

LEGAL REASON AND ILLEGAL FICTIONS

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*...the fault, dear Brutus,
is not in the stars, but in ourselves.²*

I. THE CONSTITUTION THAT DOES NOT SPEAK

To say that constitutional law is simply what the Constitution provides is to be in an awkward position. It is to say that the rules on legal standing, the overbreadth and void-for-vagueness doctrines, the distinction of self-executing and non-self-executing provisions, *et cetera*—which are indubitably part of constitutional law—are found in that legal document.³ The fact is they are not, at least not in express terms. Hence, the only way to justify such a position is to say that they are necessary deductions from the constitutional text; they are “emanations” or penumbral ideas, as it were, that though concealed and however attenuated the connection, have an objective and inevitable existence. *Verba legis*: it is the intrinsic meaning of words; the immutable link between signifier and signified. It is a paradigm of natural similitudes: just as the Christian god, in the Book of Genesis, named his creatures according to their attributes, words are supposed to contain in themselves what they signify. It is ontological nomenclature.

This position is awkward because it is superstition. It is to believe in magic, in the immortal soul of words. It is almost religion because the superstition is ostensibly organized, widespread and doctrinal in statutory construction. Even the uninitiated common sense knows that words change: some disappear from usage and become archaic; others simply vanish to oblivion; others still are invested with new meanings and some are created. The words “*chika*” and “*charing*” in Philippine gay-speak or showbiz are undoubtedly quite recent in origin, but is understandable

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² Act I, Scene 2, ll. 140-41 at 110 in WILLIAM SHAKESPEARE, JULIUS CAESAR. A. Humphreys Edition (1984).

³ In our case, the 1987 Constitution.

to the contemporary Filipino. Certainly, this is not the work of a divine patriarch or for that matter, Jesus Christ or Allah; but of course one can always say that it is part of his grand design. Before the benefit of his artificial voice box, Stephen Hawking could only mumble guttural sounds, but his mumbling seems to be perfectly intelligible to his close associates. Wittgenstein asks: “[c]an I say ‘bububu’ and mean ‘If it doesn’t rain I shall go for a walk?’”⁴ Well, of course; for language is relational, that is, it does not exist in a vacuum. Both signifier and signified are never collocated in texts *a priori*; rather, words are formally signifiers whose signifieds are supplied by something else: be it the author’s intention,⁵ the *Volksgeist*, the cultural space, or the archeological rules that make discourse possible.⁶ Words are symbols in the sense that they always signify something; however, their existence is contingent on the presence of a meaning-maker. The moment human beings perceive is the moment meaning is equiprimordially created. Such is the human being as *homo significans*. Now whence cometh the souls of words? Necessarily, from humans themselves. It is no wonder that the Bible has been interpreted in more all-too-human ways than one.

But so is the Constitution—and quite expectedly so. This document has been avowed to be, in the words of Justice Marshall in *Marbury v. Madison*,⁷ as “forming the fundamental and paramount law of the nation” and embodying the “principles of our society.”⁸ Thus it is indeed an irony that as the ultimate source of legitimating authority, the Constitution does not—and *cannot*—speak for itself. Like any symbol/s, it can only speak when there is a meaning-maker who consciously or unconsciously create that whereof to speak. By itself, in its pure singularity, the Constitution is an empty form, a veritable hole in being; it is not even a symbol to begin with. For a symbol must express; hence in order to simply *be*, its signifier and signified must attach *inter se*, thus presupposing the presence of a meaning-maker. A signifier without a signified or vice versa is quite simply a non-reality.⁹

If the Constitution does not speak, then legal authority can only come from the one who speaks in its behalf—the meaning-maker. Legal thought has recognized various identities of this meaning-maker: the text itself, the author-

⁴ LUDWIG, WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (2001), 23.

⁵ See Stanley Fish, *There is No Textualist Position*, 42 *SAN DIEGO L. REV.* 629 (2005). (“Words alone, without an animating intention, do not have power, do not have semantic shape, and are not yet language; and when someone tells you (as a textualist always will) that he or she is able to construe words apart from intention and then proceeds (triumphantly) to do it, what he or she will really have done is assumed an intention without being aware of having done so.”)

⁶ MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE*. Trans. A.M. Sheridan Smith (1972).

⁷ 5 U.S. 137 (1803).

⁸ *Id.*

⁹ Even the word “non-reality” or “nothingness” are symbols because they mean something; thus there is already the meeting of the signifier and signified. What I mean here of “non-reality” is that outside of human consciousness or the *lebenswelt* (life-world) such that there is really nothing to speak of nor to perceive.

legislator's intention, the whims of judges, an overarching ideology, the superstructure *et cetera*. There is a grain of truth in what Justice Antonin Scalia said, obviously adopting the textualist position: "Men may intend what they will; but it is only the laws that they enact which bind us."¹⁰ After all, once a law is enacted, it assumes a life of its own regardless of what the legislator/s intended.¹¹ It may signify something that never crossed the mind of the author. An individual may superimpose her own intentionalist interpretation of the law, but it cannot be denied that she is constrained: she draws from a background of preexisting meanings and signs; she does not create meaning *ex nihilo*. The concededly creative act of adjudication by the judge is similarly situated. Furthermore, there is a continuous and dialectical tension between the dominant ideology or superstructure and the marginalized discourses in a society such that what the former intends to mean may have been surreptitiously refashioned by the resistant forces on the margins.

