodations law because his religion disapproves selling a product to a group of customers, whether defined by sexual orientation, race, sex, or other protected trait,” but they also offered an additional justification for *upholding* the Commission’s decisions, which undermined the majority’s charge of anti-religious

⁸⁸ Note also in this context, the prevalence of civil rights cases in which the official responsible for enforcing the challenged law is named as the opposing party, e.g. *Roe v. Wade*, Henry Wade being the Dallas District Attorney in charge of prosecutions that would have taken place if Roe had attempted to secure an abortion in Dallas in violation of the law prohibiting abortion; *Hobby Lobby v. Burwell*, Sylvia Matthews Burwell being the Secretary of the Department of Health and Human Services which administers the Affordable Care Act (ACA) which Hobby Lobby successfully challenged as applying to them.

⁸⁹ Gorsuch, joined by Alito and Thomas, joined by Gorsuch; theoretically leaving Kennedy and Roberts affirming this reasoning.

⁹⁰ *Masterpiece*, slip op., Opinion of the Court, at 10.

sentiment. The majority opinion, as noted in Justice Ginsburg's and Justice Sotomayor's dissent, does indeed appear to make a strong case for rejecting the contention that there could be an exemption from the public accommodations law on the basis of a religious belief that opposes same-sex marriage. It also highlights the problem of limiting any such exemption so that it does not obviate the very purpose of public accommodations laws. Justice Kagan's and Justice Breyer's concurrence seems only to strengthen that argument by rejecting Justice Gorsuch's and Justice Alito's argument that a wedding cake is a different product when it is used for a same-sex wedding than when it is used for a different-sex wedding. Thus, the Court's failure to rule 6-3 to uphold the Colorado Human Rights Commission's decision is inexplicable—in terms of the individual rights advocacy model.

Despite its own strong argument against an exemption from CADA, the majority decided that comments by two Commissioners, months after the initial decision, revealed animus against Phillips' religious beliefs. The majority even acknowledged that some of the comments were susceptible of multiple interpretations, including benign statements about what the law requires. The majority expressed concern that the Jack cases were treated differently than Phillips's case, despite what Justice Kagan and Justice Breyer's concurrence describes as an "obvious" distinction. The bakers in the Jack cases all refused to sell a cake they would sell to any other customer, with evidence that they in fact routinely sold cakes with religious messages to other religious customers, while Phillips refused to sell to a gay customer a cake he would, and routinely did sell to

straight customers: a wedding cake.⁹¹ Although Justices Kagan and Breyer found the Commission's failure to offer this explanation "disquieting," Justices Ginsburg and Sotomayor disagreed, finding that this difference did absolve the Commission of impermissible anti-religious bias. They also argued that the comments by some commissioners, which came in the middle of a multi-layered decision-making process, fell far short of the level of hostility to religion that the Court had previously found violated the First Amendment, and "far removed from the only precedent upon which the Court relies."⁹²

The proprietor of Colorado's Masterpiece Cakeshop is not the only provider of wedding goods and services in the country who has refused to provide the same wedding goods/services to same-sex couples that they provide to different-sex couples. As soon as the first states recognized same-sex marriage as legally equivalent to different-sex marriage, religious vendors of wedding goods and services began to make claims that their religious belief, unlike the religious beliefs that motivated hostility to racial integration, justified exemptions from neutrally applied, generally applicable public accommodations laws. Masterpiece was simply the first to reach the U.S. Supreme Court. Since the Court issued its ruling in Masterpiece, the proprietors in several of these other cases have sought U.S. Supreme Court review after state courts denied their claims for

⁹¹ *Masterpiece*, slip op., Kagan, J., concurring, at 2.

⁹² *Masterpiece*, slip op., Ginsburg, J., dissenting, at 8, referring to *Church of Lukumi Babalu*, in which the city of Hialeah, FL passed a municipal ordinance clearly targeting the church's religious ritual slaughter, while exempting animal slaughter for non-religious purposes that was indistinguishable from the church's practice. In this case, the Court found that the law itself was not neutral, but rather intended to target the religious practice of one group while allowing similar practices for non-religious reasons. Justices Ginsburg and Sotomayor rejected the contention that the same criteria could be applied to CADA.

exemption. In each case, the Court has declined to consider the case on the merits, either declining to take up the case at all⁹³ or remanding the case to the state court to reconsider “in light of” the Court’s ruling in *Masterpiece*.⁹⁴ Thus, the question of whether the First Amendment provides an exemption from public accommodations laws for providers of wedding goods and services who object to same-sex marriage on religious grounds remains outstanding. Justice Thomas thinks this is a good thing, that “[b]ecause the Court’s decision vindicates Phillips’ right to free exercise, it seems that religious liberty has lived to fight another day.”⁹⁵ But the Court did not rule that Phillips was entitled to an exemption from the public accommodations law, and has declined to re-consider other cases in which this claim was made and denied, leaving religious vendors without clear guidance about whether the exemption exists and if so, under what circumstances. At the same time, the Court also failed to rule that such an exemption does not exist, leaving gay and lesbian couples likely to be “subject[ed]. . . to indignities when they seek goods and services in an open market,” and anti-same-sex wedding vendors to test their rights for

⁹³ *Cervelli v. Aloha Bed & Breakfast*, 415 P.3d 919 (Haw. Ct. App. 2018), petition for cert. denied March 18, 2019.

⁹⁴ *Klein v. Oregon Bureau of Labor & Industries*. The full order of the Court consisted of the following: “The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the Court of Appeals of Oregon for further consideration in light of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 584 U.S. ____ (2018).” Legal scholars are uncertain what this language from the Court means, given that the Court did not make a decision on the substantive issues in *Masterpiece*. Their best guess is that the Supreme Court is directing the Oregon court to explicitly confirm whether the plaintiffs’ religious beliefs were treated with legally sufficient government neutrality. The Arizona Court of Appeals cited *Masterpiece* in rejecting the claim of a wedding vendor that challenged the Phoenix non-discrimination ordinance, also citing *Piggie Park. Brush & Nib Studio, LC v. City of Phoenix*, 418 P.3d 426, 432 (Ariz. Ct App. 2018), cited in NeJaime and Siegel, FN 86, at 221. However, the Arizona Supreme Court cited *Obergefell* when it overturned the Court of Appeals decision on September 16, 2019.

⁹⁵ *Masterpiece*, slip op., Thomas, J., concurring in part, at 14.

clarification.⁹⁶ Case law in this area is currently specific to same-sex marriage, but is capable of reproduction in other areas. Indeed, it is already occurring, as the same religious prejudices animating the claims in *Masterpiece* are applied to other businesses, and state legislatures pass a variety of anti-liberal, religiously pro-family measures, including health care refusal laws, further demonstrating the need for something more than individual rights advocacy law to resolve the conflict.⁹⁷

The example of marriage equality usefully demonstrates the limitations of the individual rights advocacy model of law and its underlying philosophical anthropology of autonomous and independent individuality. As of 2015, the right to civil same-sex marriage exists throughout the United States, and every validly contracted same-sex marriage conducted in any state in the country is now valid in all other states.⁹⁸ The Court's decision in *Obergefell* represents a huge step forward for LGBTQIA advocates. Despite this important nominal gain, however, lesbian and gay couples remain subject to discrimination in public accommodations as they plan their weddings. Without definitive judicial resolution, wedding goods and service providers for different-sex couples may still refuse to provide the same goods and services to same-sex couples. In terms of legal questions of discrimination and equal protection, sexual orientation is in many ways more like race than gender. Although sexual orientation is not a protected classification and does not trigger heightened scrutiny, as do claims of racial discrimination, arguments can be made that disparate legal treatment on the basis of sexual orientation is as unjustified

⁹⁶ *Masterpiece*, slip op., Opinion of the Court, at 18.

⁹⁷ NeJaime & Siegel, esp 222-224.

⁹⁸ Because of the Full Faith and Credit Clause, see FN 46.

as disparate legal treatment on the basis of race. However, sexual orientation implicates religion in a way that race does not—either more so than gender or as an extension of gender—despite the fact that religious justifications were offered in defense of slavery, segregation, and anti-miscegenation laws.⁹⁹ Cases produced by religious resistance to same-sex marriage are only the tip of the iceberg, as rights for LGBTQIA persons are either still-to-be recognized¹⁰⁰ or dependent on tolerant government officials. The deadlock at the heart of *Masterpiece* demonstrates the limitations of the philosophical anthropology of the law, as based in Locke’s abstract and atomistic individual, and the consequent need for a different lens through which to view the on-going social divisions driving anti-liberal politics and social policy. Revisiting the philosophical anthropology might also be able to generate new ways of directing the law’s energy toward expanded flourishing.

⁹⁹ Even claims of gender equity appear to trigger concern, let alone equal rights for sexual minorities. Case, “Trans Formations in the Vatican’s War on ‘Gender Ideology.’” See also Millbank and Pabst’s argument that it is the “*abolition*” of gender difference not patriarchy that causes subordination and violence, while the “complimentarity” of the different sexes “*automatically* produces symbolic meaning, legal norms, political order, social peace, charitable but non-institutionalized care and economic subsistence and stability (second emphasis added).” John Milbank and Adrian Pabst, *The Politics of Virtue: Post Liberalism and the Human Future* (London: Rowman & Littlefield, 2016), 271. Note also in this context, that despite the attempt of religious vendors who object to same-sex marriage to distinguish their objections from religious objections to racial integration, as recently as September 2019, an interracial couple was initially denied use of a wedding venue on the basis of the proprietor’s initial belief that the Bible prohibits both inter-racial and same-sex marriage. Although the proprietor retracted their objection, apparently after their pastor clarified that the Bible does not oppose inter-racial marriage, less than a year before, an inter-racial couple was asked to leave a Christian church whose leaders did believe that the Bible does oppose inter-racial marriage.

¹⁰⁰ Indeed, the Supreme Court will hear a collection of cases this term (October 2019) addressing the question of whether Title VII which protects federal employees from discrimination “because of sex” protects gay, lesbian and transgender employees. The U.S. Court of Appeals for the 11th Circuit ruled that Title VII does not apply to discrimination based on sexual orientation. But the U.S. Court of Appeals for the 2nd Circuit reached the opposite conclusion, reasoning that discrimination based on sexual orientation is a “subset of sex discrimination.”

Chapter Two: Rosenzweig's New Philosophy & New Theology

Franz Rosenzweig's goal in *The Star of Redemption*¹⁰¹ was to fully describe the “new thinking” he had previously hinted at, a revolution in philosophy on the order of Kant, not to fashion an alternative philosophical anthropology. However, his alternative philosophy does indeed lend itself to a robust alternative philosophical anthropology which counters, but remains within the tradition of liberalism. At the core of his revolutionary new mode of philosophy is the claim that the All cannot be cognized through thinking, both because there is no unity of thinking and being, and because the All is not an abstract, universal, timeless, singularity. Instead, Rosenzweig argues in and through the structure of *The Star* that the All is an irreducibly diverse multiplicity, which is relational, oriented in time, and may only be grasped through particularity, especially through the particularity of Judaism.

His alternative begins with an insight about the fear of death—that it is not a universal or generic fear but a specific fear of one's own particular death, the disappearance of one's own particular something into a specific nothing. This insight about the particularity of death shatters the illusion of a unitary, universal cognizable All into three separate pieces, which must somehow come into relationship with each other in

¹⁰¹ Franz Rosenzweig, *The Star of Redemption*, trans. Barbara E. Galli (Madison, WI: University of Wisconsin Press, 2005). All references to *The Star* are to the Galli translation, published in 2005, unless they are quoted from others who use the older version. Where necessary, I will compare the two translations.

order to form reality and the possibility of human relationship to reality. Rosenzweig refers to these three separate pieces as the nothings of knowledge, arguing that none is further reducible or conflatable with the others. These three nothings of knowledge turn out to be the three rational sciences Kant left out of his articulation of metaphysics as science, precisely because they are not cognizable, thus, they are “nothings”: theology (God), psychology (Man or Human Being¹⁰²), and cosmology (World). Rosenzweig moves from a description of these nothings to the new thinking’s theological turn, the temporal dialectic of Creation/Past, Revelation/Present, and Redemption/Future. The theological turn’s temporal nature re-prioritizes speaking over thinking because speech takes place in time. The new thinking’s alternative philosophical system culminates in the communal structures of Judaism, which in their vocational orientation provide the means for an understanding of justice as acts of love toward neighbor. The structure of the new thinking also uses an evolving epistemology, which moves from the traditional philosophical epistemological framework of logic to that of experience, and finally to an epistemological framework of communal structures, but which is actually understood in reverse order, in that the successive epistemological framework is the condition of the possibility of the previous epistemological framework.

Rosenzweig’s new thinking is capable of grounding an alternative philosophical anthropology that is fundamentally different than the one on which liberalism is based. In contrast to liberalism’s portrayal of humans as primarily autonomous and independent, Rosenzweig’s description of the diverse relational multiplicity at the heart of reality

¹⁰² Some translations use “person” or “self.” However, because this nothing transforms into “self” on its way to becoming “beloved soul” such gender-neutral terms create interpretive problems.

centers relationality as constitutive of both reality and what it means to be human. His description of sin as failure to love as the driving force of relationship centers openness as finitude and imperfectability. His account of Judaism and Christianity as vocationally oriented communities provides a first glimpse of an expanded conception of justice as equity and not merely justice as the fair resolution of rights.

Rosenzweig's critique of philosophy also suggests a general framework for a similar critique of law, especially the American legal system, which like German Idealist philosophy posits foundations of universality, abstraction, and a "pointless" point of view. Because the philosophical anthropology that grounds liberalism centers autonomous and independent individuality, legal analysis through the lens of relationality is always secondary, if it occurs at all. In contrast, the philosophical anthropology developed from Rosenzweig centers relationship, making this primary, thus more consistently producing outcomes that promote both relationality and openness in the resolution of conflict. Rosenzweig's theological turn in philosophy replaces the pointless point of view with a contextualized, time-oriented point of view, offering a structure for a similarly contextualized & time-oriented method of legal analysis. Such a re-orientation helps to reveal the law's historical entanglement with religion, exposing the many religious ideas and structures which continue to underlie apparently secular legal ideas and structures.¹⁰³

Rosenzweig's thought develops a strain of explicitly Jewish philosophizing whose aim is to demonstrate that Judaism is fully compatible with a humanistic and universal

¹⁰³ Sullivan, *The Impossibility of Religious Freedom*, 153.

philosophy. Maimonides and Rosenzweig's own mentor, Hermann Cohen, are exemplars of this tradition of Jewish philosophy, which generally works to demonstrate Judaism's universality, as ethical monotheism. Rosenzweig, however, argues in the opposite direction. Instead of arguing for Judaism's universality, he argues that the benefit of Judaism is its innate and unique particularity. Contrary to Maimonides and Cohen, who portray Judaism as just another religious system of universal values, consistent with a universal philosophy, Rosenzweig argues that it is the very particularism of Judaism which corrects and is necessary to disabuse philosophy of its unrealistic pretensions to universality—the abstraction from the individual and the view from nowhere. Rosenzweig argues that Judaism is “uncanny” in that the Jewish community, uniquely among religious or ethnic/national groups, exists as a particular communal form, out of time, without its own land, yet possessing its own, separate language. The vocation of the Jewish community is to remain uncanny—not fully at home—for the sake of the redemption of the world. Rosenzweig makes this argument in part in opposition to Hegel's explicit insistence that philosophy thrives in conditions of “at-homeness,” referring primarily to ancient Greek philosophy. The particular means by which the Jewish community does this is through the epistemological framework of its communal structures, the cycle of ritual liturgies and prayers, as well as by calling Christianity to account. This is necessary because Christianity is always only ever “on the way” and can never make it to redemption on its own. Rosenzweig's description of Christianity is as the paradigmatic universal, determined by his systemic interests and Christianity's relationship to eternity. In this sense, Rosenzweig notes that Christianity's primary liturgical celebration (Eucharist) remains grounded in Revelation, unlike Judaism's

primary liturgical celebration (Shabbat), which reconciles Creation and Revelation, for the sake of Redemption.¹⁰⁴

In this chapter, I will outline the structure of *The Star* in its several layers of meaning and interpretation, both as they set out the system of the new thinking and as they inform an alternative philosophical anthropology. This layered approach is necessary in part because of the complex interrelationships of the parts of *The Star*, and in part because of the way in which I will build on those interrelationships. I will also offer an account of how Rosenzweig's "theological turn" functions structurally, rather than dogmatically. Just as Rosenzweig argues in favor of a "new" theology that can act as a conversation partner for philosophy, which is neither superior nor subservient to philosophy, I will argue that this "new" theology can ground a new philosophical anthropology to reorient liberal jurisprudence. My analysis begins and ends, as does *The Star* itself, with Rosenzweig's insight about the fear of death, taking Rosenzweig to be both oriented toward the everyday and aware of its limits as the means of grasping or coming into meaningful relationship with the All. Although aspects of the alternative philosophical anthropology are present throughout the structure of *The Star*, Rosenzweig's account of how Man is transformed into Beloved Soul and turns toward the World provides the most explicit account of this expanded conception of individuality and thus, of human flourishing. This description is part of the theological turn described in Part Two of *The Star*, specifically the middle of the temporal progression. Thus, after

¹⁰⁴ Rosenzweig, *The Star*, 330, 338.

exploring the overall structure of *The Star* and its systemic implications, I will take a deeper look at this transformation, which Rosenzweig calls Revelation.

My main interpretive lenses for *The Star* are Leora Batnitzky's *Idolatry and Representation: The Philosophy of Franz Rosenzweig Reconsidered*¹⁰⁵ and Benjamin Pollock's *Franz Rosenzweig and the Systematic Task of Philosophy*.¹⁰⁶ Batnitzky's work provides the explanation of how and why Rosenzweig employs different epistemological frameworks for each section of *The Star* and the "backwards" way in which these relate to each other. Rosenzweig's use of grammar as the orienting structure for his theological turn resonates in some ways with American Christian theologian George Lindbeck's idea of narrative theology, of religion as native language, rather than belief. Batnitzky offers Lindbeck's theological conception to show how Rosenzweig's theological turn remains relevant to both modern and post-modern discourses about meaning. Her argument here also makes further credible my particular extension of Rosenzweig's thought in the realm of law. I rely on Pollock for his insistence on the centrality of system to *The Star* and his exploration of whether Rosenzweig acknowledges the possibility of fully grasping the All in life. My goal in this chapter is to demonstrate how Rosenzweig's thought could be developed to ground an alternative philosophical anthropology capable of providing a counter and corrective to the limitations of the Lockean individual and the individual rights advocacy model of justice as fairness.

¹⁰⁵ Leora Batnitzky, *Idolatry and Representation: The Philosophy of Franz Rosenzweig Reconsidered* (Princeton, NJ: Princeton University Press, 2000).

¹⁰⁶ Benjamin Pollock, *Franz Rosenzweig and the Systematic Task of Philosophy* (Cambridge: Cambridge University Press, 2009).

Structural Overview

In order to understand the meaning of *The Star* one must first understand its structure, both the structure of the writing, and the “structure” the writing produces. Rosenzweig scholars disagree about how to read the structure as an aspect of meaning and how to understand the meaning of the structure. Rosenzweig himself describes the “structure”—a Star of David—as the “countenance,” or God’s truth; and it is a vital, but disputed, aspect of his overall meaning. The debate over our capacity to “see” this truth in life and its relationship to a vocation for justice will be addressed more fully later in the chapter. First, though, we must take *The Star*’s claims of system and its “backwards” hermeneutical structure seriously, using Pollock’s and Batnitzky’s work as guides.

The Star comprises three parts, each of which begins with an Introduction, and contains three books. The Introduction to each Part shows the reader the path leading from the reader’s familiar intellectual worlds to the similar but slightly different world of *The Star*.¹⁰⁷ When put together, the structure of Rosenzweig’s philosophical argument creates a Star of David, which Rosenzweig describes as the countenance. The upright triangle is formed by the three nothings or elements: God, Man, and World, (described respectively in Book One, Two, and Three of Part One), and forms the forehead, cheeks, and ears of the countenance. The bottom-pointing triangle is formed from the temporal dialectic of Creation-Past, Revelation-Present, and Redemption-Future (described respectively in Book One, Two, and Three of Part Two), and forms the eyes and mouth

¹⁰⁷ Franz Rosenzweig, “The New Thinking,” *Philosophical and Theological Writings*, trans. and ed. Paul W. Franks and Michael L. Morgan (Indianapolis, IN: Hackett Publishing, 2000), 129.

of the countenance.¹⁰⁸ Part Three compares and contrasts Jewish and Christian communal structures of time and liturgy. The book closes with a final section called, “The Gate,” a summation that explains the physical shape of the argument as “the countenance” [of God] and acts as a charge, a “commissioning,” to the reader to put the new thinking into practice, as an immediate grasping of the reconstituted All by heeding the words of the divine mouth “to do justice.”¹⁰⁹ Rosenzweig himself appears to have actualized this charge through his subsequent work and to have “grasped” the All in just this way, on rare occasions.¹¹⁰

Rosenzweig tells his readers that *The Star* is a system, whose purpose is to bring about a Kantian order “total renewal of thinking,” which while read forward, can only be understood fully “backwards.” He notes in one of his subsequent explanations of *The Star*, the 1925 article, “The New Thinking,” that unlike traditional philosophical works, the “ultimate meaning” of *The Star* is revealed only at the end.¹¹¹ Leora Batnitzky argues against a progressive or dialectical interpretation of *The Star*, in which logic leads to experience and finally to a communal understanding of truth. Instead, she argues that taking Rosenzweig himself seriously means understanding that for him logic is actually derived from experience, while experience itself is a product of communal frameworks. Thus, the earlier parts of *The Star* are “produced from” the subsequent parts, rather than

¹⁰⁸ Rosenzweig, *The Star*, 445.

¹⁰⁹ Rosenzweig, *The Star*, 446-447.

¹¹⁰ Pollock, *Systematic Task of Philosophy*, 303.

¹¹¹ “The New Thinking,” at 114. “Therefore, if any philosophical book is to be worth reading, it surely requires that one does not understand the beginning, or, at the very least, [that one] understands it wrongly.” See also, Rosenzweig’s acknowledgment at the beginning of Book Three of Part 2 that he will explain “everything that the two preceding Books still had to leave in abeyance.” Rosenzweig, *The Star*, 221.

giving rise to or providing the foundation for the latter (e.g. Part One is *produced from* Part Two in that the logic of Part One is derived from the experience of Part Two).¹¹² Logic provides the foundation of Rosenzweig's alternative system, but experience is required to ground the relationships necessary to the reconstructed All, and meaning is ultimately dependent on communal structures, rather than logic. Although the argument must start with logic and be built in the order Rosenzweig provides it, the profound differences the alternative system generates can only be fully understood "backwards," i.e. earlier sections reveal their full meaning only after the reader has grasped the epistemological framework of the latter sections.

More than simply a description of each of the features of the new thinking, the Parts of *The Star* also illustrate the way Rosenzweig uses successive epistemological frameworks as part of the construction of his alternative system. As Batnitzky explains, although each part of *The Star* is complete in itself, it is only through each subsequent epistemological framework that one comes to understand both the meaning and the limitations of the previous part(s). This is true for each successive epistemological framework and constitutes the way in which *The Star* must be read "backwards." In a similar way, Rosenzweig argues that the future actually shapes the past, this is the way in which Creation and Redemption are related, not simply as the past giving rise or leading progressively to the future.

In Part One, Rosenzweig describes the nature and the origin of the three nothings that comprise the All using the (traditional philosophical) epistemological framework of

¹¹² Batnitzky, *Idolatry and Representation*, 64.

logic. Part Two builds on this necessary prior logical framework. However, only through Part Two's epistemological framework of lived experience can the reader begin to understand both the fullest meaning of as well as the limitations of logic, i.e. of the significance of the claim that the All cannot be cognized through thinking. Lived experience is the necessary epistemological framework for fleshing out the mere idea of the nothings available through the lens of logic. Logic is well-suited to and necessary for an explanation of the first stage of the nothings' emergence, of how each particular something arises in the nothing, and the nothing begins its process of transformation through the mathematical differential of the something without losing its particularity. Only through the lens of lived experience, however, can we understand how these partially transformed nothings come to be grounded in time and how they turn toward and enter into relationship with each other. Lived experience is not only the condition for the possibility of understanding the temporal dialectic of Creation, Revelation, and Redemption, it is also the condition for the possibility of understanding the logic of the nothings themselves. However, it is only through Part Three's epistemological framework of communal structures that the reader can begin to see both the meaning as well as the limitations of the epistemological framework of lived experience, that experience is ultimately no more adequate than logic to bring us into meaningful relationship with the All. Finally, Part Three also demonstrates that even the combination of logic, experience, and communal structures only ever generate a partial relationship to the All; and, thus, our "grasp" of even a reconstituted All can only ever be partial. In each

case, Batnitzky argues, the subsequent epistemological framework doesn't supersede or replace the prior, but is instead the condition for the possibility of the prior framework.¹¹³

As Pollock notes in his introduction to *Franz Rosenzweig and the Systematic Task of Philosophy*, despite Rosenzweig's repeated claims that *The Star* is indeed a "system of philosophy," the bulk of Rosenzweig scholars in his own day and since have understood the systematic features of *The Star* as incidental to its meaning.¹¹⁴ Given that it is precisely the systematic nature of German Idealism that Rosenzweig most critiques, it is not surprising that his interpreters have struggled to take his own systemic claims seriously. Like Batnitzky, however, Pollock argues that we really must take Rosenzweig at his word if we want to understand *The Star*. Pollock argues that this conundrum of system is resolved when we see, as Rosenzweig saw, that German Idealism's discovery of system as the task of philosophy only revealed the perennial problem of philosophy. Unlike the system of his German Idealist contemporaries, based on Hegel's totalizing system, Rosenzweig's system is "not some kind of totalizing force of intellectual oppression that reduces all difference."¹¹⁵ Rather, for Rosenzweig, the "task of system" is to provide a response to the paradox of the uniquely particular individual who also "shares identity in common with all others."¹¹⁶ In his entry on Rosenzweig for the Stanford Encyclopedia of Philosophy, Pollock identifies this as Rosenzweig's life-long search for a reconciliation of the radical subjectivity of the free individual and the

¹¹³ Batnitzky, *Idolatry and Representation*, 69.