The point is the meaning-maker is not simply a person or a group of persons with a singular will. The very situatedness of our existence reveals that the act of speaking is an act conditioned from its inception to its materialization: it is an intersection by an infinity of semantic events past, present and future. Past—for an act is inevitably influenced by historical contingencies; present—for it is still influenced by contemporary events; and future—for it is intentionally done in view of a possibility, of a desired outcome—a vision the construction of which is again conditioned. Being itself is temporality; Dasein,¹² according to Heidegger, is the equiprimordiality of all the temporas.¹³ The constitutional meaning-maker therefore is a semantic confluence, a plural and norm-generating¹⁴ dynamism. It is a space—the field of legal meaning that is created due to the temporal interaction of semantic actors and events—legislators, judges, the President, academics, the drafting of the Constitution, picketing, a revolution, war, *ad infinitum*. Moreover, it is a *nomos*—a normative universe which we all inhabit.¹⁵ For "[w]e constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void."¹⁶ Hence, the semantic space has force: it prescribes or proscribes and affects general behavior.

¹⁰ Antonin Scalia, "Common-Law Courts in Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution" in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW*. Amy Gutman ed. (1997). Cited in Fish, *supra* footnote 4.

¹¹ That is, if legislative intent can be identified especially if the legislature is a collegial body.

¹² *Da-sein*, literally translated as "there-being"—a be-ing (*Sein*) thrown (*da* or "there") into existence.

¹³ See MARTIN HEIDEGGER, *BEING AND TIME*. Trans. Joan Stambaugh (1996). Also see Craig Nichols, "Primordial Freedom: The Authentic Truth of Dasein in Heidegger's 'Being and Time'" in *THINKING FUNDAMENTALS, IWM JUNIOR VISITING FELLOWS* (2000).

¹⁴ In Cover's language, "jurisgenerative". See Cover, footnote 14, *infra*.

¹⁵ See Robert Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983-1984).

¹⁶ *Id.*, 4. Citations omitted. According to Cover, there are two corresponding ideal-typical patterns for combining corpus, discourse, and interpersonal commitments to form a *nomos*. He calls it the "paideic" or world-creating and the "imperial" or world maintaining. In here law is a system of tension between reality and vision; it is the connective between the material and the normative universe.

This is the provenance of the binding effect of laws, customs and traditions. The constitutional meaning-maker is the constitutional space.

II. CONSTITUTIONAL WARPING

Constitutional space is not flat.¹⁷ It is not an undifferentiated background. In the same way as the Theory of Relativity exposed the limitations of Newtonian Physics in its conception of a “neutral space”, the far-reaching and macrocosmic scope of constitutional law renders unlikely the notion of a “neutral” legal system. Power—especially semantic power—is never uniform. Semantic power involves the privileging of one meaning over others. Thus the varying densities of power distort constitutional space both in its semantic and normative aspects. Like actual space-time, constitutional space is curved. Lawrence Tribe used General Relativity in the legal universe by emphasizing the dynamic and interactive characteristic of curved space: “just as space cannot extricate itself from the unfolding story of physical reality, so also the law cannot extract itself from social structures x x x Each legal decision restructures the law itself, as well as the social setting in which law operates, because, like all human activity, the law is inevitably embroiled in the dialectical process whereby society is constantly recreating itself.”¹⁸ Hence the act of a semantic actor may restructure the space of constitutional law. A decision, for instance, of the Supreme Court may impose novel restrictions or open new possibilities, effectively channeling the actions of other legal actors. The Philippine judicial review case of *Angara v. Electoral Commission*¹⁹ in effect changed the *de facto* power distribution among the branches of government as the Court assumed for itself the capacity to nullify the act of a *de jure* co-equal body. Indeed, judicial decisions do not preserve a “natural” order of things; they are performative utterances that dynamically alter a legal *nomos*. Moreover, it is important to note that constitutional space is not only warped by the action of a social agent; there is spatial curvature *ab initio* because of the mere presence of different entities with varying semantic powers. Constitutional space is warped by virtue of the operations of inclusion and exclusion that meet every utterance and the one who utters. The transmission and positing of meaning may, like light travel, be bended by the space itself; it may be amplified or rarefied, or simply consumed by a black hole. Preexisting and powerful semantic beings are like bodies with huge mass/energy in the universe: like heavy bowling balls placed on a mattress, they warp the space

¹⁷ Here, I use the intriguing metaphor of Lawrence Tribe, *The Curvature of Constitutional Space: What Lawyers can Learn from Modern Physics*, 103 HARV. L. REV. 1 (1989). It appears that Professor Tribe’s concept of constitutional space in this article is more of a general social phenomenon. My treatment, on the other hand, is primarily linguistic.

¹⁸ *Id.*

¹⁹ 63 Phil. 161.

around them and thereby influence the behavior of smaller bodies—those entities with lesser semantic powers. This is an uneven playing field—a convoluted distribution of the densities of semantic power—where some entities have more capacity to speak than others. Some emerge empowered, others are marginalized. This is the kind of curvature that is obviously problematic, not only as a democratic issue, but as a question of reason. In the discussion that follows, I will show that this can be remedied.

There are, therefore, two aspects of the curvature of constitutional space. The first, which I shall call “active curvature,” is Tribe’s understanding.²⁰ It is “active” because the action of an agent is required to alter the legal landscape. It adopts a microcosmic view that centers on the act of the agent. This aspect is unproblematic because it is merely descriptive. After all, it is unavoidable that certain actors affect the behavior of others. Rather, the relevant question is how to restructure constitutional space so that it will embody the values that we seek to attain. The second aspect, which I shall term “passive curvature,” is the problematic one. It is “passive” because the mere existence of various agents creates the spatial distortion. It proceeds from a macrocosmic perspective because it views constitutional space as a whole.

The presence of semantic entities implies a systemic differentiation of roles. Organization becomes an inevitability, taxonomies are created and various hierarchies are established. Categorizations develop into relations of power. Titles carry privilege and license; other labels degrade and exclude. This is where meaning arise. The passive curvature entails foundational conditions for the emergence of meaning. Foucault uses the term “epistemes” or discursive formations to refer to the rules that determine the boundaries of thought in a given domain and period.²¹ The human primitive power to utter is delimited by the power-distortions of semantic space. The speaker herself and what she says are significantly determined by the facticity of the curvature. Hence the existence of the passive curvature *per se* becomes a normative problem.

III. CONSCIOUSNESS AND FREEDOM

The historicity of our existence is undeniable. To be is to be thrown into a world of preexisting meanings and relations. To be is to be formed by externalities beyond one’s will. To be, in large part, is to not have a choice. Moreover, much of the reality that is commonly deemed as “natural” or “permanent” can be evolutionarily traced back to the most whimsical event of the past. The sheer

²⁰ Tribe, *supra* footnote 15.

²¹ FOUCAULT, *supra* footnote 6.

contingency of some of our realities seems always a matter of curious surprise to us, despite its predominance. Artifices appear not grounded on reason but on capricious events. Natural law, it turns out, is a metaphysical delusion. Postmodern theorists take for granted the nonexistence of universals and metanarratives; they deem it quite evident that there is no universal progress of history, no Hegelian march towards an Absolute Spirit. And to some extent, they are right.

To be, however, is also to have a choice and choice presupposes consciousness—for indeed, how can one choose without being aware of anything? The singular locus of human experience is consciousness; it is that primordial act of being conscious of something that one can only begin talking about a thing's existence or the determinist influence of power. As Heidegger would have it, the emergence of *be-ing* is equiprimordial with the act of knowing; in other words, a thing *is* only if we know it to be such and only secondarily and derivatively can it be conceived as a correspondence between subject and predicate.²² The existential condition is such that the knowing subject is inextricably immersed in her own subjectivity—in her whims, caprices, instincts, aversions and desires—and within the wider context of systemic power—of norms, institutions, historical contingencies and ideologies—where other subjects interact. More importantly, however, is that consciousness indicates a degree of freedom: to know is to position one's self apart from the known object; it is to acquire a level of autonomy and self-determination that are necessary to cognize and examine a thing. Knowing involves negation—it entails the act of distinguishing the cognized thing from all others including the knower. To know something is to put the thing within one's cognitive context of delimitation and determination. Hence, a complete union between the knower and the known will result in the absurd situation where negation is done away with. The intentionality of consciousness means that consciousness is consciousness of something *other than itself*.²³ The dialectical unity of the *noesis* (the subject-of-the-object) and the *noema* (the object-for-the-subject) nevertheless necessitates separation. The latter presupposes autonomy and autonomy involves freedom.

Of course, the separation is not absolute. This is the inexorable consequence of historicity and temporality. We are, in large part, determined by the space that we inhabit. We sometimes speak of “false consciousness” that is brought by the prevailing ideologies of society. But the fact that we are able to talk about it, even to a limited extent, reveals that we are able to extricate ourselves from the determinism of this space. We *know* “false consciousness,” thus we are able to stand apart from it. The relative independence that is concomitant with this act of knowing is the foundation of our capacity to effect change in the world. This is the ground on which the question of justice becomes possible. Freedom is of course situated; but the higher and more robust our level of consciousness becomes, the

²² See HEIDEGGER *supra* footnote 12.

²³ See EDMUND HUSSERL, LOGICAL INVESTIGATIONS. Trans. J. Findlay (1970); THE PHENOMENOLOGY OF INTERNAL TIME CONSCIOUSNESS. Trans. J. Findlay (1966).

more we become free. The more we become conscious of the world, the greater is our power to see the interconnectedness of entities and events. And since, by evolution, human cognition must be, to a certain degree, orderly and systematic, the more we see regularity in the universe and therefore, the more we are able to use reason. To paraphrase Socrates, the more we examine life, the more it becomes worth living.

Karl Popper notes that contrary to traditional epistemology, knowledge does not really begin with sense perceptions.²⁴ Rather, by evolutionary theory, problems come before observation or sense perceptions, since senses are tools of survival that evolved as a result of solving biological problems. For example, “animal and human eyes developed so that living things that are able to change their position and move about may be warned in sufficient time of dangerous encounters with hard objects from which they might receive an injury.”²⁵ Thus knowing,²⁶ even for a single-cell amoeba, is primarily experimental; it employs the method of trial and error. “To be precise, it is the method of *trying out* solutions to our problem and then discarding the false ones as erroneous.”²⁷ Popper presents a three-stage model for learning: (1) the problem; (2) the attempted solutions; and (3) the elimination of unsuccessful solutions. This reveals that living beings are disposed towards laws and regularities. Indeed, there is always an expectation of substantial regularity in one’s environment. Popper then states that the same model applies to the logic or methodology of science.

Now he asks: “*What is distinctive about human science? What is the key difference between an amoeba and a great scientist such as Newton or Einstein?*”²⁸ Popper immediately provides an answer: the critical method—that is, “we act in a consciously critical manner.”

All prescientific knowledge, whether animal or human, is *dogmatic*;²⁹ and science begins with the invention of the non-dogmatic, critical method.

At any event, the invention of the critical method presupposes a descriptive human *language* in which critical *arguments* can take shape. x x x
For the essence of the critical method is that our attempted solutions, our

²⁴ KARL POPPER, “The Logic and Evolution of Scientific Theory” in ALL LIFE IS PROBLEM SOLVING. Trans. Patrick Camiller, (1999). This was originally a talk in the North German Radio (NDR) on March 7, 1972.

²⁵ Id., 7.

²⁶ In this particular article, Popper uses the term “learning” instead of “knowing.” But for my discussion, I will use both terms interchangeably.

²⁷ POPPER *supra* footnote 24 at 3.

²⁸ Id., 7.