¹¹⁴ Pollock, *Systematic Task of Philosophy*, 3.

¹¹⁵ Pollock, *Systematic Task of Philosophy*, 6.

¹¹⁶ Pollock, *Systematic Task of Philosophy*, 5.

objectivity of the world. Rosenzweig initially thought that Hegel had found the solution to this problem, but eventually became disillusioned with Hegel's system. Pollock believes that this disappointment particularly informed all Rosenzweig's subsequent work.

Going Deeper

Having grounded ourselves in an overview of the structure of *The Star* and decided how to read the relationship of the structure of *The Star* to its meaning, we are ready to explore its parts more deeply. We start by returning to the fear of death.

The new thinking reorients itself first and foremost through Rosenzweig's insight about the fear of death: that the fear of death is not a generic or universal fear, but the particular fear of one's own particular death. "[A]ll cognition of the All begins" with this insight about particularity as the means through which we come into meaningful relation with reality.¹¹⁷ In contrast, the old thinking insists on the universal, "pointless" point of view and "excludes" death, i.e. fears and so denies death's fundamentally particular nature, thus also denying its own "presuppositions." Grounded in this combination of singularity and denial, the old thinking can only consciously presuppose a singular All. Through the epistemological lens of logic, it appears that this singular All can be fully cognized because of the supposed unity of thinking and being. A philosophy based on the goal of cognizing such an All eventually culminates in an "end" of history, as thinking thinks the All, creating a system with no remainder, nothing outside of itself.¹¹⁸

¹¹⁷ Rosenzweig, *The Star*, 9.

¹¹⁸ Rosenzweig, *The Star*, 26.

However, as Rosenzweig argues, such a philosophy cannot reconcile the fundamental paradox of particularity and universality (subjectivity and objectivity), much less the conundrum of how the world can be both contingent and necessary.

In other words, “the basic thought of philosophy, the thought of the one and universal cognition of the All” is a lie.¹¹⁹ For Rosenzweig, the counter to this lie is that the only All worthy of cognition is an All that is not fully cognizable. Instead, it is an All grounded in the multiplicity of knowledge (both Kant’s omitted rational sciences/the nothings of knowledge and the successive epistemologies), refracted from the view of the particularity of one’s own death. Rosenzweig’s description of how the elements of the diverse All are transformed through the interaction of their Yes and their No, and then turn toward relationship with each other through the temporal dialectic of Creation-Revelation-Redemption, demonstrates the capacity, even the necessity, for establishing relationship generally through the particularity of difference, without the need to eliminate, conflate or reduce difference.

This multiplicity of knowledge—the elements of the true All—is comprised of the detritus Kant left out of his account of the possibility of metaphysics as a science, precisely because they cannot be “cognized,” i.e., they cannot be proved or disproved cognitively: rational theology, cosmology, and psychology.¹²⁰ In his *Critique Of Pure Reason*, Kant reduced the objects of these three rational sciences to what Rosenzweig calls the three “nothings” or elements from whose relationship the All is actually formed:

¹¹⁹ Rosenzweig, *The Star*, 11.

¹²⁰ Immanuel Kant, *Critique of Pure Reason*, trans. and ed. Paul Geyer and Allen W. Wood (Cambridge: Cambridge University Press, 1998), 115/Bxxvi.

God, World, and Man. Although Kant wasn't able to get farther than deconstruction, Rosenzweig credits him with at least not falling back into a "one and universal despair about cognition."¹²¹ Thus, for Rosenzweig, it is Kant who provides the foundation for the three-fold nothing of knowledge that leads to the true All, even though Kant did not understand the consequences of his own insight. Rosenzweig understands his project as going beyond Kant in providing, not merely a Copernican revolution of thought, but "a total renewal of thinking."¹²²

Kant found it necessary to exclude the three nothings precisely because they were uncognizable and despite the fact that (per Rosenzweig) they appear consistently through history as aspects of a unified philosophy and of general metaphysics. Previous generations of philosophers did not have Kant's concerns about the inability to cognize these features of the All, although they did effectively eliminate two of the three by consistently theorizing a similarly singular All. Previous generations of philosophers missed the diverse nature of the All because they posited the All as universal, singular, and therefore as primarily one of these elements, with the others understood as mere expressions or emanations of the one primary something which was itself the unitary All. Thus, in "cosmological antiquity" (Greek philosophy), the Cosmos (World) was the All, while the divine (God) and human (Man) were conceived as merely aspects of the Cosmos—imperfect copies, as in Plato. In the "theological Middle Ages" (Medieval Christian philosophy), the Divine (God) was the All, who created the World and Man in

¹²¹ Rosenzweig, *The Star*, 29.

¹²² Rosenzweig, "The New Thinking," 110.

His [sic] own image, and from which Man subsequently fell, disordering himself and the World as well. In “anthropomorphic modernity” (as articulated in Kant and typified in German Idealism), the Human (Man) was the All, while both God and World were derived from the human, mere projections of the human mind, uncognizable, in Kant’s definitive terms. In each case, the All was conceived as unitary and thus all movement was toward homogenization or perfection of what had fallen or was otherwise incomplete or imperfect, rather than toward the valuing or proliferation of difference and incompleteness-as-openness. Such an All is not only singular but progressive or perfectible, in the sense in which Hegel’s dialectic is progressive.

Philosophers such as Fichte and Schelling, drawing on Kant’s work, identified difference as a key feature of the All, noting that without difference, there is nothing.¹²³ Fichte even had the insight, contra Kant, that the Absolute was in the *relationship* between being and consciousness, rather than in either alone. However, each remained ultimately committed to the proposition that the All was absolutely one and invariable, so much so that Rosenzweig identified Fichte and Schelling as among the “three great charlatans” (along with Hegel).¹²⁴ Even the Christian Trinity—the God who is three in one—is ultimately One, and thus unitary. Rosenzweig’s framework preserves God as one, while providing a basis for Man and World as distinct additional and irreducible elements of the All.

¹²³ Schelling, *Philosophical Investigations into the Essence of Human Freedom*, trans. Jeff Love and Johannes Schmidt (Albany, NY: SUNY Press, 2006).

¹²⁴ Pollock, *Systematic Task of Philosophy*, 3.

Understanding how the elements of the All have been misconceived and conflated is necessary to the deconstruction of Idealism's false All, and as precursor to its authentic reconstruction through relationship and its capacity to be grasped through communal structures. This deconstruction starts with the *success* of the Hegelian project, the "end" to which Hegel brings philosophy. This is the point "where knowledge of the All comes to a conclusion in itself,"¹²⁵ as historicism eliminates all points of view through relativizing. This realization that "thought presupposed that thinking has to think the All"¹²⁶ shatters the illusion of the one and universal All into the three distinct, mutually opposed nothings, precisely those that Kant excluded from metaphysics as a science. When combined with Rosenzweig's insight about the particularity of the fear of death, it becomes clear that none of the three nothings is reducible to the others; each is a distinct, particular nothing. Each of these three nothings represents an aspect of reality that cannot be further reduced or conflated. There is no generic nothing that counters a generic All. God, Man, and World are the three separate, "indissoluble and permanent" pieces of the All. Although the shattering of the false All reveals a still "only" possible and not actual opportunity to construct the true All, the eventual realization of this All will be "beyond cognition and experience,"¹²⁷ i.e., beyond the epistemological framework of logic in Part One, and beyond the epistemological framework of lived experience in Part Two. Ultimately, Rosenzweig demonstrates that it is even beyond the epistemological framework of communal structures, as outlines in Part Three.

¹²⁵ Rosenzweig, *The Star*, 12.

¹²⁶ Rosenzweig, *The Star*, 26.

¹²⁷ Rosenzweig, *The Star*, 95.

Part One uses the logic of math to explain both the factual nature of each nothing and how something can emerge out of nothing. Despite the prevalence of examples of diverse-but-unified systems, both Western philosophy and theology tend toward a conception of reality as having oneness or singularity of some kind at its heart. This is true of Greek and medieval theology and philosophy, as Rosenzweig describes the history of philosophy leading up to German Idealism. These essentially unified systems necessarily struggle to account positively for difference or diversity. In spite of notable efforts by German Idealists such as Fichte and Schelling to account for diversity within the Absolute, neither was able to provide an ultimately compelling resolution to this conundrum while they retained a commitment to an absolute that was absolutely one and invariable. Fichte explained multiplicity as somehow embedded in the Absolute, while Schelling posited a distinction between what he termed the “ground of existence” and the Absolute itself. This allowed him to argue that paradoxically darkness is mixed with light in the ground of existence, evoking the Christian narrative of the Fall in Genesis to explain the presence of evil without locating evil in the Absolute itself. While this provided for a unique theodicy, it failed to explain the conundrum of how something comes out of nothing.¹²⁸

Rosenzweig uses his mentor Hermann Cohen’s work with the mathematical differential to explain how something can be part of the nothing without resorting to the use of a Hegelian dialectic. For Rosenzweig, Cohen’s application of this math principle

¹²⁸ Schelling, *Philosophical Investigations*, 40-65. Theodicy—the explanation of how evil can be present in a world in which God is both omnipotent and benevolent.

to philosophy was the “organon of thinking,”¹²⁹ that resolved this critical foundational paradox, despite the fact that he locates Cohen’s project as remaining within the German Idealist philosophy the new thinking rejects. In essentially the same way that the differential in math contains within it infinitesimal relative value, each of the three nothings at the heart of reality contains specific somethings as part of its original state. These are not contradictions, as in the dialectic, emerging cyclically only to be eventually resolved in the creative synthesis. Instead, for Rosenzweig, these somethings are “originary” to the nothing. He calls them the Yes and the No, the original words. They provide for two distinct paths out of each nothing: 1) the affirmation of the nothing is the path of the Yes; and 2) the negation of the nothing is the path of the No. Although they appear to emerge in the manner of the dialectic, with the Yes emerging before the No, and being ultimately joined together by the And, Rosenzweig insists this is not a dialectic in the Hegelian sense. This is because the differences are not resolved, not eliminated or synthesized, but rather transformed in the process of establishing relationship, while remaining distinct aspects of the distinct nothings-now-elements.

As each nothing represents a particular aspect of the All (God, World, Man), which cannot be further reduced or resolved, each also has its own differential, its own Yes and No. The Yes, as the way of affirmation, is the essence/origin of the Nothing and posits the infinite. The No, as the way of negation, is the action/beginning of the Nothing and posits the finite. The Yes of each nothing is its mode of being, while the No is its mode of Action. As they emerge, the Yes and the No reverse, producing change in their

¹²⁹ Rosenzweig, *The Star*, 27.

nothing, which is unique to the character of the nothing. The specific being and action of each nothing can be plotted on the upright triangle, e.g., as 1) God-being in the unconditional/(action)divine freedom; 2) Man-being in the particular/(action) free will; and 3) World-being in the universal/(action) inexhaustible fountain of the phenomenon.

Although the And is not an “original” word, the process is capped by the And. The And is not a synthesis—it is not original to the nothing, nor is it creative. It does not resolve the differences in the Yes and the No through the creation of something new. For Rosenzweig, the And represents the crucial final difference from a dialectic in its lack of creativity. In the traditional dialectic, only the thesis is original. After the thesis emerges, various contradictions develop from within the thesis, which become the antithesis. Eventually, these contradictions are resolved through the creative action of the synthesis. As “originary” terms, Rosenzweig’s Yes and No both have their origin in—are “immediate” before—the nothing.¹³⁰ Although the No emerges after the Yes, this is a simple temporal rather than a causal relationship, as in the Hegelian dialectic. The No is not dependent on and does not emerge out of the Yes, either because of contradictions or otherwise. To explain the difference between the Yes-No-And and the dialectic, Rosenzweig offers the example of packing and unpacking a suitcase, that what is packed first is unpacked last. This also explains why the No emerges after the Yes from the nothing.¹³¹ Thus, for Rosenzweig, there is no progression toward a final resolution of all contradictions; there is instead a single progression of the somethings inherent in the

¹³⁰ Rosenzweig, *The Star*, 123-124.

¹³¹ Rosenzweig, *The Star*, 123.

original nothings. Whereas the dialectic is “progressive” in that it repeats the cycle of thesis-antithesis-synthesis over and over until all contradictions have been resolved, Rosenzweig’s differential is not progressive. The somethings within the nothings are not contradictions needing resolution to resolve difference as a problem. Instead, for Rosenzweig the differences are a permanent part of the structure of the All, emerging to establish the relationships that secure the All.

Because the Yes and the No, as two originary terms, are equal, their differences do not need to be resolved. In fact, their differences cannot be resolved, they are necessary if each nothing is to become relational with the others. Unlike the thesis and antithesis, which must be resolved in the synthesis in order to maintain the progression toward a final resolution of all contradictions, the Yes and the No remain distinct, even as each reverses and transforms its nothing such that it becomes capable of relationship with the other nothings. This difference not only distinguishes Rosenzweig’s differential from Hegel’s dialectic, it also provides a uniquely solid foundation on which to construct an alternative system of philosophy in which difference itself is original, necessarily constitutive of existence, and therefore positive. Even as each nothing is transformed through the emergence of its own Yes and No, their interaction, and the bridge of the And, each nothing remains distinct. This transformation does not resolve or eliminate differences, it is the first step on the road to relationship among the still-distinct nothings, it grounds existence in difference. Ultimately, we will see that existence is also grounded in relationality and, thus, that relationship requires difference as does existence.

Rosenzweig also demonstrates, through the lens of logic, how little we know of each element. Each Book of Part One begins with the acknowledgment that we start with

the understanding that we know nothing: “About God we know nothing,”¹³² and “Of the world we know nothing,”¹³³ and finally, “Man cannot be proved any more than can the world or God.”¹³⁴ We learn much about the nothings in Part One, always in the context of the limits of knowledge, but it is in Part Two, where the epistemological framework shifts to lived experience, that we begin to understand the meanings of what we know. It is also in Part Two that Rosenzweig tells us that something new happens: God creates.¹³⁵ With this, God, Man, and World begin to come into relationship with each other. God creating (creation/past) is what begins Rosenzweig’s dialectic, which is for him a one-time progression from creation to revelation to redemption, from past to present to future. This progression is also what constitutes Rosenzweig’s philosophical turn to theology.

Rosenzweig was always ambivalent about *The Star’s* description as a “Jewish” book or work of philosophy, perhaps because he understood that this set it apart in precisely the way he did not want. However, in “The New Thinking,” he acknowledged that if the book is Jewish, it is Jewish in its method, and that its method is the method of “healthy human understanding,” which is “healthy” in that 1) it “knows . . . that it cannot cognize independently of time,”¹³⁶ and 2) in its use of “Jewish words.”¹³⁷ Thus, Part Two is the most “Jewish” part of the book, in its exploration of the temporal method of healthy

¹³² Rosenzweig, *The Star*, 31.

¹³³ Rosenzweig, *The Star*, 49.

¹³⁴ Rosenzweig, *The Star*, 71.

¹³⁵ Rosenzweig, *The Star*, 123.

¹³⁶ Rosenzweig, “The New Thinking,” 123.

¹³⁷ Rosenzweig, “The New Thinking,” 131.

human understanding, the epistemological shift from logic to experience, and the prioritization of speaking over thinking, which Rosenzweig calls “speech-thinking.” For Rosenzweig, thinking epitomizes the atemporal, while speaking is always “time-bound, time-nourished” and “lives from the life of the other.”¹³⁸ In living “from the life from the other,” speech is also, thus, fundamentally relational.

Despite the prioritization of speech over thought, the temporal dialectic does not begin with God speaking, but with God creating. For Rosenzweig, this is the initial miracle.¹³⁹ Creation initiates the temporal cycle, and the first thing to emerge from this is the end of the hidden God and the beginning of the God capable of relationship. The temporal progression is also ultimately understood in the same way as the progression of epistemological frameworks: backwards. So, for example, it is not primarily the case that understanding Creation is necessary in order to understand Revelation, but that Creation is understood more completely through the lens of Revelation; the past is understood from the perspective of the present, while the present is most fully understood from the perspective of the future (Redemption). The temporal dialectic is the “only one fully unique and particular progression, absolutely not admitting of a universal concept.”¹⁴⁰ In its temporal ordering, its prioritization of speech, and in its shift of epistemological framework, we see more fully how Rosenzweig distinguishes his alternative system from a Hegelian dialectical framework, despite its apparent structural similarity.

¹³⁸ Rosenzweig, “The New Thinking,” 125.

¹³⁹ Rosenzweig, *The Star*, 123.

¹⁴⁰ Rosenzweig, *The Star*, 247.

Through this process of temporal progression, while the nothings remain distinct, neither emanating from each other nor blurring into or becoming each other, they also emerge beyond mere “factuality” and through the reversals they encounter enter into relationship with each other. Their distinctiveness remains in the context of their relationships with each other, even as each is transformed itself through the process of relationship. Entering into relationship in each case also involves speech. Where math operated in the epistemology of logic in Part One, grammar takes its place in the epistemology of experience. Having become capable of relationship, the transformed-yet-still-distinct nothings, or elements have also become capable of constituting a reconfigured All, which can’t be “known honestly” (through logic alone) or “experienced clearly,” (through experience) but only “grasped immediately” (through the epistemological framework of communal structures, i.e. the liturgy). The epistemological framework of each section is not simply transcended by the subsequent one, but is the condition for the possibility of the prior. Through this epistemological progression, Rosenzweig is also expanding our philosophical understanding of knowledge itself, from the purely cognitive, through experience, by means of communal structures.

Readers grounded in an understanding of Judaism or Christianity will recognize both the familiar, biblical aspects of this structure (creation-revelation-redemption), as well as distinctly non-biblical aspects in Rosenzweig’s work. His purpose, however, was not apologetic in a theological sense; instead he is correcting or expanding the limits of the old thinking. In the new thinking, the new philosophy works together with a new theology to render “visible” through grammar “the greater part of human [problems] . . . for scientific comprehension,” although the old thinking remains “accessible and

intelligible.”¹⁴¹ Through the lens of the new thinking, this is understood as merely a “first orientation,” which is completed in the new thinking through the more equal relationship between theology and philosophy.

In contrast to the “old” theology, Creation-past is the process by which God comes into relationship with the World, beginning with the miracle of God speaking¹⁴² and characterized by divine activity.¹⁴³ Revelation-present is the process by which God comes into relationship with Man. This also takes place through speech—the call by the proper name, the command to Love, and Man’s confession of sin—and is also characterized by divine activity. Redemption-future is the process by which Man comes into relationship with the World, when “[l]ove for God is externalized as love for neighbor” and can therefore also be commanded, without becoming law.¹⁴⁴ While each stage of this temporal progression involves speech, the speech is essentially one-way in Creation and Revelation (from the divine), while in Redemption, the speaking becomes a duet, in which God is not involved. Instead, the duet is between Man-as-Beloved-Soul and the World.¹⁴⁵ All aspects of the theological turn are infused with time as well as with speech,¹⁴⁶ because it is precisely the theological which restores time to philosophy, and because speech is time-bound and time-nourished, as thought is not.

¹⁴¹ Rosenzweig, “The New Thinking,” 129.

¹⁴² Rosenzweig, *The Star*, 123.

¹⁴³ Rosenzweig, *The Star*, 138.

¹⁴⁴ Rosenzweig, *The Star*, 230.

¹⁴⁵ Rosenzweig, *The Star*, 246.

¹⁴⁶ The importance of speech to the new thinking is further explored in Book Three of *The Star* through comparison of the communal structures of Judaism and Chris

The beginning of Rosenzweig's temporal dialectic and the turn to theology clearly references the opening lines of Genesis, "in the beginning, when God began to create." However, creation in this sense is not a matter of theistic belief, but rather the process by which existence comes into being, God and the World coming into relationship with each other.¹⁴⁷ Thus, despite the clear reference to the structure of Genesis, Rosenzweig is not making a case for the existence of God as deity or for belief, but rather a case for structure, the structure of reality (the All) and the structure of relationship as fundamental to reality. Although his explanation of how God and Creation come into relationship with each other in Book One of Part Two of *The Star* bears a striking similarity to the theological explanation one finds, e.g., in the Jewish Publication Society's classic Torah Commentary series on Genesis, Rosenzweig is not making a traditionally theological argument. Rather, he is providing the first example of the way the new thinking restructures reality through an alternative system that takes difference seriously. He is the "new philosopher," who is "situated *between* theology and philosophy;"¹⁴⁸ the new philosopher of the "point of view,"¹⁴⁹ who needs the new theologian, who in turn needs philosophy for the sake of integrity. Rosenzweig's purpose in reordering the relationship of theology to philosophy from that of "charwoman" to sibling is to reconnect Creation to

¹⁴⁷ Although note that Mara Benjamin describes Rosenzweig's presentation of Scripture as the Word of God as a "compelling conceit" that allows him to reinvent revelation and the Bible for modern sensibilities. Benjamin argues that *The Star* is not ultimately successful in this conceit. She also argues that *The Star* is merely the beginning of Rosenzweig's investigation of other modes of thinking, rather than the culmination, which is how many Rosenzweig scholars treat *The Star*. Mara H. Benjamin, *Rosenzweig's Bible: Reinventing Scripture for Jewish Modernity* (New York: Cambridge University Press, 2009). Accessed April 21, 2018. ProQuest Ebook Central.

¹⁴⁸ Rosenzweig, "The New Thinking," 116, emphasis added.

¹⁴⁹ Rosenzweig, "The New Thinking," 115.

knowledge as an orientation to and engagement with the past. Because God created the world and not religion, theological problems “want” to be translated into human problems, according to Rosenzweig. His goal is not to justify or even explain religion, but rather to explain the structure of reality as temporal, reconstructed from the point of view, in contrast to the old thinking, and thus, to complete philosophy.¹⁵⁰ As Rosenzweig explains further in “The New Thinking,” Judaism and Christianity are uniquely capable of providing the necessary completion for philosophy *because of* their “impulses to free themselves from their religiosity.”¹⁵¹

As mathematical logic explained the initial, pre-relationship stage of the transformation of the three primordial nothings, grammar is what allows the new theology to complete the new philosophy. Language, thus, plays a significant role in relation to reality. Through speech, each nothing-now-element is further transformed as it enters into relationship with the others. The process for each is unique, although the pattern is similar. This grammar particularly informs the transformation of primordial Man into the Beloved Soul and the resulting alternative philosophical anthropology that flows from Rosenzweig’s system.

Beloved Soul-Man’s Transformation

Rosenzweig’s alternative account of reality as inherently relational necessarily suggests an alternative philosophical anthropology, a different reality generates a different anthropology. This becomes most evident in his account of the relationship between God and Man, as this takes place in/as Revelation. In many ways, Rosenzweig’s

¹⁵⁰ Rosenzweig, “The New Thinking,” 129.

¹⁵¹ Rosenzweig, “The New Thinking,” 130.

whole system can be summed up in Revelation,¹⁵² because the Revelation of divine love is the heart of the All.¹⁵³ In God's vitality, God creates, initiating the process of Creation, and then God speaks, initiating the process of Revelation. Just as each successive epistemological framework of the parts of *The Star* provides the lens through which the prior can be fully understood, Revelation provides a degree of retrospective meaning to Creation. As Rosenzweig describes it, Creation is a kind of first revelation of God, which actually risks being lost in the very "infinity of the Creation," unless it is anchored in "a "second" Revelation, of a Revelation that is nothing but Revelation." ¹⁵⁴

Although mathematics was able to explain "the becoming of the elements," this new mode of becoming requires grammar because the "order of cognition does not correspond to [the] order of the concrete."¹⁵⁵ Hence, where the initial transformation of the nothings was explained through the use of the "original words" as mathematical symbols, the continuing transformation of the elements is explained through grammar, including the root words of Creation and Revelation (or in the case of Redemption, the "root sentence"), which are true regardless of who speaks them. The "root word" of Revelation is I, while the root word of Creation is good. The root sentence of Redemption is "God is good." The root word "leads from the primordial, inaudible Yes . . . to the

¹⁵² Rosenzweig, *The Star*, 221.

¹⁵³ Rosenzweig, *The Star*, 403.

¹⁵⁴ Rosenzweig, *The Star*, 173-174.

¹⁵⁵ Rosenzweig, *The Star*, 135-136.

audible reality of language.”¹⁵⁶ (138). As we see more concretely, language is the key to the reversals that bring the nothings into relationship.

Revelation (Book Two of Part Two) begins with the Song of Songs’ claim that “Love is as strong as death” (Song of Songs 8:6). From this Rosenzweig explains the origin of the soul as faithfulness in responding to God’s love, which also gives permanence to God.¹⁵⁷ After God calls to the self, “Where are you?” (Genesis 3:9), using the proper name (Adam), the soul responds, “I am here.” God’s speaking calls forth the soul, which in its response, “Here I am,” becomes an authentic I responding to an authentic you.¹⁵⁸ This self or soul is coming into a different mode of existence than Man in Man’s primordial state; it is doing so relationally through language and in particularity. That God calls with “the proper name” is vital here because it is the indication of the particularity of the incipient relationship. This self, Adam, is not a generic or abstract entity, but a particular self, coming into relationship through particular language – Jewish words, which for Rosenzweig are capable of renewing the world.¹⁵⁹ This particular self, this authentic I, this Adam, doesn’t fully exist autonomously, but as a product of relationship through language. The rise of the authentic I also constitutes the prelude to the Commandment, “You shall love the Eternal your God with all your heart, with all

¹⁵⁶ Rosenzweig, *The Star*, 138.

¹⁵⁷ Rosenzweig, *The Star*, 185.

¹⁵⁸ Rosenzweig refers in “The New Thinking” to “the problems of the old Aristotelean and Kantian logic . . . as problems of the It” and notes that even though Part One is a mere “first orientation,” it is “already dissociated from the wrong relation to the I. Rosenzweig, “The New Thinking,” 129. The right relationship is grounded in the authentic I.

¹⁵⁹ Rosenzweig, “The New Thinking,” 131.

your soul and with all your might.” This command from God to love God is the only one not capable of being “decanted” into law,¹⁶⁰ because it is so fully present, lacking the future and duration necessary for law. Indeed, it is so fully present that it transforms all other commandments from law back to commandment. For Rosenzweig, the commandment to Love God, like all love, is immediate, pure present. In contrast to the perpetual immediacy of love and thus, of the commandment to love, law requires time, future, duration.¹⁶¹

The soul eventually responds to the command to love with the confession of sin, “I have sinned/I am a sinner.” Rosenzweig is again building on and correcting Cohen, this time for the understanding of sin as the failure to love. Time remains significant here. The confession takes time, because in order to confess its sin, the soul must confess to a lack of love in the past, and this admission of finitude is painful to the soul in the face of the constancy of God’s love, as an expression of God’s finitude. But from the confession of sin also springs the confession of faith that “the God of my love is really God.”¹⁶² This confession of faith effects two goals, it expresses the soul’s certainty of God’s love and it confirms the being and duration of God. The confession of sin/faith also gives rise to the love of neighbor. Note again that as Rosenzweig uses the concept of faith here, it is not an expression of theistic belief, but a component of the structure that secures the nothing of God against slipping out of relationship and back into nothingness.

¹⁶⁰ Rosenzweig, *The Star*, 191.

¹⁶¹ Rosenzweig, *The Star*, 191.

¹⁶² Rosenzweig, *The Star*, 195-196.

The individual human I is the necessary precursor to the externalization of the Self as love of neighbor. In effect, Rosenzweig demonstrates that the individual human I is not an end in itself, but rather the condition of relationship, the prerequisite for the connection between Man and World. As Rosenzweig notes in his description of Man's metaethical nature, "even though he prides himself on his individuality, he recognizes that he is himself a part."¹⁶³ It is in the relationships among the nothings that reality is grounded and it is in relationship (communal structures) that we experience the reconstituted All,¹⁶⁴ to the extent that this is possible. More than this, though, it is in relationship that Man emerges fully from the primordial world. One may logically/experientially draw from this account of the human as fundamentally relational in its origin the conclusion that relationship is not an addition or a choice. Instead, relationship is both constitutive of the human, and the purpose of what it means to be fully human, and it begins with the relationship between God and Man. It is, therefore, properly a theological anthropology, without being dependent on religious belief. It is therefore also a philosophical anthropology, capable of application elsewhere without importing the sectarian religious. Finitude is also a constitutive factor in the meaning of humanity—in the notion of sin, as failure to love—and in the way sin fosters the transformation of Man into Beloved Soul, still distinct from, but now defined by God's love and its own response of externalizing love. Finitude is also demonstrated in the Beloved Soul's need to externalize its response to God's love as love of neighbor.¹⁶⁵

¹⁶³ Rosenzweig, *The Star*, 73.

¹⁶⁴ Rosenzweig, *The Star*, 95.

¹⁶⁵ And perhaps also in the "betrayal" that God's constantly renewed love represents.

Book Two of Part Two (Revelation) ends with the words, “As he loves you, so shall you love.” This phrase directs attention to the initial work of Redemption, to bring Man and World into relationship, which is the final stage of the temporal dialectic. The Beloved Soul comes into relationship with the World because it must externalize its love of God as love of neighbor. Speech is once again involved in this turning. In this case, the turning involves a different kind of speech than the speech of Creation or Revelation. Rather than the one-way speech of Creation or Revelation, the speech of Redemption is mutual speech, a “duet.” Just as God’s love is constantly in the present, the soul’s love of neighbor is also prospective, a constantly renewed response to God’s own love of the Beloved Soul. The constant renewal of the response to God’s commandment to love is in contrast to the law of obedience, which is static and always in the past.¹⁶⁶ Only through love of neighbor is the soul “finally definitively con-firmed in its place,”¹⁶⁷ as the result of the soul’s concern for the World and a fundamental aspect of reality. Out of the same gratitude that allowed the confession of sin, the Beloved Soul externalizes its love of God as love of neighbor, turning toward and entering into relationship with the World.

The core question Rosenzweig explores in Redemption is how “Love your neighbor” follows from God’s “Love me.” Although the soul has responded to and grounded God in actuality, the soul itself is not fully grounded; it still has the possibility of slipping back into silence and isolation. The process of becoming grounded, through entering into relationship with the World takes the soul through ancient and modern

¹⁶⁶ Rosenzweig appears to be contrasting Love of Neighbor to both Kantian moral duty and the “determined and resolved obedience” he argues is characteristic of Islam. Rosenzweig, *The Star*, 230-233.

¹⁶⁷ Rosenzweig, *The Star*, 257.

tragedy, the mystic, the saint, and finally through God's servant to the "oriented will," a further inner reversal (which God and World also experience) in which "the surrender required in the commandment of love for God" is completed. This completed or pure surrender makes it necessary for the soul to "externalize [itself] in the act of love, once the soul has been awakened by God."¹⁶⁸ For Rosenzweig, "Love cannot do other than be effective. There is no act of love toward one's neighbor that falls into the void."¹⁶⁹ Hence, the soul is not merely oriented toward or even merely concerned for the neighbor; the soul *must* engage in acts of love toward neighbor in order to be secured in its existence. Thus, in a foundational sense, the very existence of the individual may be dependent on the soul's acts of love toward others. Indeed, it might even be the case that the existence of reality itself is at risk when the soul fails to engage in acts of love toward the neighbor.

This brings us back to Rosenzweig's unique philosophical insight: that we understand reality not through some abstract universal, but through our own particularity. For Rosenzweig, this particularity is Judaism, at least in part, to invoke Lindbeck, because this is his "native language." However, although the communal framework grounded in the Jewish community is the paradigmatic expression of the epistemological framework of communal structures necessary to grasp the all, even the communal framework of the Jewish community is insufficient for a complete realization of the All. Finitude is ultimately the condition for the possibility of relating creatively to reality. As Batnitzky says, "To remain in life is to remain human, and to remain human, *The Star of*

¹⁶⁸ Rosenzweig, *The Star*, 230.

¹⁶⁹ Rosenzweig, *The Star*, 286.

Redemption continually reminds us, is to be able to perceive only partially and always incompletely.”¹⁷⁰ The very structure of *The Star* “suggests that incompleteness emerges through relation.”¹⁷¹ One of the ways we see this is in the fact that the Soul recognizes its sin of failure to love in the past only because God speaks and, thus, initiates relationship. In other words, the Beloved Soul’s recognition of its finitude is the condition of its relationship with God, and all others.

Communal Structures

The final progression of epistemological frameworks takes place in Part Three, in which Rosenzweig explores Jewish and Christian liturgy and liturgical cycles, as well as the core liturgies and vocation of each worshipping community. Having explored the nature of reality and the place of Man through the epistemological framework of experience, Rosenzweig turns in the final part of *The Star* to the epistemological framework of communal structures “in general and the Jewish community in particular.”¹⁷² Communal structures include time, prayer, and liturgy, and through these lenses, one comes to a fuller understanding of the possibilities and limits of the experience of Redemption. In this context, Rosenzweig is talking about more than the reorientation of past, present, and future, or the way in which the past constitutes identity in the present. Here in Part Three, the communal structure of time is the cycle of the Jewish and Christian liturgical calendars, the structure of the religious ritual year, which

¹⁷⁰ Batnitzky, *Idolatry and Representation*, 68.

¹⁷¹ Batnitzky, *Idolatry and Representation*, 78.

¹⁷² Batnitzky, *Idolatry and Representation*, 62.

consists of regular recurring rituals. Both the cycle of liturgies and the liturgies¹⁷³ themselves are structures of this last epistemological framework.

Rosenzweig contrasts the Jewish and Christian forms of the cycle of liturgies and the liturgies themselves, demonstrating the superiority of Jewish communal frameworks as well as the necessary relationship between Judaism and Christianity. Although Judaism requires Christianity to fulfill its vocation, the Jewish communal structure is always superior. For Rosenzweig, this is expressed most fully in the fact that the core Christian liturgy is celebrated on Sunday, the first day of the week. In choosing this day for the celebration of the Eucharist, Christianity chose to perpetually align itself with the present (revelation). Christianity is, thus, only ever “on the way.” In contrast, the core Jewish liturgy, Sabbath, is celebrated on the seventh day, the day of completion and of rest. It is, thus, “both sign of Creation and first Revelation, as well as and even above all anticipation of Redemption.”¹⁷⁴ While Christian liturgies, prayer, and the Christian liturgical calendar do provide community as the condition for experience, Rosenzweig argues that Christian communal structures fail to express mutuality and thus, remain fundamentally individualistic. For example, although Christians come to a common table in the core liturgy of the Eucharist, they both approach and leave the common table as individuals. In contrast, the Sabbath meal is truly communal, set in the mutual life of the home, in which “each is equal to the other.”¹⁷⁵ In his extended comparison (which

¹⁷³ Specific, “core” liturgies from each tradition. From Judaism, the Days of Awe (Yom Kippur and Rosh Hashanah), Shabbat, and the Festivals of Revelation (Passover, Shavuot, and Succot). For Christianity, weekly Sunday worship and the Festivals of Revelation (Christmas, Easter, Pentecost).

¹⁷⁴ Rosenzweig, *The Star*, 230.

¹⁷⁵ Rosenzweig, *The Star*, 334

includes Islam as foil), we see how Rosenzweig prioritizes communal frameworks “in general *and the Jewish community in particular*,”¹⁷⁶ even where the structures of the communal frameworks are similar, such as in the reading and explication of the biblical text. Nevertheless, for Rosenzweig, “both Jew and Christian are workers on the same task. He [God] cannot dispense with either.” Moreover, “[t]he truth, the whole truth, belongs therefore to neither of them,” because “the essence of the truth is to be shared.”¹⁷⁷

A final dispute among Rosenzweig scholars is the question of whether Rosenzweig believed it is possible to grasp the All in this life. Although scholars generally agree that we should read the opening and closing words of *The Star* together as “From death . . . into life,” they disagree on the correct understanding of this overall admonition. Is Rosenzweig saying that the reconstituted All is a transformation from dead philosophy into a living engagement with the All? In many ways this appears to be the case. Nahum Glazer, one of *The Star*’s earliest interpreters, reads the admonition at the heart of *The Star* in this way, as an affirmation of everyday life over dead philosophy.¹⁷⁸ The fact that Rosenzweig left academia after the publication of *The Star* in order to teach the core Jewish texts to other assimilated Jews and translate the Bible into German with Martin Buber appears to confirm this reading. However, other scholars note that *The Star* describes the “countenance” as ultimately inaccessible. Benjamin calls it

¹⁷⁶ Batnitzky, *Idolatry and Representation*, 62, emphasis added.

¹⁷⁷ Rosenzweig, *The Star*, 438-439.

¹⁷⁸ Nahum N. Glatzer, *Franz Rosenzweig: His Life and Thought*. 3rd Ed. (Indianapolis, IN: Hackett Publishing, 1998).

“a mystical vision rather than a return to ordinary life,”¹⁷⁹ while Rosenzweig says himself that “[i]mmediate sight of the whole truth comes only to him who sees it in God. But this is a seeing beyond life.”¹⁸⁰ Human knowledge, as described by Rosenzweig is only ever partial, only ever a share of the full truth that is God’s own. In support of this reading, Benjamin points out that the biblical images Rosenzweig uses refer to Moses, evoking the particular way in which God prevented Moses from entering the promised land before dying, according to Deuteronomy. Moses merely glimpses the promised land before receiving the kiss of God’s mouth that is his death. Benjamin thus argues that Rosenzweig could only mean by “true life,” the state in which we can fully grasp the All, is life beyond this world (possibly through a mystic vision, but definitely not in the everyday). Pollock generally agrees and explores the question of mystic vision as an experience Rosenzweig himself had of the All. He argues that Rosenzweig had at least one such experience of an “immediate vision of the whole truth . . . in God.” Pollock proposes the “possibility” that Rosenzweig believed his ability to have such an immediate vision was “rooted in his unique ability to stand “beyond life” and see from a standpoint that is both Jewish and Christian at once.” Moreover, Pollock proposes that Rosenzweig believed that “the few Jews and Christians like him” might also be capable of such direct experience.¹⁸¹

¹⁷⁹ Benjamin, *Rosenzweig's Bible* 31.

¹⁸⁰ Rosenzweig, *The Star*, 439.

¹⁸¹ Pollock, *Systematic Task of Philosophy*, 297-304. Pollock explains in a footnote to this section that his mentor, Emil Fackenheim, also read Rosenzweig in this way and thought it indicated a relapse in Rosenzweig’s own thought from the new thinking to the old. (Pollock, 303n59)

There is much to support the contention that Rosenzweig believed it impossible to fully grasp the All, except as a kind of rare mystical vision of the All. Even though lived experience and communal structures give us crucially important insight far beyond the bounds of mere logic, Rosenzweig rejects the Hegelian dialectical model of history, an intelligible process moving towards the realization of human freedom.¹⁸² Instead, Rosenzweig insists that no mode of knowing gives us full access to the reconciled All. His own words in *The Star* provide ample evidence that he believed a full grasping of the true All was beyond this life, even if there is some doubt about what he meant by beyond life. Nevertheless the question remains whether this impossibility is ultimately an impediment to what appears to be Rosenzweig's charge to his readers to re-enter life, the everyday, acknowledging the specific fear of one's own particular death and the limitations of logic to cognize, much less grasp, the All. Again, his own life seems to be an example of grounding logic in experience and communal structures. We may, I think, draw the conclusion that even if Rosenzweig thought grasping the All in this lifetime largely impossible, he might nevertheless advocate trying. Even assuming the impossibility of immediately grasping the All, we might live as much as possible in creative relationship with the All, through an engagement of logic (theory) with experience and communal structures (practice). Such a pragmatic view would eschew utopia without thereby opting for either nihilism or quietism, thus also avoiding being simply "on the way," as Christianity, but actually living into the redemptive vocation of doing justice, loving the good, and walking humbly with God. Note though, that

¹⁸² Redding, Paul, "Georg Wilhelm Friedrich Hegel," *The Stanford Encyclopedia of Philosophy* (Summer 2018 Edition), Edward N. Zalta (ed.), <https://plato.stanford.edu/archives/sum2018/entries/hegel/>.

Rosenzweig offers this admonition from the Hebrew Prophet Micah as the shape of vocation in order to describe the task of grasping the All through humility, of relating creatively to reality in our human finitude. For Rosenzweig, this is what makes relationship with the other possible, even necessary.

In Rosenzweig's description of the new philosophy, he lays the foundation for a philosophical anthropology that expands the narrow focus of the Lockean individual. At the heart of the alternative he provides is the irreducibly diverse multiplicity out of which the reconceived All, or reality is founded. In addition, *The Star* highlights how imperfection and finitude provide the keys to entering into enduring relationship. Failure to love in the past and the understanding that "disappointment keeps up love's strength,"¹⁸³ as well as the successive epistemological frameworks with their inevitable limitations are all elements of this imperfection and finitude. The philosophical anthropology that emerges from this foundation provides an alternative to the individual rights advocacy model of justice in which to be human is to be primarily relational and open, rather than primarily autonomous and independent. Thus, to foster flourishing, legal advocacy models must also foster relationality and openness.

For Rosenzweig, it is from the fear of our own death that we return most fully to life. The completion of philosophy with theology further demonstrates that particularity and finitude are the keys to relating most creatively to reality. To engage creatively in this sense is also to live into our redemptive vocation through communal structures. As exemplified in Rosenzweig's description of the Jewish community, a vocationally

¹⁸³ Rosenzweig, *The Star*, 231.

oriented community is organized ritually, oriented in time, and lives for the redemptive vocational purpose of promoting justice. Drawing on Rosenzweig's understanding of love as constantly renewed externalized acts of love toward the neighbor, grounds a dynamic interrelationship between theory and practice for the purpose of doing justice. Importantly, this sense of vocation, based on Micah 6:8, also includes a permanent aporetic yet dependent relationship between Judaism and Christianity. The Hebrew prophet Micah admonished the people that all that God required of them was to "walk humbly with their God, to do justice and to love mercy." When we combine this with the idea that the relationship between Man and World, of the self with meaning, is an externalization of God's love as acts of love toward neighbor, and translate, we get something like an admonition to acknowledge our limited compassion for others as the basis of a commitment to assure that all are able to participate to their fullest extent in civil society. Exactly this notion of doing of justice while loving mercy, or justice as acts of love toward the neighbor, complicates abstract and atomistic constructions of individuals and their nominal rights which perpetuate inequity and unfreedom as the result of the application of the abstract rule of law.

Chapter Three: Open and Relational Subject

At the core of Rosenzweig's revolutionary new thinking is the claim that reality depends for existence on the relationships among three irreducibly diverse elements. From this it follows that individuality must be relational before it is anything else. The nature of the elements and of their relationships also demonstrates that individuality is also open, meaning particular, finite, and imperfectible. The individual who is capable of grasping Rosenzweig's reality is therefore radically different than the essentially abstract individual Locke imagines exists in nature prior to civil society.

Both the First Amendment and the public accommodations laws are designed to protect the value of diversity inherent in Rosenzweig's conception of reality. However, grounded in the lens of rights, the abstract value of diversity requires a justification not inherent in the social contract itself; moreover, it does not provide a mechanism for evaluating the rights claims of diverse individuals against apparently competing claims to protect religious liberty, when these claims compete in the commercial marketplace to accommodate sexual diversity and religious traditionalism. Working from Rosenzweig's new philosophy and its companion, theology-as-temporal, we can construct a philosophical anthropology that is capable of countering Locke's narrow vision of atomistic individuality. The understanding of individuality grounded in Rosenzweig's reality, not only posits diversity as the original characteristic of existence, but centers

relationality and openness in the temporal process through which the diverse elements of reality emerge, transform, and enter into relations that further transform them and solidify their relationships. Like reality itself, this open and relational individual is irreducibly diverse and particular, finite and imperfectible, possessing bounded rationality and ethicality, as well as limited agency.

As with Rosenzweig's insight about the new philosophy, insight into the nature of an expanded individuality is grounded in a seeming negative. The fear of one's own particular death provides insight into the new philosophy. What Rosenzweig calls the "confession of sin"—the admission of past failure—provides the insight into the alternative philosophical anthropology. This admission of past failure becomes enduring-and-transforming present, grounding openness, as well as relationality, in the individual. Grounded in the present, rather than a mythic past or utopian future, and continually transformational, openness as a characteristic of individuality is not progressing toward some ultimate perfection. It is not teleological or Hegelian. Openness is not a stand in for a historical arc toward justice, for example. In this sense it is consistent with Rosenzweig's general rejection of Hegel's dialectical form of gradual perfectibility, marking imperfectability as an enduring limit.

The Lockean individual is characterized by autonomy and independence, the perfectible subject of secular liberalism and of the individual rights advocacy model of law, tending always toward abstraction in its perception of its own universality. In contrast, the open and relational nature of the philosophical anthropology drawn from Rosenzweig is able to contextualize both diversity and particularity in ways that do not tend to devolve into atomistic identity politics. The human capable of orientation toward

reality as Rosenzweig describes it in *The Star* is a particular human, finite, oriented in time, and formed in relationship, able to participate fully in civil society and the public square with diverse and particular others. The finitude which is part of openness, combined with relationality, helps this individual live into Rosenzweig's vision of justice as "vocation," as calling or life's work. Openness and relationality draw on similar sources in *The Star* that contribute to both the particularity and diversity of the individual, and are grounded in acknowledgement of a failure of compassion for others. They are interrelated and co-constitutive, as are the elements of the All. However, it is helpful to examine these sources in their specificity before translating them into non-theological terms familiar to the discourse of secular liberalism and jurisprudence. As we explore and translate the details of this broad picture, we begin with relationality.

Relationality

Relationality is the most striking feature of Rosenzweig's alternative system, therefore it is also the most prominent characteristic of individuality grounded in his system, rather than in Locke. Rosenzweig's whole system and each of the elements in it are driven by relationality. Reality is inherently relational because it is the product of the relationships among the elements. Each element is also individually relational in that each comes into being from its primordial nothingness through the emergence and reversals of its unique somethings. The process of emergence and transformation of each element both secures the existence of each element and brings it into relationship with the others, thus grounding the whole of reality. As Rosenzweig repeatedly notes, but for their relationships with each other, the elements remain possible only, with the potential to slip back into their original nothingness; indeed, anxiety over this possibility partially drives

the relational transformations.¹⁸⁴ As conceived by Rosenzweig, the three core nothings or elements that comprise reality exist independently and cannot be further reduced or conflated, making reality irreducibly diverse. Even in their primordial state, however, each of the elements contains the capacity for relationship which is also the capacity for existence. Each is also internally relational, as it contains within itself its own particular something, what Rosenzweig calls the differential. Thus, the nature of individuality that flows from his system is also irreducibly diverse and constituted through relationship.

Because one of the elements of reality that Rosenzweig identifies and describes is called “Man,” it may be tempting to think that the section on Man is Rosenzweig’s philosophical anthropology, but this is not the case. The element Man is not the individual, nor the basis of a philosophical anthropology, but rather a constitutive element of reality. Indeed, there is as much discussion of the concept of individuality, its relationship to particularity and to community, in the description of World, also a constitutive element of reality, as there is in Rosenzweig’s description of Man.¹⁸⁵ It is as this element in the structure of reality that the temporal relationships between the elements also express the relational as it is developed in the alternative philosophical anthropology that naturally flows from Rosenzweig’s alternative philosophical system.

This temporal relationship uses explicitly theological terms and is described as the

¹⁸⁴ This idea comprises a significant portion of the “Transition” between Part One and part Two of *The Star*, see for example pp. 96-97. Notice, however, that in Rosenzweig, this insecurity is not competitive or antagonistic as it is in Asad’s description of the Lockean individual. Instead, it actually facilitates relationship. As will be further demonstrated in the discussion of openness, in Rosenzweig, this insecurity is also not capable of resolution. It is an aporia, distinct from Hegel’s effort to systemically resolve all contradictions.

¹⁸⁵ See for example, Rosenzweig’s discussion of the relationship between particularity and universality, beginning at the bottom of p. 55 and continuing through the middle of p. 57.

theological turn in Rosenzweig; however, it can also be translated into the language and structures of liberalism. The translation of these relationships begins by recognizing the function of each element as an aspect of reality, and comparing its distinct usage in Hegel: God as being, Man as self, World as meaning; and its unique process of entering into relationship with the others. Thus, constructing the alternative philosophical anthropology flows particularly from the relationships between being and self, as well as between self and meaning. Every step of the transformations involved in the becoming of a relational self is also a function of and promotes relationality. What Rosenzweig describes as the turn toward God in response to God's call by the proper name, the soul's confession of sin as failure to love in the past, and finally, the Beloved Soul's turn toward the World to externalize God's love as acts of love toward neighbor is for him the description of justice as vocation. Translated, the diverse and relational individual becomes open and particular by acknowledging their failure of compassion as enduring, as imperfectability. Therefore, the open and relational individual becomes free to participate fully in civil society and the public square and support others in doing the same as a life's work for justice as equity.