²⁹ Then in this case, religious or faith-based knowledge is “prescientific.”

theories, and our hypotheses, can be formulated and objectively *presented* in language, so that they become *objects of consciously critical investigation*.³⁰

To put it in more general terms, knowledge and—I will add here something equally important—the process of knowing itself must be objects of consciously critical investigation. “Consciously” is the operative word here, for as discussed, it is only through consciousness that we can be ontologically separated from our historicity. This self-conscious method guarantees that we are continually and critically evaluating both substance and procedure of our inquiry. This reflexivity (turning back upon one’s self) is a universal norm, for the alternative can only be obscurantism: it simply makes no sense that certain areas of knowledge must remain unknown. One can of course always argue that there is no truth; that in fact, there is neither superiority nor inferiority between enlightenment and obscurantism; and that there is no hierarchy of values. However, she cannot say this without falling into a performative contradiction: with such an argument, she implicitly assumes the validity of her claim, thus implying the latter’s superiority to contrary arguments. Moreover, she assumes that hers is the enlightened view, since no one can possibly argue based on pure ignorance. The existence of a hierarchy of norms and values cannot be denied, though it is non-metaphysical and spatio-temporally limited.

It becomes clear, therefore, that in the case of the participants in constitutional law-making, they are not totally condemned to the passive curvature of constitutional space. Indeed there is freedom in consciousness. By universalizing the norm of a consciousness-reinforcing reflexivity of inquiry, we are able to flatten the spatial distortions of power. At this point, it is never too redundant to qualify that we cannot completely escape our historicity. Its total elimination is tantamount to omniscience and therefore absolute freedom. Furthermore, following the arguments propounded by Legal Realism, Critical Legal Studies and the Postmodern/Antifoundationalist trends of thought, one can say that whatever method one employs is ultimately ideological—for the appearance of neutrality is only a tool that ideologies use to conceal and legitimize themselves. This argument may be conceded; however, like our previous example on “false consciousness,” the fact that we are able to talk, investigate or theorize the matter—reveals that the reflexive mode of inquiry is something that can be universalized or considered to be a transcendental norm. By deconstruction, for instance, we are able to know the ideological underpinnings of just about anything. Because we become aware of their manifestations, we are not forever constrained by them. To a certain degree, we are able to transcend their influence. The semantic characteristic of constitutional space shows that powerful meanings shape a speaker and what she utters; the speaker, in turn, by her awareness of these meanings, can separate herself from them and thereby willfully shape or at least influence the vast expanse of constitutional law in ways that can create, destroy, or further entrench existing symbols. The determinist fallacy still stands: if one contends that there is no free will and that everything is

³⁰ Id., 7-8.

completely determined, then his act of saying this had already been determined—thus he cannot claim that his proposition is actually true or valid. I do not see how the quest for greater awareness can be whimsical or constraining. Consciousness is the primordial act that sets us free.

IV. THE FREE MARKETPLACE OF IDEAS

If constitutional law is an interactive space among semantic entities, then it becomes primarily a function of speech. The jurisprudential rationale of free speech as advancing knowledge and “truth” in the free marketplace of ideas is relevant here. This has its origin in the opinions of Justice Holmes, notably his dissent in *Abrams v. United States*:³¹

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.³²

The major criticisms of the “free marketplace” metaphor rest on four valid premises: (1) the myth of autonomy and rationality of a speaker; (2) the inequality among speakers; (3) the truth as socialization and (4) the preclusion of government intervention.³³ These arguments can be readily granted. However, they do not undermine the rationale itself of the free marketplace proposition. Holmes is right when he says that “the best of truth is the *power of the thought x x x itself x x x*.”³⁴ These criticisms, with the exception of the socialization of truth, concern something external to the validity of a proposition. They pertain to the discursive space where speech is situated. The myth of absolute autonomy and the non-parity of semantic entities are consequences of the passive curvature of constitutional space. Within the context of the disparities of power, a speaker’s autonomy can indeed be compromised. But as said, this passive curvature is not completely deterministic.

³¹ 250 US 616 (1919).

³² *Id.* at 630.

³³ See Stanley Ingber, *The Market Place of Ideas: A Legitimizing Myth*, 1984 DUKE L. J. 1 (1984); Jerome Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. (1978).

³⁴ *Abrams*, *supra* footnote 31. Emphasis supplied.

Even if there is no metaphysical truth, every utterance carries with it a validity-claim.³⁵ Even descriptive statements as basic as “That is a chair” or “There is a person in the house”—are already judgments of existence. Their validity-claims consist in propounding the idea that such things exist or are present. The same idea is true for descriptive attributions such as “The plant is green” or “molecules move faster when there is heat”—that is, whether such characteristics exist. Normative statements prescribe certain actions; their validity-claim involves the prioritization of a value. They propound the idea that a certain behavior is desired because it advances a value that is superior to others. Validity-claims presuppose consciousness on the part of the speaker; hence they are attempts, in varying degrees, to extricate one’s self from the determinism of the space that one inhabits. Normative statements, in particular, are attempts to effect change in the environment. The capacity to do so emanates from the freedom that is concomitant with the separation between the knower and the known. This is the free will that inheres in consciousness.

At most, the criticisms that are grounded on the power-distortions of space serve only to illustrate the difficulty of free speech. They do not show that validity-claims of utterances can overcome the validity-claims of others in a more or less flattened space. Certainly, a passive curvature does not render impossible a competition of validity-claims. To say otherwise is clearly to be in a performative contradiction. Needless to say, such a proposition is claiming more validity over one which states that there is a free competition of ideas. The same is true for the argument of truth as socialization: to claim that truth is a mere social construct is to say that this same claim is socially constructed such that its truthfulness cannot be determined. To a certain extent, there is social construction of truth but that is not all. Postmodernism, it seems, rests on a performative contradiction. On this point, the possibility of a marketplace of ideas still stands.

The last criticism—the preclusion of government intervention—is valid insofar as it prescribes for regulation in the conduct of speech. It is clearly a critical policy in view of the passive curvature of space. However, to contend that the “marketplace” rationale precludes government intervention is *non sequitur*. The connection apparently arises from the free market metaphor being impregnated with the *laissez faire* ideology. Other than that, one does not follow the other. Indeed, the existing passive curvature precludes epistemic efficiency and an invisible hand that will eventually take hold of the truth. On the contrary, it behooves the government to flatten this curvature to approximate a free market place of ideas. By virtue of the active curvature of constitutional space, the government can warp it in a way that will ensure maximum participation among semantic entities and assign the highest value in society judged by universal criteria.