Individuality drawn from sources in Rosenzweig is internally constituted by relationship and is also the product of relationships. Individuality and relationality are co-constitutive; relationality is not a later addition or the result of individual agency as conceived through the lens of either Locke or Kant.¹⁸⁶ The relationships Rosenzweig

¹⁸⁶ The concept of agency here is that reflected in Kant's short treatise "What is Enlightenment?" It also touches on the second significant characteristic of the individual as drawn from sources within Rosenzweig, and will be addressed more fully later in this chapter.

describes as reality may also be understood as the process of the development of the individual, as particular and diverse, into and as the result of relationship. This development of particularity and diversity is both the enduring source of openness and of compassion for (solidarity with) others. It, thus, sustains the shared work of justice as equity, or social justice and advocacy with and for others, internally rather than externally. Relationality is an original characteristic of the individual as grounded in Rosenzweig. Thus, regard for others is also both natural and enduring, even though imperfect, as the open and relational individual is imperfect and imperfectible. The individual thus conceived is also capable of continuing transformation, refining their particularity, in the same way that the elements of reality both transform and remain distinct. As with the elements, the continuing refinement of the particularity of the individual secures relationship, rather than polarizing. The individual as conceived through Rosenzweig's system continues, through relationship, to be transformed and to transform the various communities of which they are inevitably a part. This expanded understanding of individuality also transforms the understanding of liberty in the context of liberal jurisprudence. Rather than Locke's freedom, which is primarily freedom *from*, the freedom that flows this alternative understanding of individuality is more like the freedom of the Greek *demos*, the freedom *to* participate with others in community.

Openness

The individual drawn from sources in Rosenzweig is also open, grounded in the present and in acknowledgment of imperfection. Each individual exists in time with their own particular narrative arc, unlike the Lockean individual whose abstraction as rights-bearing citizen is not located temporally. This openness, while temporally grounded in

the present, is also connected constructively to the past, and, ultimately, to the future. As located in the relationship between Man as Beloved Soul and World, to be open is to be constantly renewed in the awareness of finitude and imperfectability, which grounds the continuing relationship between the particular self (Beloved Soul) and meaning (World). This openness-as-finitude begins by acknowledging the failure of compassion in the past. That openness should be a product of finitude may seem paradoxical, but is consistent with Rosenzweig's insight into the creativity inherent in the acknowledgment of the fear of death as the fear of one's own particular death. Moreover, the coincidence suggests that maintaining relationship depends on acknowledging finitude and imperfection. Just as the command to love is always in the present, the confession of failure is also always a present confession, although it is a confession about the past. In this sense, the present rests on "the existence of the past [but] doesn't dwell in it."¹⁸⁷ The connection between past and present that this creates gives rise to a present that is enduring-and-transforming. The acknowledgement of failure of compassion in the past motivates a difference concept of justice. In contrast to justice as fairness, based on equal rights for those similarly situated, justice as equity, precisely because it provides options for resolving conflict where justice as fairness fails, recognizes the incommensurability of diversity and particularity. The enduring-and-transforming nature of openness also provides the basis of the capacity for self-reflection as the capacity for self-correction. Thus, openness also sustains the creative process, driving exploration and experimentation in the face of

¹⁸⁷ Rosenzweig, *The Star*, 169.

continuing internal and external imperfections, rather than leading to either resignation or resentment.

In Rosenzweig's counter-Hegelian temporal dialectic, transformations in the relationship between self and meaning (Man and World) takes place in the present (Revelation). The relationship between being and self (God's love) is always in the present, constantly new and renewed, it has no duration. This presentness sustains the individual's openness.¹⁸⁸ The transformation also takes place in and as part of the future (Redemption). As part of this re-orientation toward the future, the self's awareness of itself as lacking in compassion-in-the-past becomes an awareness of itself as always-lacking compassion. Rosenzweig refers to this as a "perpetually new self-negation"¹⁸⁹ of the self. This perpetually new self-negation expresses not just current imperfection, but the impossibility of perfection, the imperfectability of the individual. Imperfectability, thus, flows from and is a characteristic of openness. Rosenzweig also acknowledges that there is an element of betrayal in the nature of the relationship between being and self (God's love), because it is constantly renewed rather than continuing. In this way, the Rosenzweigian individual also contains an element of insecurity, and this insecurity is as permanent as the relationship itself. However, unlike the insecurity of the modern secular subject, as explained by Asad, this insecurity is not competitive or antagonistic. Precisely

¹⁸⁸ For Rosenzweig, presentness is also the characteristic that distinguishes God's love (as present relationship) from law, and which makes God's command to love the only commandment that can't become law. Law for Rosenzweig is generally negative because it has duration, rather than presentness. However, Rosenzweig describes fate as both enduring and as the original law. However, fate loses its endurance when it "breaks into the light," which it does precisely when God breaks out of God's hiddenness into Revelation (as part of the configuration of reality). Rosenzweig, *The Star*, 172.

¹⁸⁹ Rosenzweig, *The Star*, 173.

because it is not resolved, this aporia instead grounds imperfectability as the source of the capacity for continuing change and adaptation.

Importantly and distinctly, the individual as grounded in Rosenzweig's system is not abstract, but particular and diverse. Both particularity and diversity flow from and are grounded in both the openness and the relationality of this individual. Because of this, the individual as grounded in Rosenzweig is capable of embodiment in exactly the ways that often prove the most problematic for the Lockean abstract and universal individual. This capacity for embodiment provides the concreteness necessary to locate race, gender/gender identity, ability – all the complexities and intersectionalities of real human difference, including social location, class and power differentials. Distinctly in Rosenzweig, particularity and diversity are grounded in relationality and openness, rather than abstract, nominal rights. This different grounding provides coherence for difference which does not require artificial limits, while also tending to resist the atomization typical of endlessly conflictual identity politics. Using this different understanding of what it means to be human provides the foundation for a variety of different aspects of human life, but especially in law because abstractions tend to elide the very characteristics necessary to fully cognize and resolve legal conflicts, which are always particular to the diverse parties, but whose resolution must also be consistent with generic principles capable of guiding resolution of similar conflicts justly. The problems posed by the individual as abstraction manifest themselves in all areas of law, but are especially acute in contexts such as employment, housing, education, government services, and public commercial space, in which diverse individuals have been and may still be discriminated against precisely because of their particularity. In such cases, maintaining the legal fiction

of the abstractly equal individual allows courts to preserve the idea of individual rights, while also failing to find, protect or redress violations of individual rights in specific cases.¹⁹⁰ The gap between individuals in the abstract and particular individuals is currently at issue in the intersection of sexual diversity and religious freedom.

Individuals are simply not equal. We do indeed have different faculties—abilities, skills, interests, which combined with variations in social location translate into vastly different life chances¹⁹¹—and the legal fiction that we are equal is the very construct that most often prevents the law from taking into account the differences that bring us into conflict and from which we seek relief. The open and relational individual is far more than an abstract possessor of rights belonging to man in the state of nature (or conferred through the consent of majorities). Unlike the Lockean individual, the open and relational individual is not oriented toward others in a stance of antagonism. As Asad points out, independent and autonomous individuals are naturally antagonistic. The theoretical freedom, equality, and independence individuals possess in the state of nature are

¹⁹⁰ Perhaps the most extensive example of this problem is the right to an abortion. Although the case granting the right has not been overturned, courts repeatedly find that legal restrictions on the exercise of this right are not substantial enough to justify the invalidation of the laws. Thus, although a woman has a technical right to an abortion, she will be hard-pressed to actually exercise that right in most areas of the U.S. Other examples can be found in criminal law. For example, in *McCleskey v. Kemp*, 481 U.S. 279 (1987), the U.S. Supreme Court agreed with data showing that the death penalty was imposed in a racially discriminatory manner. However, despite a variety of legal protections against racial discrimination, these facts in themselves did not benefit the defendant, because he had not shown that a specific act of individual discrimination against him resulted in his being sentenced to death rather than life in prison. In other words, the Court accepted racial discrimination as normative in the system. Courts frequently find laws acceptable despite their “disparate impact” – the undeniably racist or sexist impact of an ostensibly neutral law – because of an absence of evidence of specific or individual animus against the disparately impacted group. Indeed, courts sometimes describe their rulings as “color-blind” precisely when they are sanctioning racially disparate results. Examples of this problem exist in every area of law for every nominally protected group.

¹⁹¹ Dean Spade, *Normal Life: Administrative Violence, Critical, Trans Politics, and the Limits of Law* (Brooklyn, NY: South End Press, 2011), 20.

insecure both because resources are finite and the mere rights-bearing individual has no natural obligations to consider the rights (or needs) of others. Rights are thus, competitive, and finite or zero-sum, i.e., one can gain rights only if others lose them.¹⁹² Identity constructed in terms of rights is necessarily also competitive. The fiction of equality also frustrates the development of consistent methods for assigning relative value to rights for the purpose of resolving conflicts of rights. Locke, like most political theorists and philosophers, orients his thesis in logic. As Rosenzweig also demonstrates, the epistemology of logic poses only a theoretical framework for relationship. In order to secure relationship, Rosenzweig shifts his epistemology to experience. Similarly, a philosophical anthropology of openness and relationality operates from an epistemological framework of experience, which both makes logic possible, but also demonstrates the limits of logic. The same abstractions that ground Locke's vision of the individual and the individual's relationship to civil society ground law with its abstract vision of individual rights. Experience is secondary, if it has a place at all. The problematic fit of experience within law is most evident in those areas that touch on the legality of relationships, especially in domestic relations law. Not coincidentally, this is also the area of law in which equity remains most structurally embedded. Black's Law Dictionary defines equity as:

A system of jurisprudence collateral to, and in some respects independent of, "law"; the object of which is to render the administration of justice more complete, by affording relief where the courts of law are incompetent to give it, or

¹⁹² The term "zero-sum" comes from game theory and is often used in political theory. Although rights may not need to work this way, political discourse often pits the desired rights of minorities against the existing rights of those with privilege. Alasdair MacIntyre's concept of internal and external goods differ in a similar way: internal goods are not finite, thus the expansion of internal goods for some is not dependent on the loss of internal goods for others. Alasdair MacIntyre, *After Virtue: A Study in Moral Theology*, 3rd. ed. (Notre Dame, IN: University of Notre Dame Press, 2007), 187-188.

to give it with effect, or by exercising certain branches of jurisdiction independently of them.

Equity has ancient legal origins as a correction and completion of the law's harshest, most formulaic elements. Reorienting the law's philosophical anthropology shifts equity from the periphery to the center of constructing and resolving legal conflicts. Experience, rather than logic is central to the construction of equitable alternatives that fill the gaps left by the abstract procedural structures of law. Even a classic jurist such as Oliver Wendell Holmes acknowledged famously in the opening of his 1881 classic, *The Common Law* that "The life of the law has not been logic: it has been experience."¹⁹³ Martha Nussbaum traces a history of equity from the Greek *epieikeia* as "flexible and particularized judgment linked to leniency."¹⁹⁴

In contrast to the Lockean individual, the open and relational individual is naturally connected to other individuals, capable of grounding experience, co-constitutive of civil society and the public square. Particularity and diversity are valuable not because of some later construct, but because they express the nature of reality itself. Expanding individuality in the way proposed by this alternative philosophical anthropology is not a means of eliminating conflict; conflicts will inevitably arise even among open and relational individuals, because particularity and diversity are challenging. The shift produced is that rights are not the only or the primary means of resolving conflicts among such individuals. Centering openness and relationality, rather than autonomy and

¹⁹³ Oliver Wendell Holmes, *The Common Law*, with a new Introduction by Sheldon M. Novick (New York: Dover Publications, 1991), 1.

¹⁹⁴ Martha Nussbaum, "Equity and Mercy," *Philosophy & Public Affairs*, Vol. 22, No. 2 (Spring, 1993), pp. 83-125, 85. Wiley-Blackwell. <http://www.jstor.org/stable/2265442>.

independence, as the core of individuality creates the opportunity to frame legal conflicts and their resolution in terms of the inevitable failure and restoration of relationship, rather than as rights competitions in which one must lose in order for another to win. Because the open and relational individual is embodied, operating in terms of broken and restored relationships, rather than nominal rights, may also better support the possibility of redressing the economic harm inevitably caused by inequity, and of restoring relationships fractured by prejudice.¹⁹⁵

Having articulated the alternative philosophical anthropology grounded in Rosenzweig, let us consider the difference it could make to an analysis of the conflict that masterpiece Cakeshop illustrates.

Rethinking Masterpiece Cakeshop

Theoretically, individual rights advocacy should be sufficient to resolve the rights conflicts of Lockean individuals, assuring the rights of all free, equal, and independent citizens to participate equally in the public square. The Court acted swiftly and decisively to reject claims for a religious exemption to discriminate on the basis of race in *Newman v. Piggie Park*. As the Court itself acknowledged, there is no rational way to limit an exemption in one case, such that it does not “subject[] gay persons to indignities in the marketplace” in all cases. As Justices Ginsburg and Sotomayor noted in their dissent, the

¹⁹⁵ For some readers, this language may seem to invoke special sentencing projects, described as Restorative Justice, in contrast to retributive justice. Such models typically involve first-time, non-violent, and often juvenile offenders, purporting to draw on pre-Colonial indigenous, and models of justice and feminine care models. *Ex parte Crow Dog*, 109 U.S. 556 (1883), which recounts a case in which the Lakota tribe sentenced a murderer to provide long-term support for the victim’s family (and which is usually cited as the reason tribal courts may no longer try capital cases), is often cited in this context. These origin claims are contested, as are the long-term results. Regardless of their origins, and although they may be consistent with the alternative philosophical anthropology model proposed here, these projects represent limited experimental exceptions to individual rights based advocacy rather than whole-sale alternatives.

logic of the majority opinion itself should have led to this result. Instead, the Court’s ad hoc concern about the anti-religious attitude of some members of the Colorado Human Rights Commission (and possibly concern for their colleagues fears of religious persecution) prevented the Court from reaching a substantive decision.

NeJaime & Siegel argue that Justice Kennedy’s opinion in *Masterpiece* is substantive in that by expressly rejecting certain religious claims and repeatedly citing *Piggie Park* as relevant, it clearly “repudiate[s] longstanding arguments advanced by exemption advocates and instead affirm[s] an approach to public accommodations law that limits religious accommodation to prevent harm to other citizens who do not share the objector’s beliefs.”¹⁹⁶ However, Justice Kennedy has been replaced by Justice Kavanaugh, who has demonstrated his sympathy for the arguments advanced by exemption advocates in his pre-Supreme Court rulings,¹⁹⁷ while the Arizona appellate court case NeJaime and Siegel cite in support of their argument was subsequently overturned by the Arizona Supreme Court.¹⁹⁸ Thus, there is good reason to doubt their

¹⁹⁶ Douglas NeJaime and Reva Siegel, “Religious Exemptions and Antidiscrimination Law in *Masterpiece Cakeshop*,” Yale L. J. Forum, September 14, 2018, at 202.

¹⁹⁷ *Priests for Life v. Dept Health & Human Svcs.* This case has a complex history, ultimately including consolidation with several similar cases all challenging specific provisions of the opt-out procedure for employers who refused to provide contraceptive coverage for their employees on religious grounds. The consolidated cases were referred to the Supreme Court, which remanded them back to the circuit court for further proceedings. Kavanaugh participated as a judge on the D.C. Circuit Court. A majority of the court dismissed the priests’ claims that even notifying the government of their refusal to provide coverage violated their religious freedom because it made them complicit in the government action of providing contraceptive coverage, i.e. that their religious convictions should permit them to prevent their employees from receiving contraceptive coverage at all. Kavanaugh wrote a dissenting opinion in which he explained why he would have granted the priests’ request. This dissent was reported in a variety of on-line sources at the time of Kavanaugh’s Senate confirmation hearings to the U.S. Supreme Court. See, e.g. National Women’s Law Center 8.30.18; Americans United for Life, 7.11.18; National Review 9.07.18; Huffington Post 9.06.18; and SCOTUS Blog 7.30.18.

¹⁹⁸ *Brush & Nib Studio, LC v. City of Phoenix*, 418 P.3d. 426, 432 (Ariz. Ct. App. 2018), reversed in part on 9.16.19 by the Arizona Supreme Court in a 4-3 decision, and quoting *Obergefell*, in finding that

claims, but even if their insights into Kennedy's goals in the Masterpiece opinion are sound and survive his retirement, the limitations of the individual rights advocacy model remain; these cases will continue to work their way through the courts seeking a resolution this model cannot provide.

The fact that the Court failed to reach a majority substantive decision was not the result of a lack of well-grounded argument based on legal precedent, and it was not because this case did not have the right legal facts. Rather, the non-decision is an example of the limitations of the individual rights model of advocacy. The logic of abstract rights cannot dislodge or alter deep-seated normative or systemic religious prejudice. A variety of causes may be advanced to explain this, but what is crucial is that such prejudices are resistant to logic, including the logic of abstract legal rights and logical explanations that the feared binary of secular-religious is simply a construct of religion itself. Experience is the only means of engaging such prejudices. Moreover, disputes over attitudes about sexuality in the U.S. are increasingly "about modernity itself" and viewed as markers of religious and political identity for some American Christians.¹⁹⁹ Such attitudes are reflected in the Obergefell dissents, explicitly invoked by Justice Thomas in his separate Masterpiece opinion. Thus, although Justice Kennedy

"Plaintiffs are entitled to 'continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).' AZ Supreme Court at 3-4. On-line sites for Lambda Legal and Alliance Defending Freedom who either represented parties or filed briefs in the case both reported on the decision on 9.16.19 before the Arizona Supreme Court opinion was available on-line.

¹⁹⁹ Elizabeth Shively, "Christian 'Purity' Guru's Loss of Faith May Signal a Coming Reckoning For Conservative Christianity," Re.Wire News. Aug 5, 2019. <https://rewire.news/religiondispatches/2019/08/05/christian-purity-gurus-loss-of-faith-may-signal-a-coming-reckoning-for-conservative-christianity/>

accepted that the requested exemption would fundamentally eviscerate the capacity of same-sex couples to exercise their right to marry,²⁰⁰ the Court was unable either to reject or to affirm Phillips's claim outright, leaving both religious vendors and gay and lesbian couples unsure what their legal rights actually entail. When individuals and their rights are abstract and nominal, it is possible to have the right to civil same-sex marriage, but still be unable to obtain the wedding goods and services typically associated with the exercise of that right on the same terms as different-sex couples.

Having more than rights in our legal toolbox can greatly assist in the increasingly challenging task of maintaining specifically religious freedom as well as a maximum of liberty and equality for all. Grounding law in the philosophical anthropology of the open and relational individual may generate resources for re-considering the legal conflicts in *Masterpiece* and other similar cases, and perhaps even reduce some of the cultural tension and distrust that resists logical explanation. Traditional legal arguments have failed to reduce this tension and distrust, and without a shift such as that provided by the replacement of Locke's individual with the open and relational subject grounded in Rosenzweig, legal distinctions such as that between identity and conduct and an ever-expanding structure of anti-discrimination exemptions for those whose animus is religiously motivated on the basis of religious freedom is likely to increase.

The first of many differences generated by an alternative philosophical anthropology is the shift in the meaning and function of liberty. For the Lockean

²⁰⁰ *Masterpiece Cakeshop v. Colorado Human Rights Commission*, 584 U.S. _____ (2018), slip op., Opinion of the Court, at 10.

individual rights are primary and relationship secondary, and, thus, liberty is negative; the open and relational individual operates from a positive concept of liberty. Instead of the Lockean understanding of liberty as “freedom from,” from government intrusion into the private sphere (the sphere of religion and the body), and consequent prominence of rights to preserve negative freedom, we shift to liberty as a positive freedom, a “freedom to,” to participate fully in civil society and the public square. This shift in the meaning of liberty flows from rejecting the fiction of the individual imagined in the state of nature, as prior to civil society. Although pre-dating Locke’s use, this fiction merely advanced the theoretical political framework that justified political rebellion for the purpose of highlighting independence and autonomy. Rather than the fiction of individuals preceding civil society, whose only obligation is to obey the law as established by consent, open and relational individuals mutually constitute themselves and civil society by taking on concern for the other. The open and relational individual is also characterized by imperfectability, which sustains relationship as a process which always falls short of perfection. The role of liberal government on this model of individuality is to promote the fullest participation of each in civil society and the public square, not through abstract rights, but through the fostering of concern for the other.

From the perspective of the open and relational individual, with its emphasis on liberty as freedom *to* rather than freedom *from*, legally sanctioned discrimination is always a last resort, available only in specialized, limited cases. Discrimination always denies equality, and usually also reduces liberty, especially liberty understood as freedom to; thus, it also frustrates relational and open individuality. As the Supreme Court itself has stated, discrimination is an “assertion of . . . inferiority” that “denigrates the dignity

of the excluded” and “reinvokes a history of exclusion.”²⁰¹ The Constitution’s two-fold guarantee of religious liberty—of free exercise and against government establishment—can be fully accommodated with this shift in the understanding of liberty: the government is free to protect society from the harms of discrimination in the marketplace, while still preserving individual freedom to practice faith as one chooses. Religious practice is one of the few areas in which diversity is fostered through the freedom to discriminate. Allowing religious communities the freedom to discriminate, for example, in the hiring of religious officials and teachers, allows the community to maintain its own distinctiveness without reducing relationality or openness generally. However, the opposite is true in the public square. Allowing public accommodations to discriminate on the basis of the owner’s religious belief reduces diversity in the public square, and constitutes an exercise of freedom as freedom *from* relationality and openness. That the simple proximity of diverse groups does not necessarily reduce prejudice, and may even increase it is demonstrated by a broad range of evidence. Instead, what reduces prejudice among diverse groups is the experience of regularly interacting as relative social and economic equals. Thus, permitting discrimination of any kind in the commercial marketplace—allowing some to exercise freedom from relationality and openness—is uniquely harmful. An increase in vendors who discriminate does not in itself diversify the marketplace, and, there is no logical principal to limit exemptions which permit discrimination, although discrimination always reduces relationality and openness more generally. Diversity as

²⁰¹ Louise Melling, “Religious Refusals to Public Accommodations Laws: Four Reasons to Say No,” 38 *Harvard J.L. & Gender* (2015), 177-192, 189, citing *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 (1994).

fostered in anti-discrimination laws is a value that flows naturally from Rosenzweig's alternative account of the nature of reality as itself irreducibly diverse, and so is inherent in the open and relational individual. This is in stark contrast to account of both reality and the human on which the social contract depends, which both assumes and requires homogeneity to function as theorized.

Nevertheless, according to the Public Accommodations Law Scholars who filed an amicus brief in *Masterpiece*, even at common law, public accommodations were required to serve customers equally. Contrary to their portrayal by advocates of religiously motivated discrimination, this assumption was part of the common law imported into the early U.S. legal system. Once slavery ended, the anti-discrimination presumptions of the common law of public accommodations had to be dismantled in order to create the legal structure of racial segregation. Only because of this prior dismantling was affirmative legislation required to restore the anti-discrimination presumptions embedded in public accommodations law. Thus, when advocates of religiously motivated discrimination argue that these laws have been over-extended to include more than race-based discrimination, they mis-represent history in order to distinguish the system of marriage segregation they are proposing from racial segregation. Although looking through the lens of logic and rights can reveal this mistaken historical representation, only experience demonstrates the limitations of logic and rights for assuring equality and liberty against religious prejudice. Reading the First Amendment in terms of the expanded philosophical anthropology of openness and relationality confirms and strengthens prior findings in other contexts that public accommodations laws generally do not implicate religious freedom in that they do not

infringe on religious practice, because they contain exemptions for religious spaces and because commerce is properly distinguished from religious practice. A long history of minority religious practitioners being able to adapt themselves to public accommodations laws while maintaining their religious distinctiveness also confirms these findings.²⁰² For example, the kosher butcher is able to operate in the public square, maintaining his own religious commitments by choosing not to sell pork in any form to any customer. He may refuse to sell kosher beef to a Christian customer because he suspects the customer will use it in a meatloaf preparation that contains pork. This is the parallel to what advocates of religious exemptions to the public accommodations laws for those who oppose same-sex marriage term an identity-conduct distinction. They insist that they are not refusing service on the basis of the would-be customer's protected identity—their sexual orientation—but rather on the conduct—same-sex marriage—which they believe God opposes, even though such refusals will “primarily impact same-sex couples.”²⁰³ Abstract logic may justify such a claim, but the experience of the open and relational legal subject

²⁰² Mary Anne Case makes this point in her explanation of “how dependent American Protestants are on state laws concerning marriage,” relative to Roman Catholics and Jews. Mary Anne Case, “The Peculiar Stake U.S. Protestants Have in the Question of State Recognition of Same-Sex Marriages,” *After Secular Law*, eds. Winnifred Fallers Sullivan, Robert A. Yelle, and Mateo Taussig-Rubio (Stanford, CA: Stanford U. Press, 2011), 302-321. Although note what I have described several times as an unlikely alliance of Roman Catholics and evangelical Christians. Mary Anne Case also argues that the motivation for Roman Catholics in that alliance is concern with maintaining the gender binary against the secular “gender ideology.” See for example, Mary Anne Case, “Trans Formations in the Vatican’s War on “Gender Ideology” (2019). *Journal Articles*. 9669. https://chicagounbound.uchicago.edu/journal_articles/9669, in which she locates the origin of this concern in writings from the mid-1980’s by then Cardinal Ratzinger; see also, John Millbank and Adrian Pabst, *The Politics of Virtue: Post-Liberalism and the Human Future* (London: Rowman & Littlefield, 2016), at 271, arguing that “modern sexism, systematic subordination and increasing endangerment of women . . . does not derive from the perpetuation of patriarchy Rather, it results from the *abolition* of gender difference (emphasis in original).”

²⁰³ *Brush & Nibb LLC v. City of Phoenix*, CV-18-0176-PR (Ariz. Sept. 16, 2019), ¶82, although the Arizona Supreme Court denied that the distinction at issue here was based on conduct. Instead, the court simply insisted that the refusal was based on the content of the speech at issue in the invitations, speech that “celebrating a same-sex marriage ceremony.”

demonstrates the limitation and error in this logic. Allowing Masterpiece Cakeshop and other wedding vendors to discriminate against same-sex couples creates diversity *only* in the sense that it allows for the creation of a legally sanctioned second class form of marriage for same-sex couples, just as racial segregation created a second class of citizenship on the basis of race. Allowing some religious vendors operating as public accommodations to discriminate on the basis of their belief about same-sex marriage reduces diversity by permitting the refusal of a commercial relationship, and thus also creates barriers to full participation by all members of civil society.

A shift in the foundation of law, from the Lockean narrow vision of humanity to the more expanded open and relational philosophical anthropology grounded in Rosenzweig, might have prevented *Masterpiece* altogether, because it might have prevented or at least dramatically changed the tone of *Obergefell*. Through the lens of an open and relational legal subject, courts considering claims for marriage equality might have focused on the same-sex couples already present in most communities, demonstrating their long-term, and even sacrificial commitment to each other, raising children together, and burdened by the dignitary and economic harm of being legally prevented from accessing the benefits different-sex couples enjoy in marriage. Such reflections might have provided counter-weight to the debates that led to Congressional passage of the Defense of Marriage Act in 1996 (the federal DOMA). The absence of federal legislation might have reduced the fuel that drove the proliferation of state DOMAs. Without these, and without the limit on federal recognition of various state-sanctioned same-sex marriages, the path of expansion for state recognition of same-sex marriage might have been dramatically different. Without the structure of limitations

created by the combination of federal and state DOMAs, a majority of the Supreme Court might not have determined that the rights at issue required recognition at the federal level. Even if the Court had determined in this different climate that the requirement of open and relational individuality required federal recognition that the fundamental right to marry includes the right to marry a person of the same gender, perhaps their decision would have reduced rather than expanded subsequent litigation over the limits on that right posed by religious freedom, if any. In *Loving* the Court did not go out of its way to validate the beliefs and good will of those who opposed interracial marriages on the basis of religious belief. They also did not go out of their way to valorize marriage generally or the importance of extending the benefits of marriage to interracial couples. They simply ruled that Virginia's anti-miscegenation law was invalid, and therefore that all remaining anti-miscegenation laws were also invalid. According to Stone, in 1967, 16 states including Virginia had laws against interracial marriage, although polling indicated that 75% of Americans were opposed to interracial marriage. By contrast, in 2015 when the Court decided *Obergefell*, only 16 states recognized same-sex marriage, but polling indicated that 60% of Americans favored approved of same-sex marriage.²⁰⁴ Thus, the different tones in the Supreme Court's decisions in *Loving* and *Obergefell* cannot be attributed to different social attitudes. Perhaps if the Court in *Obergefell* had taken a

²⁰⁴ Geoffrey R. Stone, *Sex and the Constitution: Sex, Religion, and Law from America's Origins to the Twenty-first Century* (New York: Liveright Publishing Corporation, 2017), 493, FN 6, and 511. Stone doesn't site his source for either the 60% claim or the claim that "same-sex couples could marry legally in 38 states and the District of Columbia" by the spring of 2015. The number of states differs from Chief Justice Roberts' calculation in his dissent in *Obergefell*. Melling cites a 1968 poll (the year after the *Loving* decision) indicating that on 20% of Americans approved of interracial marriage. She also cites a 2011 poll (one year prior to *Obergefell*) indicating that 55% of Americans approved of same-sex marriage. Melling, "Religious Refusals to Public Accommodations Laws," at 183, fn39.

similar tone as the Court in *Loving*, challenges such as that in *Masterpiece* would not have proliferated at the state level.

Discrimination always presumptively undermines openness and relationality even when it does not violate legal rights. The relational harm it does undermines both liberty and equality, not just for Craig and Mullins, the particular customers who were refused service and brought a legal claim for redress in *Masterpiece*. A broad range of actual and potential third parties have already been affected and continue to be impacted by the *Masterpiece* Court's refusal to on whether the refusal of service on religious grounds is legally permissible in some or all cases. Craig's mother was also refused service by Phillips; if the couple had had children, their children would have experienced discrimination, as relational harm, because of their parents' sexual orientation.²⁰⁵ Other persons who are protected by public accommodations laws might begin to fear that they, too, could be refused service on the basis of the vendor's objection to the conduct their status represents. In rural areas with fewer service providers of all kinds, this problem is exacerbated. Already in the area of healthcare, some rural communities are dependent on a single provider who refuses to provide some medical services on the basis of the provider's religious beliefs and practices. Friends and family members could also come to fear refusal, restricting their liberty—both as freedom to participate and freedom from

²⁰⁵ In addition to the harm children experience when their parent is refused service, children been denied service themselves because of their parents' sexual orientation. Children have been denied admission to religious schools and even refused medical care, because of their parents' sexual orientation. These examples further demonstrate how the complicity argument dramatically expands both the circumstances in which exemptions are claimed and the potential third parties who are harmed when exemptions from anti-discrimination laws are permitted legally. The majority in *Obergefell* identified such harms to children as a factor in its finding that the denial of the fundamental right to marriage for same-sex couples posed a legally impermissible dignitary harm. *Obergefell* at 2600, "children suffer the stigma of knowing their families are somehow lesser."

discrimination. In addition, granting Phillips an exemption, when other religious vendors comply with the public accommodations laws,²⁰⁶ and other religious practitioners advocate for marriage equality, as a result of their religious commitments, treats Phillips preferentially, thus giving government sanction to his religion and not to others. As Sullivan and others have noted, such privileging of one set of religious beliefs by exempting those believers from the application of a generally applicable law, allowing them to discriminate, may constitute an “establishment” of his religion, in violation of the prohibition in the First Amendment. The potential harm would not be limited to same-sex couples seeking wedding goods and services. Expanding exemptions from discrimination on the basis of the provider’s religious commitments expands inequality and restricts liberty. Openness and relationality are reduced as relationship is severed and the possibilities of transformation, self-reflection and correction are lessened. Although rights are at issue, the problems identified as flowing from the recognition of an exemption for religiously motivated discrimination are not primarily problems of rights violations, but compromises of the open and relational nature of individuality itself and the state’s consequent responsibility, even within and otherwise Lockean construct of liberal jurisprudence, to preserve the lives, liberties, and estates of the members of civil society.

Many of those who would grant the exemption requested by Phillips, including the Supreme Court justices who dissented in *Obergefell*, are particularly sensitive to

²⁰⁶ E.g. the kosher butcher mentioned in FN15; a Seventh-Day Adventist vendor who closes on Saturdays; or even a mainstream Christian vendor who closes on Sundays to provide employees time to attend church, even though such closure reduces profits.

conflations of opposition to same-sex marriage and racism. Although the history of racism as well as the breadth of consequences from racism and that of opposition to same-sex marriage are quite different, discrimination in both cases reduces liberty and equality, and was/is motivated by religious belief. This is as true for same-sex couples refused service on the basis of the vendor's belief that God opposes same-sex marriage as it was for African Americans refused service on the basis of the vendor's belief that God opposes racial mixing.²⁰⁷ This is true, even if discrimination on the basis of race is fundamentally different than discrimination on the basis of sexual orientation, and although race and sexual orientation trigger different levels of scrutiny in other areas of law. In public accommodations laws all protected categories are treated as equal.²⁰⁸ This is another reason why *Masterpiece* is an ideal case through which to consider the differences that result from a philosophical anthropology oriented toward relationality and openness; what is at issue in this case and others like is not simply the right to have a particular identity recognized, instead, the issue is the responsibility of the liberal state to assure the fullest possible access of all protected groups equally to public space.

The rights-oriented view provides for the obligation of the Colorado Human Rights Commission to assure that rights are respected as part of the government's

²⁰⁷ Although the Supreme Court did not discuss this aspect of the case, nor did anyone claim an exemption from anti-discrimination laws, including the Civil Rights Act of 1964, the explicitly religious motivation for the anti-miscegenation law – or at least its enforcement – is clear in the case of *Loving*, as revealed in the trial judge's explanation of miscegenation laws, which the Supreme Court quotes in its decision:

“Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And, but for the interference with his arrangement, there would be no cause for such marriage. The fact that he separated the races shows that he did not intend for the races to mix.” *Loving v. Virginia*, 388 U.S. 1 (1967) at 3.

²⁰⁸ Brief for Public Accommodations Law Scholars as Amicus Curiae, p. 5, *Masterpiece Cakeshop v. Colorado Human Rights Commission*, 584 U.S. ____ (2018).

compelling interest in preventing discrimination, but provides no protection against the fear that religious views are being denigrated. Preventing discrimination is at the heart of the secular liberal project and the goal of even the individual rights advocacy model of law; however, the value of diversity, as grounded in openness and relationality is inherent in the expanded philosophical anthropology grounded in Rosenzweig. Both the First Amendment and the public accommodations laws are designed to protect this value.²⁰⁹ However, grounded in the lens of rights, the abstract value of diversity requires a justification not inherent in the social contract itself; moreover, it does not provide a mechanism for evaluating the rights claims of diverse individuals against apparently competing claims to protect religious liberty, when these claims compete in the commercial marketplace to accommodate sexual diversity and religious traditionalism. In fact, the hidden religious structure of the public square is likely to privilege the exclusion claims advanced by religious traditionalism. Grounded in the lens of open and relational individuality, however, the liberal state meets its responsibility to secure life, liberty, and property when the government secures the fullest participation of all in civil society and the public square by incenting all to take on concern for the other. Where the understanding of discrimination as a rejection of concern for the other and the claims of the other is grounded in a different understanding of the nature of humanity itself, discrimination may only be permitted where the liberal state finds a compelling reason that overrides and/or offsets the ways discrimination necessarily undermines relationality.

²⁰⁹ Brief for Public Accommodations Law Scholars, p. 27-28, noting that “[i]t has long been settled that public accommodations laws further a compelling state interest in eradicating discrimination that outweighs any incidental infringement on the interests of public-facing, commercial entities like Masterpiece,” and citing *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), at 250 and *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) at 628.

The liberal state's interest in fostering the fullest level of participation is itself sufficient to justify anti-discrimination laws and reject claims for exemptions, without the need for recourse to rights in nature or through legislative grant in order to justify concern. This interest also helps to reframe critiques of religion from anti-religious, or legally impermissible hostility to religion, as religion-positive claims for an expansive rather than a narrow view of religious freedom. Such an expanded view encompasses far more than the right to discriminate in ways otherwise prohibited by the requirements of liberty and equality, while also expanding the categories of religious belief and practice the law is able to recognize. In light of such a shift, a product of the openness of the individual as understood through Rosenzweig, decision-makers may consider claims that religious freedom is being used as a "pretext," a legally specious attempt to justify otherwise illegal behavior, and discuss the damage that can or has been done in the name of religion as part of the legally permissible inquiry by a religion-neutral court or other government decision-maker in determining whether to grant requested exemptions. Thus, a government decision-maker could find a request for religious exemption "patently frivolous" as the Supreme Court did in the case of *Piggie Park*, without triggering the objection advanced by the majority in *Masterpiece*.²¹⁰ Fostering diversity, as public accommodations laws do by forcing (equal) association in the public sphere, is also potentially transformative, in that it brings together those who might not otherwise have or take opportunities to associate. Not granting a religious exemption in this situation

²¹⁰ "Indeed, this is not even a borderline case, for the respondents interposed defenses so *patently frivolous* that a denial of counsel fees to the petitioners would be manifestly inequitable. Thus, for example, . . . "defendants' contention that the Act was invalid because it 'contravenes the will of God' and constitutes an interference with the 'free exercise of the Defendant's religion.'" *Piggie Park*, FN5 at 402 [emphasis added].

better fosters in the public square the diversity inherent in reality than granting the exemption, without unduly burdening or restricting religious belief or practice; it also fulfills a goal of government to promote concern for the other.

Because the open and relational self finds connection to others in recognizing its own past failure of relationship, which is the source of self-reflection, using this lens to resolve the conflict represented in *Masterpiece* might include reconciliation procedures that invoke equity. Expanding the understanding of individuality expands the analysis of the legal conflict, allowing for fruitful complexification rather than the preemptive narrowing typical of traditional rights-based analysis. This assures that we can also evaluate the likely consequences of various options, which also allows us to engage in a different reflection about the harms involved in the conflict. We can evaluate the harm claims of all the parties involved or potentially impacted: 1) the baker's claim of religious harm in making a cake for a couple whose relationship he thinks is wrong; 2) Craig and Mullins's claim of dignitary harm resulting from discriminated 3); the claim of the community generally against the harm resulting from discrimination; and 4) the claim of harm to specific community members who observe Craig and Mullins' rejection.

The turn to equity is facilitated by the shift from the exclusive use of rights, while allowing the system to continue to operate within the broad structure of liberal jurisprudence founded on the constructive insights of Locke about the need for consent from the governed and the benefits of religious tolerance.²¹¹ Equity provides access to

²¹¹ Note that although Locke's theory of religious tolerance is probably the most contested aspect of his legacy for the U.S. system of preserving religious liberty while advancing secular liberal governance, he excluded Roman Catholics from his vision because of his perception of their incurable intolerance. On the one hand, this perception reflects exactly the secular-religion binary Asad encourages us to abandon. At the same time, the claims of religious practitioners advancing the religious exemption argument is precisely

resources not available through rights jurisprudence. Specifically, it offers the opportunity to bring the conflicted parties into a different kind of relationship – one which has elements of restorative justice, or what is referred to in Jewish-inflected social justice movements as *tikkun ha-olam*, of restoring the fabric of reality that was torn by discrimination.

The process would allow something like an “Allen plea” in which the vendor agrees to accept certain consequences without admitting any wrongdoing. The case would proceed like other diversion cases (diverted from traditional punitive process), in equity, and involve participation in reconciliation conferences that allowed all parties to express to and discuss with each other their different views of the conflict. Same-sex couples (or others denied service) would share how that experience negatively impacted them/their families/friends and vendors would explain their own conception of how their opposition to same-sex marriage is not prejudice on the basis of sexual orientation. Such conferences could conclude with an apology from the vendor and a parallel acknowledgment of the vendor’s sincere faith from those initially refused. The vendor would agree to provide the good or service. Vendors would remain free to reject the “diversion & reconciliation path” and instead be fined and potentially sentenced to remedial conduct, such as training employees on legal compliance, and subject to a period of monitoring. These last two could be left to the outcome of the reconciliation process in the diversion cases.

that the authority structure guiding their religious practice does not permit compliance with an alternative “secular” authority.

The possible structure of enforced relationship would be like the conferences typical of restorative justice, with the same goal of providing a context in which the vendor could come to better understand the dignitary harm his behavior causes, to himself as well as to rejected customers. As a result of such a process, the baker might develop an understanding of the distinction between civil and religious marriage, i.e. that those who enter into a civil marriage regardless of whether they are same or different sex are not implicating his religious value for Christian marriage. Another possibility is that the baker would develop a greater appreciation and respect for gay and lesbian couples regardless of whether they are religious or not, including that they are faithful members of a tradition that is not Christian. Such a process also evokes the equitable “best interests” standards at work in parental dispute cases—rather than pitting the rights of various members of the public or the business community against each other, this model provides for a consideration of what is in the “best interest” of all concerned. Similarly to the criteria at work in parenting cases, without importing values that violate Rawls’ notion of overlapping consensus, the criteria the courts would use would be the maintenance of relationship.²¹²

The individual drawn from Rosenzweig experiences compassion as a product of forgiving oneself. This structure also operates within the register of Christianity, as well as the register of equity which, for example, may require an apology, which the law cannot. Given the nature of the conflicts Masterpiece represents, this may provide a means for experience to compensate for the limits of logic without feeding traditionalist

²¹² It might even include similar caveats, that forced relationship would pose a risk of physical or developmental harm to one or more of the parties.

religious practitioner's fears that they are being "vilified" for their beliefs. In the context of religious wedding vendors who are opposed to same-sex marriage because they believe God is opposed to such relationships, this gives the law a way to supersede the limitations of the law's epistemology of logic and operate in a register that specifically invokes symbols familiar to Christians who seem to be the main ones who oppose supplying goods and services for same-sex couples getting married.

Phillips and others like him claim that the public accommodations law as applied to him burdens his exercise of religious freedom, under the theory of complicity: that by creating a cake for use in a same-sex wedding celebration, Phillips is complicit in conduct that he believes God opposes. Courts are appropriately leery of inquiring into the substantive details of faith traditions,²¹³ asking only whether a litigant's beliefs are sincerely held. Broadly speaking, the First Amendment protects the right to practice one's faith without government interference, thus the government is limited to inquiring into the details of claimed harm. The inquiry in the case in which Sullivan acted as an expert witness on American religion followed this process. The court inquired into the impact of the city's cemetery regulations on the Plaintiff's faith. Courts can and must consider claims of how the law at issue burdens religious belief or practice. The proposed shift in understanding of individuality as relational and open better supports exactly this inquiry,

²¹³ According to the so-called "Lemon Test"—which may or may not be good law in light of subsequent Supreme Court decisions on religious freedom—a law which requires excessive entanglement of the government in religion is unconstitutional. Typically, courts refrain from inquiry into the details of religious belief in part on this basis and in part on the basis of the idea that the First Amendment prohibits the government from taking a stand on the truth of religion as expressed in claims for protection. See, e.g. the discussion of "the secularity principle" as the theoretic heart of the Establishment Clause in Dennis J. Goldford, *The Constitution of Religious Freedom: God, Politics, and the First Amendment* (Waco, TX: Baylor U. Press, 2012), pp. 213-233.

and does so in ways likely to expand recognition of minoritized religious practices, such as the wearing of religious head coverings, while still maintaining predictable public order and general access consistent with state and local public accommodations laws.²¹⁴ Because religion is generally not practiced in public commercial space, only the theory of complicity provides the basis for finding that the commercial sale of wedding goods and services implicates the religious practices of vendors. The theory of complicity underlies many of the healthcare refusal statutes that NeJaime and Siegel mention. Neither the theory nor the statutes seem to have any natural limit. Phillips was not being asked to perform or even attend the same-sex wedding ceremony reception. The public accommodations law does not—and could not—prohibit him from discriminating in his church or religious community. Although it prevents him from posting a sign indicating that he does not make cakes for same-sex weddings, it does not prevent him from otherwise expressing his faith, by posting an Ichthus symbol²¹⁵ in the window and/or on all his advertising media, for example. He was not asked to create a cake containing a message in favor of same-sex weddings.²¹⁶ Even the penalty imposed by the

²¹⁴ Not all states prohibit discrimination in public accommodation on the basis of sexual orientation. However, all those that prohibit such discrimination do so on the basis of democratic process.

²¹⁵ The fish symbol historically associated with Christian identity, and used by a variety of businesses and business professional to indicate to co-religionists the religious values of the business. NB that the Phoenix Human Rights Ordinance at issue in *Brush & Nibb* does permit vendors to use signs to indicate limitations in service, and doing so was one of the issues in the case.

²¹⁶ As Justice Kagan noted in her concurrence, the Jack cases are distinguishable on this point because in those cases, Jack asked the bakers to include anti-same-sex marriage messages on the cakes. In each case, the baker agreed to bake the cakes, but not to include the messages. In at least one case, the baker had baked other cakes with explicitly religious messages. Therefore, this limitation was also available to Phillips had he been asked to make a cake that contained an explicit statement in favor of same-sex marriage. Moreover, as Justice Ginsburg noted in her dissent, the Masterpiece bakery web-site displayed no images of cakes with words. *Masterpiece*, slip op., Ginsburg, J., dissenting, at 6, FN 5.

Commission, requiring that Phillips train his employees to assure future compliance with the public accommodations law, did not limit his belief or practice. Contrary to concern expressed by Justice Gorsuch in his concurrence, this does not require Phillips to teach something he doesn't believe: it does not require him to teach that God approves of same-sex marriage, only that the law requires the bakery to serve same-sex and different-sex couples equally. Without the exemption, Phillips remains free to believe and to exercise his belief (that God opposes same-sex relationships) in all the ways the First Amendment is designed to protect. In contrast, those the law seeks to protect are completely denied the protection of the law if Phillips is granted the exemption; they suffer a relational harm, as well as economic harm, which extends broadly to third parties, reducing both relationality and openness for all. Thus, a neutral decision-maker could find that the only restriction the law places on Phillips' practice is that it prevents him from discriminating in the public sphere on the basis of sexual orientation, which it is the express purpose of the law to prohibit. Through the lens of open and relational individuality, Phillips' claims for exemption are understood as a rejection of the claims of others upon him.

Reconsidering the claim in this way further highlights the relational harm that granting his request poses to Phillips himself, as well as to other individuals in civil society and the public square.

In some cases, Courts have exempted religious practitioners some neutral laws, finding that although they were not designed to impact religion, they did indeed unduly burden minority religious practices. Examples of exemptions from such laws include the right of the Amish to withdraw their children from public schooling required for others and for members of minority religious groups who oppose war to be relieved of otherwise

compulsory military service. Phillips and other vendors with religious objections to same-sex weddings argue that their now minority religious view about same-sex marriage should be exempt from public accommodations laws like the Amish and pacifists. They also offer *Hobby Lobby* as an example of a similarly mandated religious exemption from neutral, generally applicable law. *Hobby Lobby* and certain recent Supreme Court cases do appear to essentially define religious freedom as the right to prevent *others* from engaging in otherwise legal activity, and not simply as the right to engage, *oneself*, in activity consistent with one's religious commitments. Granting Phillips's claim extends this definition to include a right to discriminate against customers on the basis of *his* religious belief about *their* conduct. Some claim that the best way to resolve the conflict, consistent with Justice Kennedy's admonition, is through this kind of legal recognition of the identity-conduct distinction. This distinction is grounded in the logic of rights inherent in the Lockean independent and autonomous individual; it further turns on the view of religious liberty as freedom *from* the claims of others to participation. The argument from this perspective is that Phillips did not refuse to serve customers on the basis of their "status," their sexual orientation, which is prohibited, but rather on the basis of his religious objection to their "conduct," same-sex marriage, which is not (or should not be). The only cases that can even be treated as making a similar distinction are cases in which courts have found that discrimination on the basis of pregnancy is not a distinction based on gender. To the extent these cases can be compared, they demonstrate the problem of the rationale behind the proffered status-conduct distinction, which is that one can discriminate against same-sex marriage without discriminating on the basis of the

sexual orientation of the partners to the marriage.²¹⁷ The oddly sympathetic language in Obergefell clearly suggested to some that this the Court might have been willing to sanction this legal distinction.

Some traditionalist Christian advocates have argued that exemptions foster diversity by accommodating a variety of religious and non-religious believers in public commercial space, and that such exemptions can be tailored narrowly. Laycock and Berg propose that exemptions could be limited to “small businesses that conscientiously object to providing personalized goods and services directly to same-sex marriages (primarily through weddings) when other providers are readily available.”²¹⁸ They argue that this is a means of encouraging religious vendors to participate fully in public commercial space, and “without subjecting gay persons to indignities when they seek goods and services in an open market” as required by Kennedy’s language in *Masterpiece*. Even some liberal advocates have offered such compromises as a means of demonstrating that their value for diversity includes traditionalist religious as well as progressive religious and non-religious vendors and service providers in the public marketplace. This might appear to satisfy the interests of the open and relational individual and a taking on of concern for others. However, what it actually does is preserve the very historic and/or normative

²¹⁷ Anton Sorkin makes the case for this distinction in Anton Sorkin, “Make Law, Not War: Solving the Faith/Equality Crisis,” 12 *Liberty University Law Review* 3, Article 5 (2018). https://digitalcommons.liberty.edu/lu_law_review/vol12/iss3/5. Scalia also suggests this distinction can be made in his dissents in *Romer* and *Lawrence*. The argument rests on the two-fold presumption that no legitimate exemptions to discrimination on the basis of race exist, but that discrimination on the basis of homosexual conduct is or should be legal.