³⁵ JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION, VOL. 1, REASON AND THE RATIONALIZATION OF SOCIETY (1984); THE THEORY OF COMMUNICATIVE ACTION, VOL. 2, SYSTEM AND THE LIFEWORLD: A CRITIQUE OF FUNCTIONALIST REASON, (1987); MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION (1999).

V. LEGAL REASON

It is important to note that the free market place of ideas is a norm and not the *status quo*. It is something that we must attain or at least approximate. It is no surprise why our present (or past) conditions seem to belie this ideal. The difficulty of this goal is readily apparent. To move towards this end requires flattening the passive curvature of constitutional space. It is reasonable to believe that we can never attain an absolutely flat space. In this case, our work here is asymptotic: as our efforts continually progress towards infinity, we may become closer and closer to this ideal but we will never touch it, even tangentially, let alone traverse it.

With the adoption of the norm of a consciousness-reinforcing reflexivity of inquiry, the next relevant question becomes one of determining the standards that we use. Our answer here is unequivocal: logical coherence, for there is no other standard. Yes, humans are also irrational, if not predominantly so. They are motivated by whims, caprices and other arbitrary desires. But irrationality is a facticity that can be transcended. What is consistently overlooked by some legal realists, critical legal studies scholars and postmodern/antifoundationalist theorists is human freedom. Not to attempt to ward off these irrationalities is simply bad policy—not to mention irrational. It is dangerous cynicism to rest content (and happy?) with whimsicalities. It is prioritizing weakness over strength. I can surmise that these theorists rejoice whenever something is exposed as a product of arbitrary human subjectivity. Besides, the nature of our inquiry will be rendered contradictory and consequently nugatory if we give in to human irrationalities. It is plainly futile to argue that we know largely through caprice. Well, coherence is on our side; performative contradiction is on theirs.

Intelligibility is primarily a function of logical coherence. In other words, we can only understand something if what passes through our cognition largely coheres. Clearly, brute and disparate information is incomprehensible; every rudimentary data that we understand has a semantic unity in itself for it to be intelligible in the first place. Cognition necessitates logical relations. People who contend about the myth of structure must nevertheless employ structure just to be understood: they use language with words that are arranged in systematic and syntactical ways; and they use logical relations—inductive and deductive reasoning—to develop their theses and supporting arguments. They rant against structure but they cannot seem to escape it. “The first thing to notice about beliefs,” according to Sam Harris, “is that they must suffer the company of their neighbors. Beliefs are both logically and semantically related. Each constrains, and is

in turn constrained by, many others.”³⁶ If one believes in the gravitational pull on Earth, she cannot concurrently believe that she will float here. Even religious and superstitious beliefs, while factually fatuous, still employ minimal logical relations just to make sense. To say that the universe is intricately designed such that there must be a complex designer behind it—is to utilize logical inference, although a faulty one. The failure to understand why the universe is in such a state does not warrant anyone to posit the humongous question mark that is god.³⁷

The central thesis of cognitive science is that “thinking can be best understood in terms of representational structures in the mind and computational procedures that operate on those structures.”³⁸ There is systematicity of thought because all ideas and propositions are relational; for instance, when we say something is “true,” any other proposition which contradicts it is “false.” The free market place of ideas, it seems, is hardwired into our brain. However, as Sam Harris observes, we cannot achieve total coherence. “[Even if our brain is a computer] as large as the known universe, built of components no larger than protons, with switching speeds as fast as the speed of light, all laboring in parallel from the moment of the big bang up to the present, it would still be fighting to add a 300th belief to its list.”³⁹ This physical constraint is one of the main reasons why contradictions in beliefs are nonetheless common occurrences. Some intelligent people are skeptical in ordinary experience and yet believe in logically outrageous claims like the virginity of Mary or the resurrection of Christ. In matters of religion, their skepticism vanishes and they totally disregard rational investigation; rather, they make unquestioning faith a primary virtue.⁴⁰ Moreover, there is the relevant consideration of emotions, nonveridical experiences, qualia,⁴¹ and socialization that vitiate our mind’s rationality. As should be clear by now, all these should not deter us from striving for greater coherence. We have the capacity to subject these

³⁶ SAM HARRIS, *THE END OF FAITH: RELIGION, TERROR AND THE FUTURE OF REASON* (2004), 53.

³⁷ The highly probable and logically consistent answer of course is natural selection.

³⁸ Cognitive Science in the *STANFORD ENCYCLOPEDIA*. See P. THAGART, *MIND: AN INTRODUCTION TO COGNITIVE SCIENCE*.

³⁹ HARRIS, *supra* footnote 35 at 57. Harris took this example from W. POUNDSTONE, *LABYRINTHS OF REASON: PARADOX, PUZZLES, AND THE FRAILTY OF KNOWLEDGE* (1988).

⁴⁰ They may also use the adamant and obscurantist argument that god is simply outside human knowing. Indeed this is quite easy to say. This is also an easy way to terminate the debate by simply saying that we cannot know god while insisting that the latter exists no matter what. It is a wonder how the theist knows that god exists. By divine revelation, which is again outside of rational investigation? This argument is hopelessly circular, that is to say, it will get you nowhere. Besides, this obscurantist argument is the only way they can insist that science and religion do not contradict each other. Well guess what? They obviously do.

⁴¹ The Representational Theory of Qualia is a controversial topic in theories of consciousness. Qualia (singular, “quale”) are qualitative features of mental representations especially with respect to the senses (e.g. color, odor, sound). It is a condition of nonveridicality, that is, qualia are mental states that are not intentional or that they do not presuppose a sense-data. See DANIEL DENNETT, *CONSCIOUSNESS EXPLAINED* (1991); F. DRETSKE, *NATURALIZING THE MIND* (1995).

constraints under the purview of rationality. Coherence is a necessity for cognition and hence behavior. Its absence is equivalent to cognitive and behavioral failure.