²¹⁸ Douglas Laycock, Robert E. Scott Distinguished Professor of Law at the University of Virginia, and Thomas C. Berg, James L. Oberstar Professor of Law and Public Policy at the University of St. Thomas (Minnesota) have made this argument in a variety of formats, including an amicus brief filed in *Masterpiece* and on SCOTUSblog.

prejudices anti-discrimination laws are explicitly designed to end; it protects traditional religious prejudices and majority religious practitioners from the consequences of social change. This effect undermines the capacity of the democratic process to produce change in response to shifting demographics and social attitudes.²¹⁹ The “diversity” that proponents of a right to discriminate against same-sex couples claim will result from allowing religious wedding vendors to enter the market on their own terms is an inversion of real diversity. They offer no meaningful difference to the commercial marketplace, except their discrimination. The consequence of this discrimination is not diversity but segregation. The Supreme Court cases tracing the trajectory of expanding rights for gay and lesbian persons are replete with the dissenters’ claims that the rights at issue are neither enumerated nor so deeply embedded in the nation’s history or conscience²²⁰ that they deserve recognition as fundamental rights. From the perspective of individual rights advocacy, a history of discrimination becomes its own legal justification against recognizing the right necessary to redress that discrimination. The openness of the open and relational individual provides a counter-weight to such arguments from tradition against legal and social change, which often involves shifts in social and political power.

Allowing discrimination to persist in the public commercial sphere undermines openness and relationality, while also rejecting positive freedom as the freedom to

²¹⁹ Counter-examples, such as the convictions of religiously-motivated social justice advocates who leave food and water on public land for border crossers and of anti-war protestors who use religiously symbolic means of vandalism, demonstrate that the protective effect goes in the direction of maintaining historic prejudices only. See Patrick Hornbeck, “Catholic Anti-Nuke Activists Looking at 20 Years in Prison a True Test for Religious Freedom,” ReWire.News. <https://rewire.news/religion-dispatches/2019/10/24/catholic-anti-nuke-activists-looking-at-20-years-in-prison-tests-religious-freedom-laws-and-industry/>. Accessed 10.24.19.

²²⁰ This is the general standard for treating a right as a fundamental right, and thus assuring its mandatory application.

participate fully in the public square. It denies the experience of relational harm to which same-sex couples are subjected, and sanctions the inequitable way they are excluded from full participation. It condones their segregation from the marketplace. Such claims are also premised on a false equivalency. Religious vendors may choose to exclude themselves from the marketplace rather than comply with public accommodations laws, but this is their choice—and not their only choice. However, those whose discrimination is sanctioned do not make a choice to leave the marketplace, they are excluded from it. Moreover, as the variety of recent cases contesting the application of neutral laws to religious believers makes clear, such exemptions cannot be even this narrowly tailored. Laycock and Berg argue that their proposal for exemptions is narrowly tailored to balance the interests of religious vendors and same-sex couples, but none of their categories is capable of rational or obvious limitation. How, for example, would a “small” business be defined, and why or how could it be legally distinguished from larger businesses? The Supreme Court has already found this precise limitation meaningless in the case of *Hobby Lobby*. At what point would a good or service become sufficiently “personalized” to trigger the exemption? Although the Court in *Masterpiece* discussed the question of off-the-shelf cakes versus customized cakes; they came to no conclusions. In the context of other vendors of similar goods and services, how interchangeable must “similar” goods be? Is a “similar” good like a generic versus name-brand alternative? Finally, does “readily available” indicate the relative physical location of the alternative goods/services or how long it would take to procure them or some combination of both? As if these questions do not already demonstrate the problem, the legal theory behind such an exemption in public accommodations also lends itself to exemptions from all

other areas of anti-discrimination law, such that the exceptions would be likely to swallow the rule. Such questions cannot be meaningfully addressed or limited through the application of individual rights advocacy based on the Lockean individual. However, once again, experience demonstrates the limits of logic to resolve or reduce the uncertainty that such standards would produce.

In contrast to the philosophical anthropology of independent and autonomous individualism, and rights-oriented expansion of discrimination and the interruption of relationship, the broader philosophical anthropology of openness and relationality fosters both diversity and redress of harm in precisely these fraught contexts. Through the lens of this expanded understanding of individuality, courts and other government entities will retain the ability to assure that all religious practitioners' religious freedom claims are treated with respect rather than hostility or suspicion. Fear that one must adhere to "new orthodoxies" of tolerance, and abandon traditional religious practices, can be addressed without creating impossible standards of neutrality and without avoiding thoughtful inquiry about the potential harm that religious exemptions may cause. Finally, the more complex analysis of conflict generated by openness and relationality fosters useful consideration of the ways in which sexual orientation is like and not like race for purposes of understanding the nature of and need to assure both liberty and equality for persons whose religious belief or sexual identity is minoritized.

Application of the philosophical anthropology of open and relational individuality to law might have prevented *Masterpiece*, but even if it did not, it might have impacted the justices' reasoning to produce a different constellation of majority, separate, and dissenting opinions. Presumptively, a majority of justices would have voted to affirm the

decisions of the Colorado Human Rights Commission and the Colorado Court of Appeals, finding that Jack Phillips a) violated CADA when he refused service to Craig and Mullins and that b) granting him a religious exemption from compliance with the law would create significant harm. Justice Kennedy might still have written the opinion, offering all the reasons Justices Ginsburg and Sotomayor argued led logically to that result. He would have a) emphasized that no rational way to limit an exemption existed, given the particular facts of this case and b) cautioned the Colorado Human Rights Commission about the need to treat religious claims with greater respect throughout the process. Justices Roberts, Kagan, Breyer, Ginsburg, and Sotomayor would have joined in the majority opinion. Kagan would still have written a separate concurring opinion in order to clarify how she would have preferred the Colorado Court of Appeals addressed the distinction between Masterpiece and the Jack cases in order to affirm that the difference was not the result of hostility to religion. She would also have written to emphasize the illogic of the claim that the wedding good at issue was not a “wedding cake” but rather a “cake celebrating same-sex marriage.”²²¹ Justice Sotomayor would have joined in this concurrence. Justice Gorsuch would have dissented from the majority’s ruling, continuing to argue both that the Jack cases cannot be distinguished except on the basis of hostility to religion and that the good at issue was “a cake celebrating same-sex marriage,” which could somehow be distinguished from a wedding cake other than on the basis of the protected identity of those whose relationship it celebrated. Finally, informed by a philosophical anthropology of open and relational

²²¹ At oral argument, Justice Kagan commented that the purpose of food is to eat it and that no one thinks it expresses speech.

individuality, Justice Thomas would have joined the majority in affirming the Colorado Human Rights Commission and the Colorado Court of Appeals findings. He would have written a separate opinion to clarify that he would not have joined the majority, but for Justice Kagan's argument that the Jack cases can be distinguished, and to affirm that hostility on the part of the government toward religious claimants is impermissible. He would also have addressed Phillips's free speech claim in order to agree with Justice Kagan that there is no free speech right inherent in baked goods. He would have cautioned the parties that in a case involving actual speech, he might have ruled differently; and he would have argued that public accommodations laws should not be used to penalize traditionalists for not holding politically correct views about inclusion.

Asad and Sullivan invite us to see religion as an organizing category, rather than an epistemological or authority framework. They also invite us to challenge religion as a useful, let alone neutral, category for promoting liberalism or equality and liberty for all before the law, given that it reproduces the same exclusions that religion itself produces. Asad also argues that apparently secular law requires a particular kind of legal subject, while Sullivan argues that the law recognizes only certain forms of religion for protection. The subject of apparently secular law that Asad proposes is the Lockean individual, naturally antagonistic toward others, and bearer of often incoherent rights, including the right to religion as backed by authoritative behavior regulating texts (or at least long-standing normative tradition). The alternative philosophical anthropology I am proposing has the capacity to change the way the law discharges its liberal obligations and to expand our organizing categories. Rather than religious versus secular, the alternative suggests that opposing categories are open and relational versus abstract and

individual. This change expands the potential for law to foster flourishing, as it transforms the relationship between the secular and the religious, expanding and complexifying the category of religion in ways that acknowledge power differentials and make room for pluralism. Instead of an antagonistic relationship, resting on an unreal claim of difference, the secular and the religious could be understood and practiced as themselves co-constitutive of civil society and the public square whose object is to maximize diversity and participation without thereby simply reinscribing the religiously restrictive secular or the overtly theologically political.

Although individuals bear rights, individuals are more than mere rights-bearers. Rights are a vital component of the means by which individuals secure their uniqueness, especially as chosen and legally recognized identity; but more is required to counter the atomism into which identity can devolve, and more is required for flourishing. Relationality and openness are also required to put rights in context, at the service of flourishing understood as taking on concern for others and promoting the fullest possible participation by all in civil society and the public square, in their diversity and particularity.

Chapter Four: Revisiting Law and Religion in the Public Square

To be human is not simply to be an autonomous individual, prior to all social relationships; rather, humans as individuals are open (finite, imperfectible, particular, present, transformed and transforming) and relational (constituted by and constituting community). Human flourishing requires law, but law based on an understanding of individuality as the open and relational subject grounded in Rosenzweig's alternative account of reality as an irreducibly diverse multiplicity, oriented in time and dependent on internal and external relationships for manifestation. Law could and should foster human flourishing, but often fails to do so because of the natural limitations in the individual rights advocacy model grounded in Locke, despite the gains achieved through the individual rights advocacy model. In some cases, law actually exacerbates the inequities and unfreedoms the social contract purports to be able to redress more securely. As demonstrated, the flaw lies not in the law or even in the core paradox of liberalism, but in the philosophical anthropology that grounds liberalism and, thus, the rule of law in liberal contexts. This default anthropology is the abstract individual Locke posits in the state of nature, prior to civil society, as free, equal, and independent, with like faculties and no natural subordination, atemporal, and tending toward abstraction. This individual enters civil society with natural rights—to freedom, equality, independence, to use and to have like faculties recognized; and rights against unnatural

subordination – having made a rational choice to give up his right of self-enforcement and consented to future majoritarian decisions. Rights jurisprudence should be able to resolve disputes among such individuals, and the resolution of rights disputes is indeed one of, if not the primary, responsibilities of civil government and the reason the individual cedes his executive function and voluntarily enters into civil society, according to the fiction of the social contract. Although Locke posits what appears to be an ideal state in nature, he acknowledges that insecurity and antagonism toward others is what motivates the transition to civil society. The rights each possesses are finite and always relative to the same rights others possess, with no natural limits. This is particularly evident in Locke’s theory of private property, which assumes a finite, one-time distribution rather than on-going expansion.²²² Like private property, rights are also finite and zero-sum. Both secular humanism and Christian theology provide constructs for understanding the concept of dignity as belonging equally to everyone, and thus, some set of basic rights could be conceived as having the character of the internal goods MacIntyre describes as flowing from practices, and therefore either unlimited or not limited by others’ possession of the same rights. In practice, however, this is not the case; partly because of the nature of rights themselves and partly because humans are actually particular and irreducibly diverse in ways Locke’s framework cannot account for without devolving into atomism and incoherence. This is uniquely evident in the clash between diversity of sexual identity and religious rights jurisprudence, and reveals the limits of rights-based advocacy which leads to the impasse at the heart of *Masterpiece*. Echoes of

²²² Helga Varden, “John Locke – Libertarian Anarchism,” in *Philosophy of Justice*, ed. Guttorm Fløistad (Oslo, Norway: Springer, 2015).

this impasse in other contexts appear to threaten to overwhelm the structures that sustain liberal democracy, especially in its efforts to reconcile religious beliefs, which for some have not evolved with continuously “evolving conceptions of individual liberty, personal privacy, and human equality.”²²³

An alternative philosophical anthropology which can account for particularity and diversity without devolving into identity politics or populist anti-liberalism is needed in order to move beyond this impasse. We find the sources for this alternative in Rosenzweig’s reconception of reality itself as irreducibly diverse and particular, consisting in the relationships among Kant’s three nothings: God/theology/being, Man/psychology/self, and World/cosmology/meaning. The philosophical anthropology that flows from this reconception of reality highlights openness and relationality as the driving forces of individuality, rather than independence and autonomy. The open and relational individual is mutually constituted in and through relationships, not prior to relationship or civil society. The open and relational individual is also finite and imperfectible, and, through acknowledgment of this, capable of self-reflection, self-correction, and compassion. This individual does not “enter” civil society, but is always part of its factuality. Individuals constitute civil society and are constituted by it, and thus the freedom most natural to civil society is the freedom to participate, freedom as humility, not autonomy or freedom from relationship with others. Individuals are not solely a collection of rights, and the redress of harm is not solely a matter of the resolution of inevitable rights competitions. Law from this perspective is a tool for

²²³ Stone, *Sex and the Constitution*, Prologue, XXXII.

negotiating the inevitable conflicts that arise among diverse and particular individuals, preventing them from succumbing to the temptation to withdraw from relationship or to seek closure at the risk of their own and others' flourishing.

The problems created in law because of its narrow Lockean philosophical anthropology are nowhere more evident than in the current impasse over identity, especially sexual identity, and religious liberty. For some, the U.S. has always represented an anomaly of modernity in its religious character. Nevertheless, the rise of evangelical Christian-inflected populism and anti-liberalism in the form of public opposition to the legal recognition of same-sex marriage seems to transgress even traditional boundaries. Asad argues that traditional critiques and discussions of the secularization thesis, whether from the side of religion or the secular, equally miss the point that the secular and the religious are not actually mutually exclusive opposites. Instead, because the religious creates and constitutes the secular, the secular is always already shot through with the religious, including its construction of power-as-exclusion. This extends in the U.S. to early Christian beliefs about "sex, sin, and shame."²²⁴ Thus, the public square has always to some extent included and excluded what religion itself includes and excludes. As Sullivan notes, this structure is also paralleled in law, which although formally committed to the recognition and protection of religious freedom, recognizes as religion only that religion that has the same shape as law. While the claim that the U.S. is a Christian nation is not true in the sense its conservative proponents intend, the religion that law has historically recognized has tended to be much like

²²⁴ Stone, *Sex and the Constitution*, Prologue, XXVII.

mainstream Protestant Christianity, including its anchoring in a specific reading of the Bible, the state's concern for public morality, and a tendency to view the secular as not simply anti-religious, but anti-American. As traditional social bonds have weakened and the culture has become more truly diverse, including new kinds of people via immigration and "newly visible people" via social movements,²²⁵ the relationship between the secular and the religious has increasingly hardened into one of opposition between mutually exclusive sources of authority. This attitudinal reification of the binary has transformed the secular from the neutral (whose presumptions were always entirely consistent with Protestant Christianity in any case) into the counter-religious or even anti-religious. Although protections for sexual minorities are increasingly stigmatized by religious and political conservatives as expressions of this counter-religious, these same religious and political conservatives do not advocate that such views are entitled to the protection of the First Amendment. Rather, they seek protection for their traditionalist prejudices, especially as these appear to be on the decline demographically and in terms of social influence. Their goals can be adequately summed up in the words of Justice Scalia in his dissent in *Romer v. Evans*, "to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws."²²⁶ Freedom and equality for these religious and political conservatives are products of rights and of relationship oriented by rights. John Millbank sums up their

²²⁵ Kenji Yoshino, "The New Equal Protection," 124 *Harvard L. Rev.* 747 (2011).

²²⁶ *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting). The majority in *Romer* struck down an amendment to the Colorado Constitution, Amendment 2, which prohibited the state or any subdivision of the state from adopting protections to prohibit discrimination on the basis of sexual "orientation, conduct, practices or relationships."

position usefully when he argues that the “complimentarity” of the different sexes “*automatically* produces symbolic meaning, legal norms, political order, social peace, charitable but non-institutionalized care and economic subsistence and stability.” When he then warns that “modern sexism, systematic subordination and increasing endangerment of women . . . does not derive from the perpetuation of patriarchy Rather, it results from the *abolition* of gender difference,”²²⁷ he is describing this same organizing model of the gender binary as necessary to social order and a form of the common good. In contrast, this same group of religious and political conservatives often stigmatize the secular as positing a false equality that denies difference and encourages people to reject their proper role or place, especially in terms of gender determinism. Even though this religious model presents itself as communal, and even produces arguably communal forms, it’s driven by a model of individual salvation fully consistent with Locke’s abstract individual. This model of salvation tends toward obsessive focus on individual behavior and legalistic purity-contamination dichotomies. Much recent scholarship has identified an inherent racism in these strains of Christianity, but the gender binary is even more deeply grounded, located at the heart of reality as constructed from the abstract universal of this version of the Christian God who creates male and female, from the beginning. As early as 1985, then Cardinal Ratzinger, writing for the Congregation for the Doctrine of the Faith warned of the dangers feminist calls for gender equality posed to the theological anthropology of gender complementarity.²²⁸ The

²²⁷ Millbank and Pabst, *The Politics of Virtue*, 271 (second emphasis in original).

²²⁸ Case, “Trans Formations in the Vatican’s War on “Gender Ideology,” 646.

primary right advocated to combat this version of the secular, and its attack on the theology of gender complementarity, is the right of the individual to religious freedom in order to resist the “new orthodoxy;” hence the insistence on religious freedom as the right to reject relationship. Efforts to preserve this version of religious freedom, against non-traditional identity and relationships in an increasingly diverse society, are likely to continue to produce social crisis and legal impasse, so long as the individual rights model of advocacy is the primary legal option. No amount of deference by moderate liberals is likely to assuage the fears or certainties motivating this group of traditionalist Christians and their growing alliance of religious practitioners who view the secular as a competing quasi-religious authority and who stridently link their right to maintain their traditionalist views of sexuality as religious exemptions from anti-discrimination legislation with nationalist identity and the binary opposition of the religious from the secular.

The alternative philosophical anthropology of openness and relationality broadens the legal and social meaning of individuality inherent in the social contract, which is too narrowly focused on independence and autonomy to ground a resolution of this impasse. Rosenzweig’s new thinking locates particularity and diversity within openness and relationality, thus providing a limit for the problematic tendencies of the Lockean individual’s abstraction and atomism, and potentially reducing our “pluralism anxiety.”²²⁹ Law based on such and alternative philosophical anthropology is capable of conceiving of and resolving legal conflicts through means that do not rely exclusively on the individual rights advocacy model. This shift of focus also increases the capacity for law

²²⁹ Kenji Yoshino, “The New Equal Protection,” 747.

to instantiate systemic rather than merely nominal equality, concerned with economic justice rather than with decency (sexuality).

Rosenzweig's critique of philosophy identifies as problematic in philosophy many of the same aspects that are also problematic in law: presumptive universalism, the pointless point of view or view from nowhere, the conflation of diversity and particularity into abstractions, the conceit of timelessness. In addition, because Rosenzweig's critique specifically rejects the Hegelian ontotheological schema on which much of the secularization thesis rests,²³⁰ dramatically new options become available for entering the debate about how to conceptualize and negotiate the relationship between religion and liberalism. Asad's critique of the binary construction of religion and the secular already points us toward the possibility of responses that do not fit within either the sociopolitical philosophy of liberal secularism, which cannot account for passionate religious commitment to exclusion, or the revival of discourses of political theology, with their opposing extremes of illiberal religious philosophy and weariness of the Enlightenment.²³¹

Even though Rosenzweig shares Hegel's goal of constructing a system that determines all things through their position within a whole, he objects to Hegel's system's failure "to take into account the particularity of each being," and the way it "divorces

²³⁰ Mandair & Dressler, *Secularization and Religion-Making*, 10. Mandair and Dressler describe the ontotheological schema as flowing from Hegel's rejection of the traditional Enlightenment model that posits a radical break between modernity and its religious past. The "ontotheological" is a combination of the "onto" of cosmological antiquity, the "theo" from the theological Middle Ages, and "logico" from anthropomorphic modernity.

²³¹ Mandair & Dressler, *Secularization and Religion-Making*, 6.

knowledge from our human vocation.”²³² Implicitly, he agrees with prior critiques that all holistic and monistic systems are necessarily nihilistic, and that Hegel’s system fails its own criteria for success. Through Hegel’s construction of what Rosenzweig calls “system as architecture,” in which each part has meaning only in relation to the whole, Hegel “reduces the diversity and multiplicity of all beings to one form, overlooking the uniqueness of each individual.”²³³ Where Hegel focuses solely on the transformation in the understanding of knowledge, Rosenzweig adds reciprocal relation.²³⁴ By grounding all of reality in relationality, as the source and nature of existence, Rosenzweig not only takes into account the particularity of beings, he also provides a foundation for particularity and diversity that avoids atomism and competition. His account of reality counters the universalism and abstraction inherent in the Hegelian system, and toward which rights tend, while also contextualizing diversity and particularity within relationality and openness. Where Hegel’s ontotheological schema maintained the continuity of philosophy and theology through the identification of reason with Christianity, allowing the particular to be elided, Rosenzweig’s “turn to the theological” as temporal grounds the individual’s openness as finitude and imperfectability, as well as a relationship of equality between the “new” philosophy and a “new” theology. This provides the capacity for self-reflection and self-critique, allowing for growth without

²³² Karin Nisenbaum, “From the Revolution in Thinking to the Renewal of Thinking: The Systematic Task of *The Star of Redemption*,” *After the Postsecular and the Postmodern: Essays in Continental Philosophy of Religion*, eds. Anthony Paul Smith and Daniel Whistler (Newcastle Upon Tyne, UK: Cambridge Scholars Publishing, 2010), pp. 105-127.

²³³ Nisenbaum, “From the Revolution in Thinking to the Renewal of Thinking,” 116.

²³⁴ Nisenbaum, “From the Revolution in Thinking to the Renewal of Thinking,” 122.

resort to the Hegelian dialectic or utopian notions of progress toward some ultimate perfection. Hope and humility sustain always-incomplete work to expand both liberty and equality.

Although Rosenzweig rejects Hegel's schema of the continuity of philosophy and theology, he also does not subscribe to the dominant Enlightenment narrative of a radical break between the past as religious/traditional and the present as modern/humanistic. That he does not subscribe to the radical break is evident in both his description of the history of philosophy, from cosmological antiquity, through the theological Middle Ages, and into anthropomorphic modernity. Although he posits both a new theology and a new relationship between the new philosophy and the new theology, his system remains to some degree within the binary of secular-religious which Asad invites us to reject. Nevertheless, his system also rejects the identification of reason with Christianity, reconnects knowledge and human vocation, and illustrates the limits of logic in the systemic task of cognizing reality. Because of these differences, his work has the capacity to ground not only an alternative philosophical anthropology, but to dramatically alter our perception of the apparent binary. It might even be said of Rosenzweig that his system is a continuation of Hermann Cohen's project of demonstrating that, contra Kant, Judaism is indeed a religion within the bounds of reason. Perhaps we can read *The Star* as closing the circular relationship between historical consciousness, the assumed secularity of critique, and Western civilizational identity through the identification of reason with Judaism, rather than with Christianity. From this perspective Judaism becomes the paradigmatic religion of reason, perhaps a religion of reason-plus, because it also understands the limits of reason and refuses to remain bound within those limits. Thus,

this new thinking does a better job of resolving the conflict between subjectivity and worldliness than Hegel's use of Christianity for the same purpose. In resolving this tension through the alignment of Judaism with reason, whether Rosenzweig intends to or not, he also grounds a different kind of distinction between religion and the secular, if only because the religion he uses to generate the secular is different, especially in its knowledge of how to live authentically on the margin of, as well as within, the dominant culture. This will not ultimately resolve the tension between liberal pluralism and religious particularity, especially given the aporia Rosenzweig insists structures the relationship between Judaism and Christianity. Nevertheless, like Kant, we can at least avoid falling back into a one and universal despair, if we are committed to the continuing expansion of our perception of possibilities and the realization that ultimate resolution of the tension is neither possible nor beneficial for human flourishing.