Logical coherence therefore implies universal intelligibility. It is “universal” in the sense that when ideas logically cohere, they can be understood by all, regardless of race, economic class, culture, sectarian affiliation and other contingencies. Hence, reason is the only common ground by which diverse people—especially those espousing different belief systems—can relate to each other. The quintessence of reason is universal intelligibility by virtue of systematicity and coherence. The consciousness-reinforcing reflexivity of inquiry is a necessary aspect of reason for it is a procedure that systematically and coherently subjects everything—including itself—under strict scrutiny. Reason prevails over historicity; it demands that ideas be freed from the passive curvature of semantic space. It tends towards a free market place of ideas.

In constitutional space, the immense difficulty of determining which among conflicting claims will prevail is not disputed given the limitations of human knowledge in a particular time-space. Indeed, even in a passively flat space, conflicting normative propositions are supported by arguments that largely cohere. It is clear, however, that the standard of logical coherence must be fulfilled—and again, this is no mean task. It follows that the passive curvature of constitutional space must be flattened to ensure the free market place of ideas. Everything must be an object of a self-conscious and critical inquiry. Privileging of certain utterances must not be countenanced; what Robert Cover calls as “nomian insularity”⁴² must be opened and integrated to the universal *nomos* of legal reason. This may be called a movement towards the monism of constitutional space.

Karl Popper’s notion of objectification becomes relevant here. To be objectified means that an utterance is detached from the speaker.

My thesis is that the step from my unspoken thought: ‘It will rain today’ to the same spoken proposition ‘It will rain today’ is a hugely important step, a step over an abyss, so to speak. At first this step, the expression of a thought, does not seem so great at all. But to formulate something in speech means that what used to be part of my personality, my expectations and perhaps fears, is now objectively to hand and therefore available for general discussion.⁴³

Objectification of meaning releases it from exclusivity and thereby becomes a property of all semantic entities. It becomes independent from one’s subjectivity. Once objectified, the prediction of rain, for instance, “can be

⁴² Robert Cover defines “nomian insularity” as “the rejection of participation in the creation of general and public *nomos*.” Cover, *supra* footnote 13 at 36. He proposes a “radical autonomy of juridical meaning” saying, in effect, that there can be no relation of superiority or inferiority between the *nomos* of a group and that of the state; neither is there such a relation between the *nomos* of one group with respect to that of another.

⁴³ POPPER, *supra* footnote 23 at 8.

experimentally endorsed by others as well as by myself, but it can also be *experimentally* disputed. The pros and cons can be weighed and discussed. People can take sides for or against the prediction.”⁴⁴ It is in this sense that we say that constitutional utterances must be *objects* of a conscious and critical inquiry. They must be divorced from the personality of the semantic entity—be it an individual, the state, a sect or other organizations. In this way, the validity-claim of an utterance is also divorced from the speaker’s semantic power.

Beyond the standard of logical coherence, it is difficult to see how some norms should rationally prevail over others. Certainly, it is not that there is paucity of criteria by which to evaluate them; rather, there are countless of them that seem equally valid and logically coherent. More than that, as Jürgen Habermas’s Discourse Ethics show, we are caught in a discursive field, or what he calls the “lifeworld” (*Lebenswelt*)—the web of communications and interactions of daily life which have embedded transcendental assumptions of validity.⁴⁵ These are inevitable assumptions—such as those of truth, fairness or sincerity—because denying them would embroil one’s self in a performative contradiction. I already gave illustrations of the latter but, for the sake of clarity, I will cite another example: a relativist who denies the existence of truth suffers a contradiction between the content of what she says and her very act of affirmation.⁴⁶ To say that “there is no truth” precludes the determination of the truthfulness of this claim. To affirm or to deny anything is to assume that something is true. These are “transcendental” assumptions, not because they are metaphysical, but that they are necessary in communicative actions. Indeed, one cannot discount the possibility of changing some of them, as when there is a paradigm-shift in the Kuhnian sense.

If constitutional space is primarily normative and normative statements carry validity-claims that propound prioritizations of values, then constitutional law is primarily an allocation of values. Taking Habermas’s cue, these “value-claims”, as it were, are caught in a constitutional space with embedded transcendental assumptions of communicative action. These assumptions do not defeat the norm of logical coherence. On the contrary, they reinforce it. Consciousness of these assumptions does not render them opaque; they likewise become objects of a conscious and critical inquiry. In this way, these transcendental assumptions and perhaps other standards of validity are still subsumed under the more primordial norm of logical coherence. I dare say that logical coherence must serve as the foundation of constitutional law. It is a necessary corollary thereto that validity-claims and the values themselves must be empirical and demonstrable. They must be objectified.

⁴⁴ Id., 8.

⁴⁵ HABERMAS, *supra* footnote 34. Also see Ramon Reyes, *Discourse Ethics of Jürgen Habermas*, 3 LOYOLA SCHOOLS REVIEW 91 (2004); Mathieu Deflem, *Introduction: Law in Habermas’s Theory of Communicative Action* in HABERMAS, MODERNITY AND LAW, ed. Mathieu Deflem (1996).

⁴⁶ Taken from Reyes, *supra* footnote 44 at 93.

VI. ILLEGAL FICTIONS

When a Constitution that “implor[es] the aid of Almighty God, in order to build a just and humane society,”⁴⁷ one readily imagines how god is a controlling fiction in the Philippine legal system.⁴⁸ To say that this is only meant to reflect the reality that a majority of Filipinos are god-believers is to entirely miss the point. If we are only talking about majoritarian status, why not say: “We, the Sovereign Filipino people, who are economically poor” or “who were (or are)⁴⁹ subjects of a colonial past” or “who have black hair”? The fact that we single out god—and not just any god, but one who is “Almighty” and apparently hears prayers or preambles and intervenes in worldly affairs—is a clear indication of how this particular idea is deeply entrenched in Philippine constitutional space. And this god-fiction is distorting, for it privileges utterances beneficial to itself while excluding others. It inhibits free speech; it perpetuates its own irrationalities while insulating them from the inquiry of reason.