We need not make this final leap to replace Hegel's ontotheological schema with Rosenzweig's new thinking in order to ground an alternative philosophical anthropology that expands the narrow rights focus of the Lockean individual while still operating within the parameters of liberal and democratic jurisprudence and acknowledging the "aporia at the heart of the 'religio-secular paradigm.'"²³⁵ What we know is that the Hegelian frame for the secular liberal provides structures for organizing knowledge and experience that are not as useful as were thought initially, because they were not as neutral as initially believed. We can also draw from Rosenzweig the conclusion that there is no truly neutral, and the better path to common ground in developing structures for

²³⁵ Mandair & Dressler, *Secularization and Religion-Making*, 4.

organizing our knowledge and experience is actually through acknowledging difference as incommensurable.²³⁶

Justice as fairness is a phrase made prominent as the title of John Rawls classic work. While fairness is a benign idea, the basis of his theory is also the individual as imagined in the social contract theory. Because it is based on the same philosophical anthropology, it also leads to rights-based justice, and similarly assumes a community of homogenous individuals. Thus, in addition to other limits, it also fails to account for the effects of the presence of distinct ethnic or social groups within communities, which are in fact, rarely homogenous. Through its focus on individuals, it also “neglects the group and both fails to account for existing practices and fails to give guidance where the practices are at issue.”²³⁷ Thus, it fails at precisely the juncture where law and religion intersect with changing sexual mores and growing awareness of sexual diversity. Rawls nuances the Aristotelian model of justice by theorizing natural limits to systemic injustice, based on individual self-interest. However, the Rawlsian model also permits those who are not similarly situated to be treated differently and envisions justice as encompassing an obligation that punishment be meted out to those who do bad things, consistent with the Aristotelian model of justice. Justice as fairness in its rights focus not only permits, but requires that those who are not equally situated be treated differently, because it is not fair that some who do bad things get away with it or that they not pay the

²³⁶ Batnitzky argues against reading Rosenzweig as post-modern, but notes that his new thinking is nevertheless consistent in some ways with the post-modern. Batnitzky, *Idolatry and Representation*, 4. This is one such area.

²³⁷ Van Dyke, Vernon. "Justice as Fairness: For Groups?" *American Political Science Review* 69, no. 2 (1975): 607-14. doi:10.2307/1959091.

appropriate consequences for the harm they have done. Thus, justice “as fairness,” even on Rawls’ more nuanced model, requires equality and/or commensurability. In contrast, equity has a long history of filling the gaps in law, especially where equality and/or commensurability are lacking, or when the law seeks to regulate relationship, rather than property, business, or criminal behavior. Aristotle calls equity “justice that goes beyond the written law.”²³⁸ Justice as equity, thus, already draws on a recognition of the limits of justice as fairness, creating the conditions for an expanded philosophical anthropology of relationality and openness, and dispelling the mentality of scarcity, of a finite capacity for justice based on the resolution of competing rights claims. Equitable as a technical term in law is not the same as equal. For example, an equitable division of marital property is not necessarily an equal distribution. An equitable distribution takes into account factors such as a wife’s greater career sacrifice to raise marital children, and consequent loss of future earning capacity. The analysis involved in determining the equity in a situation necessarily requires consideration of the particular characteristics of the actual parties to a specific case, rather than of generic roles or rules. Equity as a system of courts separate from but parallel to law courts is long gone, but remains structurally embedded in family law. Equity informs the practice of resolving parenting disputes through determination of what is in the best interests of the children, rather than through competing parental rights; in standardized and detailed laws guiding the calculation of child support, it provides guidelines for departing from those detailed, standard rules; and when Native American children are removed from their parents, it centers the importance of cultural heritage in

²³⁸ Aristotle, *Rhetoric* 1.13.13

guiding placement decisions. The alternative philosophical anthropology of openness and relationality expands options for applying equitable principles to traditional legal problems to generate new solutions.

Jack Phillips of Masterpiece Cakeshop continues to refuse to serve customers in violation of CADA. This continuing refusal may or may not result in an eventual return to the U.S. Supreme Court as “*Masterpiece II*.” However, a sufficient number of religious wedding vendors are also refusing to provide the same service to same-sex couples as they do to different-sex couples that it is only a matter of time before the Supreme Court is once again asked to rule definitively on the question of whether public accommodations law should exempt them from compliance. NeJaime and Siegel explain the decision in *Masterpiece* as outlining a program for rejecting religious freedom and free speech claims for exemption from public accommodations law consistent with the rejection of similar claims for racial discrimination in *Piggie Park*. This structure was indeed adopted whole-heartedly by the Arizona Court of Appeals in the case of *Brush & Nib LLC v. City of Phoenix*, a religious wedding invitation vendor who claimed the right to an exemption from the city’s public accommodations ordinance, which like CADA prohibits discrimination on the basis of sexual orientation. The Christian owners of Brush & Nib LLC create custom-designed, hand-lettered wedding invitations with “celebratory messages” consistent with their belief that God approves of only different-sex marriages. They argued that application of the city’s ordinance to them would constitute “compelled speech” in violation of the First Amendment’s free speech provisions, as well as violate their religious convictions about the God-given nature of marriage as between one man and one woman. In its elegant opinion rejecting these claims, the Arizona Court of

Appeals quoted a portion of Justice Kagan’s opinion in *Masterpiece* for the proposition that

a vendor cannot escape a public accommodations law because his religion disapproves selling a product to a group of customers, whether defined by sexual orientation, race, sex, or other protected trait. A vendor can choose the product he sells, but not the customers he serves—no matter the reason.”²³⁹

Unfortunately, the Arizona Supreme Court did not read *Masterpiece* in the same way as NeJaime and Siegel. Instead they reversed the decision of the Court of Appeals on exactly the legal grounds equal marriage advocates most fear, and which I have argued demonstrate the limits of the individual rights model of advocacy and the need to ground law in an expanded philosophical anthropology. Using precisely the analysis NeJaime and Siegel argued that Justice Kennedy ruled out, the Arizona Supreme Court found that Brush & Nib’s free speech and free exercise rights superseded the city’s interest in eradicating discrimination, or what they pejoratively described as “efforts to compel uniformity of beliefs and ideas” through the use of public accommodations laws.²⁴⁰ Although the Arizona Supreme Court described its ruling as a narrow, applying *only* to the creation of custom wedding invitations with celebratory messages, the logic of the decision reflects both the siege mentality of the *Obergefell* dissenters and the way Laycock and Berg’s suggestion of permitting limited exemptions is likely to be used to deny equal marriage in practice. The Phoenix city ordinance permits businesses to post notice to customers about their service limitations, and the Arizona Supreme Court decision gave explicit permission for Brush & Nib to post a notice indicating that they do

²³⁹ Brush & Nib LLC v. City of Phoenix, 418 P.3d 426 (Ariz. Ct App. 2018), ¶27.

²⁴⁰ Brush & Nib LLC v. City of Phoenix, CV-18-0176-PR (Ariz. Sept. 16, 2019), reversed in part and vacated in part.

not create wedding invitations for same-sex couples. Thus, the case demonstrates how exemptions are unlikely to be narrowly tailored in practice, and, if granted, are likely to swallow the purpose of anti-discrimination laws, created the same different-but-equal regime the U.S. Supreme Court rejected for race. The Arizona Supreme Court based its expansive ruling in part on the claim that *Masterpiece* “clearly contemplated that *some* exemptions, if narrowly confined, were permissible.”²⁴¹

Consistently with the tendency of the individual rights advocacy method, the Arizona Supreme Court shifted the focus of the case from an inquiry into discrimination in public accommodations laws to a question of how to protect religious freedom. “Although this case is about freedom of speech and religion, it suits the preferred analysis of our dissenting colleagues to reframe it as one involving discriminatory conduct based on a customer’s sexual orientation.”²⁴² Having made this shift, the Court balanced the religious freedom of the vendor against the city’s interest in eradicating discrimination, entirely neglecting any consideration of the impact of discrimination on same-sex couples. Not surprisingly, they found that the combined free speech and religious freedom rights of the vendor outweighed the city’s interest in eradicating discrimination (contrary to the opposite opinion in *Masterpiece*, which the Court of Appeals opinion cited). Having narrowed their focus on religious freedom, the Court found that the public accommodations ordinance would create a broad harm to Brush & Nib’s proprietors, including a violation of their free speech rights as well as their religious freedom, if they

²⁴¹ Brush & Nib LLC v. City of Phoenix, CV-18-0176-PR (Ariz. Sept. 16, 2019), ¶ 154.

²⁴² Brush & Nib, ¶ 6.

were compelled to produce custom wedding invitations “with celebratory messages” for same-sex couples.²⁴³ While rejecting the claim of a distinction between status and conduct, the Arizona Supreme Court nevertheless found that refusal to make wedding invitations for same-sex couples did not constitute discrimination on the basis of sexual orientation because they would not sell invitations with messages celebrating same-sex marriage to any customer. The normative religious prejudices protected by this ruling confirm Sullivan’s thesis about the kind of religion law recognizes as entitled to protection. These religious views about the nature of marriage turn out to be waning in influence, according to polling data showing increased acceptance of same-sex relationships even among Evangelical Christians. Those who continue to hold them find sympathy among traditionalists on the U.S. Supreme Court and elsewhere for their perception that the application of public accommodations laws to them represents “vilification” for their “unwilling[ness] to assent to the new orthodoxy [on marriage].”²⁴⁴ Despite, or perhaps because sexual mores are changing, the attempt by those whose views are no longer dominant socially to retain the power to exclude also demonstrates the truth of Locke’s other insight which also shapes U.S. law: that religions become intolerant when they have the power of the government to back them.²⁴⁵ Because the law is not really secular, and the secular is not really religion-free or even religion-neutral,

²⁴³ The conditional language here is occasioned by the specifics of this case. *Brush & Nib* were not fined for or charged with violating the ordinance, but rather sought a prospective court order prohibiting the city from enforcing the ordinance against them.

²⁴⁴ *Obergefell*, 2642 (Alito, J., dissenting)

²⁴⁵ John Locke, *A Letter concerning Toleration and Other Writings*, edited and with an Introduction by Mark Goldie (Indianapolis: Liberty Fund, 2010). <https://oll.libertyfund.org/titles/2375>; accessed 9/6/2019.

some religious rights will always win, despite shifting social attitudes, and some will always lose. The difference is the degree to which the religious right at issue reinforces existing power structures or reinforces them.

Other courts may rule differently than the Arizona Supreme Court;²⁴⁶ they may take the same tack as the Arizona Court of Appeals (and the three dissenting justices of the Arizona Supreme Court). However, there is every reason to believe that when a similar case reaches the U.S. Supreme Court again, they will not rule consistently with NeJaime and Seigel’s explanation of Kennedy’s decision in *Masterpiece*. Because Kavanaugh has replaced Kennedy, if the same logical rights-based arguments are made as were made in *Masterpiece*, the likely result will be more like the Arizona Supreme Court’s opinion than the Arizona Court of Appeals opinion. Thus, a different lens is needed if the right to civil same-sex marriage is not to be eroded in practice by ever-expanding religious exemptions.

The open and relational legal subject is capable of navigating the legal terrain differently. Its embodied philosophical anthropology may better support a counter-argument against the abstract argument that a religious vendor who refuses to provide wedding goods and services to same-sex couples that they would to a different-sex couple is not discriminating on the basis of sexual orientation, even though this “*primarily* impact[s] same-sex couples.”²⁴⁷ In addition, when considering claims for

²⁴⁶ And note that religious freedom rights under the Arizona Constitution are broader than the First Amendment to the U.S. Constitution (because federal rights set the “floor” while states can guarantee greater rights, but not less); in addition, the Phoenix public accommodation ordinance permits broader exemptions for religious entities than CADA does. The weight of both these factors to their decision is discussed by the Arizona Supreme Court in its opinion.

²⁴⁷ Brush & Nib, ¶82 (emphasis added).

exemption through the lens of an open and relational legal subject, courts might expand their balancing tests to consider the relative harms to vendors, potential customers, and to the community itself. Rather than the sterile and abstract weighing of government interest against the always specific claims of religious vendors, and the rejection of an obligation to consider the impact of their decision on others, including those most directly harmed by exclusion, the balancing of relative harms fosters relationship. In addition, openness may operate as a compelling invitation for courts to adopt a higher standard for determining what kind of burden neutral laws such as the public accommodations laws actually place on religious vendor's religious freedom, given that commerce is generally not the only or primary venue for religious persons to express their faith. In the beginning of its *Brush & Nib* opinion, the Arizona Supreme Court declaimed that the right to free exercise of religion includes, "the right to create and sell words, paintings, and art that express a person's sincere religious beliefs."²⁴⁸ This is both true and unrelated to the question of whether *Brush & Nib* should be exempt from application of Phoenix's public accommodations ordinance or be permitted to post a notice of non-service for certain customers whose only common characteristics are the possession of a protected identity and the exercise of a fundamental right. Finally, through the lens of the open and relational legal subject, a court faced with a preemptive claim such as *Brush & Nib*'s might combine principles of restorative justice and equity to require the proprietors of *Brush & Nib* to meet with same-sex married couples who share their Christian faith. Note that the goal in such a situation would not be primarily to change the vendor's opinion

²⁴⁸ *Brush & Nib*, ¶ 1.

about whether God approves of same-sex marriage, but rather to impact their belief that if they provide wedding goods or services they are either endorsing a contrary religious value or complicit in conduct by others of which God does not approve. This goal is consistent with both Locke's religious toleration views and the structure of the First Amendment's guarantee of religious liberty consistent with equality and liberty for all.

These potential differences are important for future cases involving religious wedding vendors and service providers. They are also important in the context of the broad reevaluation of the place of religious freedom, identity, and what constitutes the common good. In addition to the religious wedding vendor cases already working their way through state and federal courts, the U.S. Supreme Court will be asked to determine this term whether federal employment protections against sex discrimination include protection against discrimination on the basis of sexual orientation. Other contested aspects of sexuality and the particular character of the religious that shapes both law and the public square include the health care refusal laws described by NeJaime and Seigel (giving a variety of state officials various rights to refuse to provide otherwise available and/or prescribed medical care/prescription drugs to a customer on the basis of the provider's religious beliefs); continuing efforts at the state and federal level to restrict access to (including by denying coverage for) reproductive healthcare generally, and birth control specifically; and finally, renewed efforts at the state level to severely restrict access to exercise the right to abortion or even to ban abortion outright.

Conclusion

Rosenzweig rejects Hegel's solution to the problem of reconciling subjectivity and worldliness. In its place he constructs his own system that preserving or even

systematizing the aporia of subjectivity and worldliness, provides justification for diversity as inherent in the structure of reality, and proposes a new relationship of equality between a new philosophy and a new theology. Importantly for law in particular, Rosenzweig proposes an epistemological structure that demonstrates both the limits of logic and that experience is the condition for the possibility of logic. While this system does not explicitly reject the binary of religion versus the secular, it does offer a different way of engaging the interrelationship between the secular and the religious, taking Asad's alternative genealogy of the secular seriously, and responding differently to attempts by passionate religious practitioners to reify the binary as forms of legal exclusion. It does so by proposing to draw the apparently irreconcilable opposites into generative relationship for the purposes of providing opportunities to engage reality directly. It thus also provides a means of taking seriously Sullivan's critique of the limits of privileging religious liberty in order to secure religious liberty, while creating an alternative to her radical solution of doing away with that privilege. Even these small moves beyond the binary construction of religion and the secular potentially defuse anti-liberal religious fundamentalisms, and may create space to forge alliances and recognize common values that promote the coordinated seeking of justice as equity, without sacrificing the particularity of identity that makes justice and equity meaningful in particular lives. The Arizona Supreme Court displayed no compassion for same-sex couples in its *Brush & Nib* decision; the U.S. Supreme Court found that the Colorado Human Rights Commission displayed no compassion for Jack Phillips' religious convictions. The alternative philosophical anthropology of openness and relationality as grounded in Rosenzweig and applied to law provides space to develop much-needed

compassion. It does so without sacrificing commitment to equal liberty for each in their diversity and particularity. Acknowledgment of imperfectability generates compassion and grounds a human vocation for justice as acts of love toward neighbor. The proposal for this expansion of the default philosophical anthropology of law may seem radical, but is in many ways modest, as it remains within traditional structures of American liberal jurisprudence. Nevertheless, it could have a powerful impact in many areas. In particular, it invites further exploration of how to assure equal liberty for distinct social or ethnic groups as well as for diverse individuals; the question of how robust an account of human flourishing can be constructed without beginning to elide differences; and continuing exploration of relationships among economics, justice, and community.

In addition to other sources of imperfectability as an aspect of the open and relational individual, imperfectability is also a function of Rosenzweig's notion of *aporia*. His concept of the systematic task of philosophy depends on a notion of *aporia* as existential for humans, as part of the human vocation for knowledge. His work suggests the political, social, and religious benefits of learning to live with unresolvable tensions. Scholars dispute whether Rosenzweig believed it was possible to fully grasp reality in "this" life, but he nevertheless bade his readers to return to life to fulfill their vocation.

DO JUSTICE, LOVE MERCY & WALK HUMBLY²⁴⁹

and

DO JUSTICE AS ACTS OF LOVE TOWARD NEIGHBOR

²⁴⁹ For Rosenzweig, freedom equals faithfulness and humility, in contrast to autonomy, because it is humility rather than autonomy that drives love of neighbor. Nisenbaum, "From the Revolution in Thinking to the Renewal of Thinking," 125.

Bibliography

- Adeney, Frances S. and Arvind Sharma, eds. *Christianity and Human Rights: Influences and Issues*. Albany, NY: SUNY Press, 2007.
- Agamben, Giorgio. *Homo Sacer: Sovereign Power and Bare Life*. Translated by Daniel Heller-Roazen. Stanford, CA: Stanford University Press, 1998.
- _____. *State of Exception*. Translated by Kevin Attell. Chicago: University of Chicago Press, 2005.
- Albeck, Shalom. *Introduction to Jewish Law in Talmudic Times*. Ramat Gan, Israel: Bar Ilan University Press, 2013.
- Anckaert, Luc. A. *A Critique of Infinity: Rosenzweig and Levinas*. Leuven: Peeters, 2006.
- Arendt, Hannah. *Love and Saint Augustine*. Chicago: University of Chicago Press, 1996.
- Arendt, Hannah. *The Human Condition*. 2nd ed. with Introduction by Margaret Canovan. Chicago: University of Chicago Press, 1998.
- Arnold, Eberhard, and Thomas Merton. *Why We Live in Community*. Farmington, PA: Plough Publishing House, 1999.
- Asad, Talal. *Formations of the Secular: Christianity, Islam, Modernity*. Stanford: Stanford University Press, 2003.
- Babie, Paul, and Vanja-Ivan Savic, eds. *Law, Religion, and Love: Seeking Ecumenical Justice for the Other*. London: Routledge, 2018.
- Badiou, Alain. *Saint Paul: The Foundations of Universalism*. Translated by Ray Brassier. Stanford, CA: Stanford University Press, 2003.
- Baird, Catharyn A. *Everyday Ethics: Making Hard Choices in a Complex World*. Denver: CB Resources, 2005.
- Balibar, Etienne. *Equaliberty: Political Essays*. Translated by James Ingram. Durham, NC: Duke University Press, 2014.
- Batnitzky, Leora. *Idolry and Representation: The Philosophy of Franz Rosenzweig Reconsidered*. Princeton, NJ: Princeton University Press, 2000.

- _____. *Leo Strauss and Emmanuel Levinas: Philosophy and the Politics of Revelation*. Cambridge: Cambridge University Press, 2006.
- Beiner, Ronald. "Forward." In *Law as Politics: Carl Schmitt's Critique of Liberalism*. Edited by David Dyzenhaus, vii-ix. Durham: Duke University Press, 1998.
- Bielefeldt, Heiner. "Carl Schmitt's Critique of Liberalism: Systematic Reconstruction and Countercriticism." In *Law as Politics: Carl Schmitt's Critique of Liberalism*. Edited by David Dyzenhaus, 23-36. Durham: Duke University Press, 1998.
- Benjamin, Mara H. *Rosenzweig's Bible: Reinventing Scripture for Jewish Modernity*. New York: Cambridge University Press, 2009. Accessed April 21, 2018. ProQuest Ebook Central.
- Berman, Harold J. *The Interaction of Law and Religion*. Nashville: Abingdon Press, 1974.
- _____. *Law and Revolution: The Formation of the Western Legal Tradition*. Cambridge, MA: Harvard University Press, 1983.
- _____. *Faith and Order: The Reconciliation of Law and Religion*. Atlanta, GA: Scholars Press, 1993.
- Berman, Marshall. *The Politics of Authenticity: Radical Individualism and the Emergence of Modern Society*. New Edition. London: Verso, 2009.
- Boff, Leonardo. *Essential Care: An Ethics of Human Nature*. Translated and with notes by Alexandre Guilherme. Waco, TX: Baylor University Press, 2008.
- Boff, Leonardo and Clodovis Boff. *Liberation Theology: From Confrontation to Dialogue*. Translated by Robert R. Barr. New York: Harper & Row, 1986.
- Bonner, Gerald. *Freedom and Necessity: St. Augustine's Teaching on Divine Power and Human Freedom*. Washington, DC: The Catholic University of America Press, 2007.
- Bonner, Stephen Eric, and Douglas MacKay Kellner, eds. *Critical Theory and Society: A Reader*. New York: Routledge, 1989.
- Brague, Remi. *The Law of God: The Philosophical History of an Idea*. Chicago: University of Chicago Press, 2007.
- Bratlett, A.J. and Justin Clemens, eds. *Alain Badiou: Key Concepts*. Durham, UK: Acumen, 2010.

- Breyfogle, Todd. *On Creativity, Liberty, Love, and the Beauty of the Law*. New York: Bloomsbury Academic, 2018.
- Brown, Peter. "Pelagius and His Supporters: Aims and Environment," *The Journal of Theological Studies, NEW SERIES*, Vol. 19, No. 1 (APRIL 1968), pp. 93-114 <https://www.jstor.org/stable/23959559>. Accessed: 26-01-2019 20:55 UTC
- Brown, Wendy. *Undoing the Demos: Neoliberalism's Stealth Revolution*. Brooklyn, NY: Zone Books, 2015.
- Bruegemann, Walter. *Journey to the Common Good*. Louisville: Westminster John Knox Press, 2010.
- Bruegemann, John, and Walter Bruegemann. *Rebuilding the Foundations: Social Relationships in Ancient Scripture and Contemporary Culture*. 2017. Kindle Edition.
- Burrell, David B. "Aquinas's Debt to Maimonides," in *A Straight Path: Studies in Medieval Philosophy and Culture – Essays in Honor of Arthur Hyman*. Washington, DC: Catholic University Press, 1988.
- Cahn, Steven, and Peter Markie, eds. *Ethics: History, Theory, and Contemporary Issues*. 3d. ed. New York: Oxford University Press, 2006.
- Camic, Charles, Philip S. Gorski, and David M. Trubeck, eds. *Max Weber's "Economy and Society": A Critical Companion*. Stanford, CA: Stanford University Press, 2003.
- Casanova, José. *Public Religions in the Modern World*. Chicago: University of Chicago Press, 1994.
- Chappell, Vere, ed. *The Cambridge Companion to Locke*. Cambridge: Cambridge University Press, 1994.
- Chen, Alan K., and Scott L. Cummings. *Public Interest Lawyering: A Contemporary Perspective*. New York: Wolters Kluwer Law & Business, 2013.
- Childs, Jr., James M. *Ethics in the Community of Promise: Faith, Formation, and Decision*. Minneapolis: Augsburg Fortress, 2006.
- Christians, Clifford G. and Jay M. Van Hook, eds. *Jacques Ellul: Interpretive Essays*. Urbana: University of Illinois Press, 1981.

- Clark, Elizabeth A. *History, Theory, Text: Historians and the Linguistic Turn*. Cambridge, Mass.: Harvard University Press, 2004.
- Cobb, Jr., John B. *Sustaining the Common Good: A Christian Perspective on the Global Economy*. Cleveland, OH: Pilgrim Press, 1994.
- Cohen, Hermann. *Religion of Reason Out of the Sources of Judaism*. Translated with Introduction by Simon Kaplan. Atlanta, GA: Scholars Press, 1995.
- Comaroff, John L. "Reflections on the Rise of Legal Theology: Law and Religion in the Twenty-first Century," *Social Analysis: The International Journal of Social and Cultural Practice* 53, no. 1 (2009): 193-216. <http://www.jstor.org/du.idm.oclc.org/stable/23182468>. Accessed: 27-04-2018 20:17 UTC
- Dionne, Jr., E.J., Jean Bethke Elshtain, Kayla M. Drogoz, eds. *One Electorate Under God? A Dialogue on Religion and American Politics* (Washington, DC: Brookings Institution Press, 2004)
- Dressler, Markus, and Arvind-Pal S. Mandair, eds. *Secularism and Religion-Making*. Oxford: Oxford University Press, 2011.
- Dreyfus, Hubert L., and Paul Rabinow. *Michel Foucault: Beyond Structuralism and Hermeneutics*. Second Ed. with an Afterward by and an Interview with Michel Foucault. Chicago, IL: University of Chicago Press, 1983.
- Elshtain, Jean Bethke. *New Wine & Old Bottles: International Politics and Ethical Discourse*. Notre Dame: University of Notre Dame, 1998.
- _____. The Clinton Scandal and the Culture of the Therapeutic. In *What's God Got To Do with the American Experiment*, eds. Dionne, E.J., Jr. and John DiIulio, Jr. 98-105. Washington, DC: Brookings Institution Press, 2000.
- _____. *Sovereignty: God, State and Self. The Gifford Lectures*. New York: Basic Books, 2008.
- Ellul, Jacques. *The Theological Foundation of Law*. Translated by Marguerite Wieser. New York: Seabury Press, 1969.
- Ewbank, Walter F. *Morality Without Law*. New York: World Publishing Co., 1969.
- Fackenheim, Emil. *God's Presence in History: Jewish Affirmations and Philosophical Reflections*. New York: Harper Torchbooks, 1972.

- _____. *What is Judaism? An Interpretation for the Present Age*. New York: Collier Books, 1987.
- Feldman, Stephen M., ed. *Law & Religion: A Critical Anthology*. New York: New York University Press, 200.
- Fichte, J.G. *The Science of Knowing: J.G. Fichte's 1840 Lectures on the Wissenschaftslehre*. Translated by Walter E. Wright. New York: SUNY Press, 2005.
- _____. *Fichte and the Atheism Dispute (1798-1800)*. Translated by Curtis Bowman. Burlington, VT: Ashgate, 2010.
- Fish, Stanley. "What Makes an Interpretation Acceptable?" *Is There a Text in This Class? The Authority of Interpretive Communities*. Cambridge, MA: Harvard University Press, 1980.
- Fitzpatrick, Peter. *The Mythology of Modern Law*. London, UK: Routledge, 1992.
- Floistad, Guttorm, ed. *Contemporary Philosophy: A New Survey*. New York: Springer, 2015.
- Foucault, Michel. *Discipline & Punish: The Birth of the Prison*. Translated by Alan Sheridan. New York: Vintage Books, 1995.
- Freund, Else-Rahel. *Franz Rosenzweig's Philosophy of Existence: An Analysis of The Star of Redemption*. Translated into English from the German Revised Ed. by Stephen L. Weinstein and Robert Israel. Edited by Paul R. Mendes-Flohr. The Hague: Martinus Nijhoff, 1979.
- Gabel, Peter, and Paul Harris, "Building Power and Breaking Images: Critical Legal Theory and the Practice of Law," 11 N.Y.U. Rev. L. & Soc. Change, 369 (1982-1983).
- Galli, Barbara E., and Franz Rosenzweig. *Franz Rosenzweig and Jehuda Halevi : Translating, Translations, and Translators*. Montreal [Que.]: MQUP, 1995.
<http://du.idm.oclc.org/login?url=http://search.ebscohost.com/login.aspx?direct=true&db=nlebk&AN=404190&site=ehost-live&scope=site>.
- Glatzer, N.N., ed. *On Jewish Learning*. New York: Schocken Books, 1955.
- Glatzer, Nahum N. *Franz Rosenzweig: His Life and Thought*. 3rd Edition. Indianapolis, IN: Hackett Publishing, 1998.

- Goldford, Dennis J. *The Constitution of Religious Freedom: God, Politics, and the First Amendment*. Waco, TX: Baylor University Press, 2012.
- Goodrich, Peter. *Oedipus Lex: Psychoanalysis, History, Law*. Berkeley, CA: University of California Press, 1995.
- Grey, Tomas C., "Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought," 30 *Stan. L. Rev.* 843 (1977-1978).
- Green, Garrett. *Theology, Hermeneutics, and Imagination: The Crisis of Interpretation at the End of Modernity*. Cambridge: Cambridge University Press, 2000.
- Greengus, Samuel. *Laws in the Bible and in Early Rabbinic Collections: The Legacy of the Ancient Near East*. Eugene, OR: Cascade Books, 2011.
- Habermas, Jürgen. *Reason and the Rationalization of Society*. Vol. 1 of *The Theory of Communicative Action*. Trans. Thomas McCarthy. Boston: Beacon Press, 1981.
- Haidt, Jonathan. *The Righteous Mind: Why Good People Are Divided by Politics and Religion*. New York: Vintage Books, 2015.
- Hall, Kermit L., ed. *The Oxford Companion to the Supreme Court of the United States*. New York: Oxford University Press, 1992.
- Harari, Yuval Noah. *Sapiens: A Brief History of Humankind*. New York: Harper, 2015.
- Hartman, David. *Maimonides: Torah and Philosophic Quest*. Philadelphia: JPS, 1976.
- Hebblethwaite, Brian. *Ethics and Religion in a Pluralistic Age*. Edinburgh: T & T Clark, 1997.
- Hegel, G.W.F. *Reason in History: A General Introduction to the Philosophy of History*. Translated by Robert S. Hartman. Upper Saddle River, NJ: Prentice-Hall, 1997.
- Helenius, Timo. *Ricoeur, Culture, And Recognition: A Hermeneutic of Cultural Subjectivity*. Lanham, MD: Lexington Books, 2016.
- Herzog, Tamar. *A Short History of European Law: The Last Two and a Half Millennia*. Cambridge, MA: Harvard University Press, 2018.
- Hicks, Douglas A. *Inequality and Christian Ethics*. Cambridge: Cambridge University Press, 2000.
- Holmes, Oliver Wendell, Jr. 1991. *The Common Law*. New York: Dover.

- Horrell, David G. *Solidarity and Difference: A Contemporary Reading of Paul's Ethics*. Second Edition. London: Bloomsbury T & T Clark, 2005.
- Howard, Philip K. *The Death of Common Sense: How Law is Suffocating America*. New York: Random House, 1994.
- Hughes, Aaron W. *Rethinking Jewish Philosophy: Beyond Particularism and Universalism*. New York: Oxford University Press, 2014.
- Ifill, Sherrilyn, Loretta Lynch, Bryan Stevenson, and Anthony C. Thompson. *A Perilous Path: Talking Race, Inequality, and the Law*. New York: The New Press, 2018.
- Ignatieff, Michael. *The Lesser Evil: Political Ethics in an Age of Terror*. The Gifford Lectures. Princeton, NJ: Princeton University Press, 2004.
- Ishay, Micheline. *The History of Human Rights: From Ancient Times to the Globalization Era*. Berkeley, CA: University of California Press, 2008.
- Jennings, Jr., Theodore. *Reading Derrida/Thinking Paul: On Justice*. Stanford, CA: Stanford University Press, 2006
- _____. *Outlaw Justice: The Messianic Politics of Paul*. Stanford, CA: Stanford University Press, 2013.
- Jobling, David, et al., eds. *The Postmodern Bible Reader*. Malden, Mass.: Blackwell Publishers, 2001.
- Kant, Immanuel. "On the miscarriage of all philosophical trials in theodicy," in *Religion and Rational Theology*. Translated and edited by Allen W. Wood and George Di Giovanni. Cambridge: Cambridge University Press. <http://cas.uchicago.edu/workshops/germanphilosophy/files/2013/02/Kant-On-the-Miscarriage-of-all-Philosophical-Trials-at-Theodicy.pdf> (accessed November 17, 2013).
- Kant, Immanuel. *Critique of Pure Reason*. Translated and Edited by Paul Geyer and Allen W. Wood. Cambridge: Cambridge University Press, 1998.
- _____. *Prolegomena to Any Future Metaphysics*. Upper Saddle River, NJ: Prentice-Hall: 1997.
- _____. *Religion within the Boundaries of Mere Reason: and Other Writings*. Translated by Allen Wood and George Di Giovanni. Cambridge: Cambridge University Press, 1998.

- Kepnes, Steven. *The Future of Jewish Theology*. Malden, MA: Wiley-Blackwell, 2013.
- Kepnes, Steven, Peter Ochs, and Robert Gibbs. *Reasoning After Revelation: Dialogues in Postmodern Jewish Philosophy*. Boulder, CO: Westview Press, 1998.
- Knight, Douglas A. *Law, Power, and Justice in Ancient Israel*. Louisville, KY: Westminster John Knox, 2011.
- Knight, Douglas A. and Amy-Jill Levine. *The Meaning of the Bible: What the Jewish Scriptures and Christian Old Testament Can Teach Us*. New York: HarperOne, 2011.
- Konvitz, Michael. *Torah and Constitution: Essays in American Jewish Thought*. Syracuse, NY: Syracuse University Press, 1998.
- Krell, Marc A. *Intersecting Pathways: Modern Jewish Theologians in Conversation with Christianity*. Oxford, UK: Oxford University Press, 2003.
- Lenzner, Steven & William Kristol, "What was Leo Strauss up to?" *The Public Interest* Issue 153 (Fall 2003), 19-39.
- Levenson, Jon D. *The Hebrew Bible, the Old Testament, and Historical Criticism: Jews and Christians in Biblical Studies*. Louisville: Westminster John Knox Press, 1993.
- Levinas, Emmanuel. *Ethics and Infinity: Conversations with Philippe Nemo*. Translated by Richard A. Cohen. Pittsburgh, PA: Duquesne University Press, 1985.
- _____. *Totality and Infinity: An Essay on Exteriority*. Translated by Alphonso Lingis. Pittsburgh, PA: Duquesne University Press, 2011.
- Levine, Emily. "How I made friends with reality." Filmed April 2018 in Vancouver, BC. TED Video, 15:27. https://www.ted.com/talks/emily_levine_how_i_made_friends_with_reality.
- Locke, Jonathan. *Two Treatises of Government*. Edited with Introduction and Notes by Peter Laslett. Student Edition. Cambridge: Cambridge University Press, 1988.
- McCann, Dennis P. and Patrick D. Miller, eds. *In Search of the Common Good*. New York: T&T Clark, 2005.
- McKim, Donald K. *Theological Turning Points: Major Issues in Christian Thought*. Atlanta: John Knox Press, 1988.

- McKnight, E. V. "Reader-Response Criticism." *Methods of Biblical Interpretation*. Nashville: Abingdon, 2004.
- MacIntyre, Alasdair. *After Virtue: A Study in Moral Theology*. Third Edition. Notre Dame, IN: University of Notre Dame Press, 2007.
- Mansell, Wade, Belinda Meteyard, and Alan Thomson. *A Critical Introduction to Law*. Third Edition. London: Cavendish Publishing, 2004.
- Markowitz, Sidney. *What You Should Know About Jewish Religion, History, Ethics and Culture*. New York: Citadel Press, 1992.
- Mendieta, Eduardo and Jonathan Vanantwerpen, eds. *The Power of Religion in the Public Sphere*. New York: Columbia University Press, 2011.
- Milbank, John. *Theology & Social Theory: Beyond Secular Reason*. Second Edition. Malden, MA: Blackwell Publishing Ltd., 2006.
- Millbank, John and Adrian Pabst. *The Politics of Virtue: Post-Liberalism and the Human Future*. London: Rowman & Littlefield, 2016.
- Milbank, John and Catherine Pickstock. *Truth in Aquinas*. New York: Routledge, 2001.
- Mirandola, Jose Porfirio. *Marx and the Bible: A Critique of the Philosophy of Oppression*. Translated by John Eagleson. Maryknoll, NY: Orbis Books, 1971.
- Morawetz, Thomas. *Law's Premises, Law's Promise: Jurisprudence After Wittgenstein*. Burlington, VT: Ashgate Publishing, 2000.
- Moss, Candida R. and Joel S. Baden. *Bible Nation: The United States of Hobby Lobby*. Princeton: Princeton University Press, 2017.
- Mousourakis, George. *The Legal History of Rome*. London: Routledge, 2007.
- Mount, Jr., Eric. *Covenant, Community, and the Common Good: An Interpretation of Christian Ethics*. Cleveland, OH: Pilgrim Press, 1999.
- Moyn, Samuel. *Origins of the Other: Emmanuel Levinas between Revelation and Ethics*. Ithaca, NY: Cornell University Press, 2005.
- _____. *The Last Utopia: Human Rights in History*. Cambridge, MA: The Belknap Press, 2010.

- Niditch, Susan. *Oral World and Written Word: An Israelite Literature*. Louisville: Westminster John Knox Press, 1996.
- Niebuhr, H. Richard. *"The Responsibility of the Church for Society" and Other Essays*. Edited and with an Introduction by Kristine A. Culp. Louisville, KY: Westminster John Knox Press, 2008.
- Niebuhr, Reinhold. *Moral Man & Immoral Society: A Study in Ethics and Politics*. Introduction by Langdon B. Gilkey. Louisville, KY: Westminster John Knox Press, 2001.
- Nisenbaum, Karin. "From the Revolution in Thinking to the Renewal of Thinking: The Systematic Task of *The Star of Redemption*." In *After the Postsecular and the Postmodern: New Essays in Continental Philosophy of Religion*, edited by Anthony Paul Smith and Daniel Whistler, 105-127. Newcastle upon Tyne, UK: Cambridge Scholars, 2010.
- _____. "The Legacy of Salomon Maimon: Philosophy as a System Actualized in Freedom." Presentation, University of Tübingen, April 2013 and New York German Idealism Workshop, The New School, October 2012.
- Nussbaum, Martha, "Equity and Mercy," *Philosophy & Public Affairs*, Vol. 22, No. 2 (Spring, 1993), pp. 83-125, 85. Wiley-Blackwell. <http://www.jstor.org/stable/2265442>.
- Nussbaum, Martha C. *Upheavels of Thought: The Intelligence of Emotions*. Cambridge: Cambridge University Press, 2001.
- _____. *Frontiers of Justice: Disability, Nationality, Species Membership*. Cambridge, MA: Belknap Press, 2006.
- _____. *Liberty of Conscience: In Defense of America's Tradition of Religious Equality*. New York: Basic Books. 2008.
- _____. *Political Emotions: Why Love Matters for Justice*. Cambridge, MA: Belknap Press, 2013.
- Oliver, Peter, Sionaidh Douglass Scott, and Victor Tadros. *Faith in Law: Essays in Legal Theory*. Portland, OR: Hart Publishing, 2000.
- Oppenheim, Michael. *What Does Revelation Mean for the Modern Jew? Rosenzweig, Buber, Fackenheim*. Lewiston, NY: The Edwin Mellen Press, 1985.

- _____. *Speaking/Writing of God: Jewish Philosophical Reflections on the Life with Others*. Albany, NY: SUNY Press, 1997.
- Pannenberg, Wolfhart. *Anthropology in Theological Perspective*. Translated by Matthew J. O'Connell. Philadelphia: Westminster Press, 1985.
- Parker, David. "Original Sin: A Study in Evangelical Theology," *Evangelical Quarterly* 61:1 (1989): 51-69. https://www.theologicalstudies.org.uk/pdf/sin_parker.pdf
- Pearcy, Nancy. *Total Truth: Liberating Christianity from Its Cultural Captivity*, Wheaton, IL: Crossway Books, 2005.
- Pelikan, Jaroslav. *Interpreting the Bible & the Constitution*. New Haven, CT: Yale University Press, 2004.
- Pickstock, Catherine, *After Writing: On the Liturgical Consummation of Philosophy*. Oxford: Blackwell, 1998.
- _____. "Aquinas and the Quest for the Eucharist." *Modern Theology* 15:2 (April 1999): 159-180.
- Pinkard, Terry. *German Philosophy 1760-1860: The Legacy of Idealism*. Cambridge: Cambridge University Press, 2002.
- Plaut, Gunther W., ed. *The Torah—A Modern Commentary*. New York: Union of American Hebrew Congregations, 1981.
- Pollock, Benjamin. *Franz Rosenzweig and the Systematic Task of Philosophy*. Cambridge: Cambridge University Press, 2009.
- Poma, Andrea. *The Critical Philosophy of Hermann Cohen*. Translated by John Denton. Albany, NY: SUNY Press, 1997.
- Rashkover, Randi. *Revelation and Theopolitics: Barth, Rosenzweig and the Politics of Praise*. London: T & T Clark, 2005.
- _____. *Freedom and Law: A Jewish-Christian Apologetics*. New York: Fordham University Press, 2011.
- Rawls, John. *A Theory of Justice*. Revised Edition. Cambridge, MA: Belknap Press, 1999.
- _____. *Political Liberalism*. New York: Columbia University Press, 2005.

- Reed, Esther D. *The Ethics of Human Rights: Contested Doctrinal and Moral Issues*. Waco, TX: Baylor University Press, 2007.
- Ricoeur, Paul. *Interpretation Theory: Discourse and the Surplus of Meaning*. Fort Worth, TX: Texas Christian University Press, 1976.
- _____. *Oneself as Another*. Translated by Kathleen Blamey. Chicago: University of Chicago Press, 1992.
- _____. *Figuring the Sacred: Religion, Narrative, and Imagination*. Translated by David Pellauer. Edited by Mark I. Wallace. Minneapolis: Fortress Press, 1995.
- Rorty, Richard. "Religion as Conversation-Stopper," *Common Knowledge* 3:1 (Spring), 1–6, 1994.
- Rosenzweig, Franz. *God, Man, and the World: Lectures and Essays*. Translated and Edited by Barbara E. Galli. Syracuse, NY: Syracuse University Press, 1998.
- _____. *Philosophical and Theological Writings*. Translated and Edited by Paul W. Franks and Michael L. Morgan. Indianapolis, IN: Hackett Publishing, 2000.
- _____. *The Star of Redemption*. Translated by Barbara E. Galli. Madison, WI: University of Wisconsin Press, 2005.
- _____. *Understanding the Sick and the Healthy: A View of the World, Man, and God*. Translated with Introduction by Nahum Glazer. Harvard: First Harvard University Press, 1999.
- Rousseau, Jean-Jacques. *The Social Contract*. Trans. Maurice Cranston. London: Penguin, 1968.
- _____. *Discourse on the Origins of Inequality (Second Discourse) Polemics, and Political Economy. The Collected Writings of Rousseau Vol. 3*. Translated by Judith R. Bush, Roger D. Masters, Christopher Kelly, and Terrence Marshall. Hanover, NH: University Press of New England, 1992.
- Rowland, Christopher, ed. *The Cambridge Companion to Liberation Theology*. Cambridge: Cambridge University Press, 1999.
- Savic, Obrad, for the Belgrade Circle Journal, ed. *The Politics of Human Rights*. London: Verso, 1999.

- Sachs, Rabbi Lord Jonathan. "How we can face the future together, without fear." Filmed April 2017 in Vancouver, BC. TED Video, 12:36, https://www.ted.com/talks/rabbi_lord_jonathan_sacks_how_we_can_face_the_future_without_fear_together/discussion.
- Schelling, F.W.J. *The Unconditional in Human Knowledge: Four Early Essays (1794-1796)*. Translation and Commentary by Fritz Marti. London: Lewisburg Bucknell University Press, 1980.
- _____. *The Ages of the World (fragment) from the handwritten remains Third Version (c. 1815)*. Translated with Introduction by Jason M. Wirth. Albany, NY: SUNY Press, 2000.
- _____. *Philosophical Investigations into the Essence of Human Freedom*. Translated by Jeff Love and Johannes Schmidt. Albany, NY: SUNY Press, 2006.
- Scheuerman, William E. *Carl Schmitt: The End of Law*. Boulder: Rowman & Littlefield, 1999.
- Schmitt, Carl. *Political Theology: Four Chapters on the Concept of Sovereignty*. Translated by George Schwab. Chicago: University of Chicago Press, 1985.
- _____. *The Concept of the Political: Expanded Edition*. Translated by George Schwab. Chicago: University of Chicago Press, 1996.
- Schubeck, SJ, Thomas L. *Love That Does Justice*. Maryknoll, NY: Orbis, 2007.
- Sedlacek, Tomas. *Economics of Good and Evil: The Quest for Economic Meaning from Gilgamesh to Wall Street*. Oxford:Oxford University Press, 2011.
- Sen, Amartya. *The Idea of Justice*. Cambridge, MA: Belknap Press, 2009.
- Shaffern, Robert W. *Law and Justice from Antiquity to Enlightenment*. Boulder: Rowman & Littlefield, 2009.
- Sheppard, Eugene A. *Leo Strauss and the Politics of Exile: The Making of a Political Philosopher*. Waltham, MA: Brandeis University Press, 2006.
- Shults, F. LeRon. *Reforming Theological Anthropology: After the Philosophical Turn to Relationality*. Grand Rapids, MI: William B. Eerdmans Publishing Co., 2003.
- Siedentop, Larry. *Inventing the Individual: The Origins of Western Liberalism*. Cambridge, MA: Belknap Press, 2014.

- Simmons, William Paul. *An-Archy and Justice: An Introduction to Emmanuel Levinas's Political Thought*. Lanham, MD: Lexington Books, 2003.
- Slagstad, Rune. "Liberal Constitutionalism and its critics: Carl Schmitt and Max Weber." In *Constitutionalism and Democracy: Studies in Rationality and Social Change*. Edited by Jon Elster and Rune Slagstad, 103-129. Cambridge: Cambridge University Press, 1988.
- Smith, Jonathan Z. *Relating Religion: Essays in the Study of Religion*. Chicago: University of Chicago Press, 2004.
- Smith, Steven B. *Political Philosophy*. New Haven, CT: Yale University Press, 2012.
- Spade, Dean. *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law*. Brooklyn, NY: South End Press, 2011.
- Spinoza, Benedict de. *On the Improvement of the Understanding; The Ethics; Correspondence*. New York: Dover, 1955.
- _____. *Theological-Political Treatise*. Translated by Michael Silverthorne and Jonathan Israel. New York: Cambridge University Press, 2007.
- Stone, Geoffrey R. *Sex and the Constitution: Sex, Religion, and Law from America's Origins to the Twenty-First Century*. New York: Liveright Publishing, 2017.
- Stout, Jeffrey. 2004. *Democracy & Tradition*. Princeton, NJ: Princeton University Press.
- Strauss, David A. *The Living Constitution*. Oxford: Oxford University Press, 2010.
- Strauss, Leo. *Natural Right and History*. Chicago: University of Chicago Press, 1950.
- _____. *On Tyranny*. Rev. and expanded Ed. Chicago: University of Chicago Press, 1961.
- Sullivan, Winnifred Fallers. 2005. *The Impossibility of Religious Freedom*. Princeton, NJ: Princeton University Press.
- Sullivan, Winnifred Fallers, Robert A. Yelle, and Mateo Taussig-Rubbo, eds. *After Secular Law*. Stanford, CA: Stanford Law Books, 2011.
- Taubes, Jacob. *The Political Theology of Paul*. Translated by Dana Hollander. Stanford, CA: Stanford University Press, 2004.

- Taylor, Charles. *Sources of the Self: The Making of the Modern Identity*. Cambridge, MA: Harvard University Press, 1989.
- TeSelle, Eugene. "Rufinus the Syrian, Caelestius, Pelagius: Explorations in the Prehistory of the Pelagian Controversy." *Augustinian Studies*. Vol 3, 1972. 61-9. DOI: 10.5840/augstudies197234
- Teilhard de Chardin, Pierre. *The Human Phenomenon*. New edition and translation of *Le phenomene humain* by Sarah Appleton-Weber. Portland, OR: Sussex Academic Press, 2015.
- Thurman, Howard. *Jesus and the Disinherited*. Forward by Vincent Harding. Boston: Beacon Press, 1996.
- Tillich, Paul. *Dynamics of Faith*. New York: HarperOne, 2009.
- Tomlins, Christopher L., and Bruce H. Mann, eds. *The Many Legalities of Early America*. Chapel Hill, NC: University of North Carolina Press, 2001.
- Tucker, Gordon. *Torah for its Intended Purpose: Selected Writings (1988-2013)*. New York: KTAV Publishing House, 2014.
- Vanier, Jean. *Becoming Human*. New York: Paulist Press, 1998.
- VerSteeg, Russ. *The Essentials of Greek and Roman Law*. Durham, NC: Carolina Academic Press, 2010.
- Voelkel, Rebecca M.M. *Carnal Knowledge of God: Embodied Love and the Movement for Justice*. Minneapolis, MN: Fortress Press, 2017.
- Volf, Miroslav. "Religions, Identities and Conflicts." In *Religion and Identity in Post-Conflict Societies*. Edited by Regina Ammicht Quinn, Mile Babić, Zoran Grozdanov, Susan A. Ross and Mrie-Therese Wacker, 21-28. London: SCM Press, 2015.
- Walzer, Michael. "Objectivity and Social Meaning." In *The Quality of Life*. Edited by Martha Nussbaum and Amartya Sen, 165-177. Oxford: Clarendon Press, 1993.
- West, Cornell. *Democracy Matters: Winning the Fight Against Imperialism*. New York: Penguin, 2004.
- Westbrook, Raymond, and Bruce Wells. *Everyday Law in Biblical Israel: An Introduction*. Louisville, KY: Westminster John Knox Press, 2009.

Wilson, Edward O. *The Meaning of Human Existence*. New York: Liveright Publishing, 2014.

Witte, Jr., John and Frank S. Alexander, eds. *Weightier Matters of the Law: Essays on Law and Religion, A Tribute to Harold J. Berman*. Atlanta, GA: Scholars Press, 1988.

Wolterstorff, Nicholas. *Justice: Rights and Wrongs*. Princeton, NJ: Princeton University Press, 2008.

Yoshino, Kenji. "The New Equal Protection," 124 *Harvard L. Rev.* 747 (2011).

Younkins, Edward W. *Flourishing and Happiness in a Free Society: Toward a Synthesis of Aristotelianism, Austrian Economics, and Ayn Rand's Objectivism*. Boulder, CO: University Press of America, 2011.