It would be worthwhile to discuss the historical background of how this particular god-fiction became ingrained in our legal system,⁵⁰ but for purposes of this paper, I will focus instead on how it worsens the passive curvature of constitutional space. The 1987 Constitution declares as one of its principles and state policies that “[t]he separation of Church⁵¹ and State shall be inviolable.”⁵² It states in its Bill of Rights that “[n]o law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall

⁴⁷ 1987 CONST., Preamble. “We, the Sovereign Filipino people, imploring the aid of Almighty God, in order to build a just and humane society and establish a Government that shall embody our ideals and aspirations, promote the common good, conserve and develop our patrimony, and secure to ourselves and our posterity the blessings of independence and democracy under the rule of law and a regime of truth, justice, freedom, love, equality, and peace, do ordain and promulgate this Constitution.”

⁴⁸ For a textual scrutiny of the theological biases of our Constitution, see a related article in this issue of the PHILIPPINE LAW JOURNAL: Florin Hilbay, *The Establishment Clause: An Anti-Establishment View*.

⁴⁹ Technically, we are still subjects of colonialism.

⁵⁰ For a postcolonial discussion of the religiosity of the 1987 Constitution, see Hilbay, *supra* footnote 47 and Raul Pangalangan, *Transplanted Constitutionalism: The Philippine Debate on the Secular State and the Rule of Law*, also in this issue.

⁵¹ Symbolically, the word “Church” (also notice the capitalization) already reflects the Christian orientation of this provision. Why not “Mosque” or more appropriately “religion”? To insist that the word “Church” encompasses all religions (while it would had been quite easy to simply use the more neutral word of “religion” instead) is to fool one’s self that symbols do not have power and do not promote a certain end.

⁵² CONST., Art. II, Section 6.

forever be allowed. No religious test shall be required for the exercise of civil or political rights.”⁵³ The legal doctrine of these religion clauses is expressed in the 1940 American case of *Cantwell v. Connecticut*.⁵⁴

The constitutional inhibition on legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be.⁵⁵

This is otherwise known as the belief-action distinction, what Preacher-Chief Justice Reynato Puno⁵⁶ buttressed, by saying, in an almost threatening tone, that “[f]or sure, we shall continue to subject any act pinching the space for the free exercise of religion to a heightened scrutiny but we shall not leave its rational exercise to the irrationalities of man. For when religion divides and its exercise destroys, the State should not stand still.”⁵⁷ Despite the distinction, the so-called freedom of religion is doctrinally about *unlimited belief*, as if it were possible given that beliefs are representations of the world and the principal guidelines of human behavior—which is admittedly subject to state regulation. As of this writing, the latest and the one which has the most extensive treatment of the religion clauses in the Philippines is that of *Estrada v. Escritor*.⁵⁸ Justice Puno reiterated the doctrine: “The purpose of the religion clauses—both in the restriction it imposes on the power of the government to interfere with the free exercise of religion and the limitation on the power of the government to establish, aid, and support religion—is the *protection of religion liberty*. The end, the goal, and the rationale of the religion clauses is this liberty.”⁵⁹ This illimitability of belief is more explicit in the early case of *Gerona v. Secretary of Education*.⁶⁰

The realm of belief and creed is infinite and limitless bounded only by one’s imagination and thought. So is the freedom of belief including

⁵³ CONST., Art. III, Section 5.

⁵⁴ 310 U.S. 296 (1940).

⁵⁵ *Id.*, 303-304.

⁵⁶ To date, Puno continues to be a lay preacher of the United Methodist Church, the Chairman of the Administrative Council of the Puno Memorial United Methodist Church. He was the past chairman of the Administrative Board of the Knox United Methodist Church, “the biggest and oldest Methodist Church in the Philippines.” JOSE MARQUEZ, *THE CONSTITUTIONAL PHILOSOPHY OF PHILIPPINE JURISPRUDENCE, THE WRITINGS OF SENIOR ASSOCIATE JUSTICE REYNATO PUNO* (2005), 791.

⁵⁷ *Iglesia ni Cristo v. Court of Appeals*, 259 SCRA 529 (1996), 544-545. The entire quotation is originally italicized.

⁵⁸ 408 SCRA 1 (2003).

⁵⁹ *Id.*, 88. Italics in the original.

⁶⁰ 106 Phil. 2 (1969).

religious belief, limitless and without bounds. One may believe in most anything, however strange, bizarre and unreasonable the same may appear to others, even heretical when weighed in the scales of orthodoxy or doctrinal standards.⁶¹

It is not that freedom of belief should be restricted—quite the contrary. But the way Philippine jurisprudence implements the protection of this right effectively defeats its purpose. It is not a surprise that the Supreme Court, through Justice Puno, publicly professes in *Estrada v. Escritor* that “man stands accountable to an authority higher than the state”⁶² and that “[w]hile man is finite, he seeks and subscribes to the Infinite.”⁶³ The god-fiction in our constitutional space is unmistakable, where laws assume that every human being is bound to supernatural obligations higher than anything else—indeed, that certain superstitious laws are superior to real laws. To uphold these supernatural laws—under the delusion or pretense of protecting freedom of belief—religious dogmas are clothed with exclusivity; they occupy a privileged position where rational scrutiny is prohibited. The Revised Penal Code classifies “offending religious feelings” as one of the “crimes against the fundamental laws of the state.”⁶⁴ This is a situation where the State takes it upon itself—as part of its “fundamental laws”—to protect “religious feelings” through penal violence. What exactly “religious feelings” means, we do not know. It has been held by the Supreme Court, however, that offense to religious feelings is judged from the offended party’s perspective and not that of the offender.⁶⁵ The chilling effect is here: it does not matter what a person does, as long as he offends the faithful in ways that the latter alone can determine—consummates the crime. The law is both vague and overbroad. It is contingent on subjectivity which is inescapably arbitrary and is not susceptible of rational discourse. This is telling of the passive curvature of Philippine constitutional space: however irrational, grotesque or dumb, religious beliefs are sacred; they are privileged utterances. They should not be criticized lest freedom of belief be constricted.

This is the distinction between sacred and secular that the legal fiction of god has engendered. Sacred space is religious space where supernatural laws govern.

⁶¹ *Id.*, 9.

⁶² *Estrada*, *supra* footnote 57 at 49.

⁶³ The resolution of *Estrada v. Escritor*, A.M. No. P-02-01651, June 22, 2006.

⁶⁴ REVISED PENAL CODE (ACT. NO. 3815), Art. 133.

Offending the religious feelings—The penalty of *arresto mayor* in its maximum period to *prision correccional* in its minimum period shall be imposed upon anyone who, in a place devoted to religious worship or during the celebration of any religious ceremony, shall perform acts notoriously offensive to the feelings of the faithful.

This provision is part of Book Two, Title Two of the said code entitled “Crimes Against the Fundamental Laws of the State.”

⁶⁵ *People v. Baes*, 68 Phil. 203 (1939).

Hence it is over and above the reach of secular space—purportedly the free market place of ideas and the realm of earthly laws. Sacred space, where religious feelings belong, is constructed to be opaque to rational investigation. Thus in *Estrada*,⁶⁶ the main decision completely ignored the adulterous act admitted by respondent Soledad Escritor herself, when the latter said that what she did was sanctioned by her faith as a member of the Jehovah's Witnesses. With Escritor's invocation of religious freedom, her beliefs and acts *ipso jure* became opaque; they were relegated to the sacred space that was outside ordinary human standards. After all, as the decision said at the outset, she thereby stood "accountable to an authority higher than the state."⁶⁷ This is the absolutism of belief that constitutional jurisprudence proudly proclaims. To be sure, I agree with the result of the decision in granting Escritor the freedom to sever her marital ties with her legal spouse. Its justification, however, is unacceptable because it is a reinforcement of the god-fiction entrenched in our constitutional space. The sacred-secular divide arises from the theological premise popularized by St. Augustine—that one cannot subject god to human determination. It is to impose upon us an indeterminate idea called god and arrogate unto itself the status of being the highest value of the cosmos. Why that is so, we are not supposed to know. How did we know god in the first place? By divine revelation, which is again, outside of human determination. This obscurantist and devious circularity of reasoning is adopted by our jurisprudence. The sacred-secular divide tells us this: in matters of religion, we should not question; but for everything else, we may be allowed to be skeptical. *The religious virtue of Faith—to believe without question—is transplanted in our constitutional law.* Just as freedom of religion is considered fundamental and inalienable so as to override other freedoms, the sacred-secular divide mirrors the distinctly Christian hierarchy that dates back to the Dark Ages: the "spiritual" is the ultimate good, over and above the temporal world to the extent of castigating what is "corporeal" or "of the flesh". This is the curious inversion of reality by the religious mindset where what is not seen is considered more real than what is actually perceived by the senses. Constitutional law must obey the very first commandment of god, taking precedence to stealing or killing one's neighbor⁶⁸ and breathtaking in its arrogance and jealousy: "You shall not have other gods besides me".⁶⁹ What becomes of our non-establishment clause? Hortatory: practically inoperative and useless.

⁶⁶ *Estrada*, *supra* footnote 57.

⁶⁷ See also *Ebralinag v. Division Superintendent of Schools of Cebu*, 219 SCRA 256 (1993).

⁶⁸ Incidentally, among the ten commandments, god also seems to prioritize the prohibition against taking his name in vain (second commandment) and honoring the sabbath day (third commandment) over killing one's neighbor (the fifth commandment), theft (seventh commandment) and bearing false witness (eighth commandment). God seems to be saying better die than not to believe.

⁶⁹ Exodus 20:2-6: I, the Lord, am your God, who brought you out of the land of Egypt, that place of slavery. You shall not have other gods besides me. You shall not carve idols for yourselves in the shape of anything in the sky above or on the earth below or in the waters beneath the earth; you shall not bow down before them or worship them. *For I, the Lord, your God, am a jealous God, inflicting punishment for their fathers' wickedness on the children of those who hate me, down to*

The 1987 Constitution itself shamelessly adopts theological tenets—making them part of the “fundamental law of the land.”⁷⁰ It prejudices the seemingly intractable debate regarding commencement of life by mandating that the State “shall equally protect the life of the mother and the life of the unborn from conception”⁷¹ even if a conceived egg has still no nervous system to experience

the third and fourth generation; but bestowing mercy down to the thousandth generation, on the children of those who love and keep my commandments. (Emphasis supplied. My, my, even your grand grand grand children (fourth generation) will still receive god’s punishment if you worship other gods than him. God’s jealousy is so scary that he will make innocent children suffer (even those not yet born) because of your non-belief). THE NEW AMERICAN BIBLE (1991).

⁷⁰ Hilbay, *supra* footnote 47. A textual analysis of the following religious constitutional provisions can be found in this article.

⁷¹ CONST., Art. II, Sec. 12. The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution. It shall equally protect the life of the mother and the life of the unborn from conception. The natural and primary right and duty of parents in the rearing of the youth for civic efficiency and the development of moral character shall receive the support of the government.

Moreover, abortion is a crime under the Revised Penal Code. The relevant provisions are part of Title Eight of the said code, Chapter One entitled “Destruction of Life.”

Art. 256. *Intentional Abortion*—Any person who shall intentionally cause an abortion shall suffer:

1. The penalty of *reclusion temporal*, if he shall use any violence upon the person of the pregnant woman.
2. The penalty of *prision mayor*, if without using violence, he shall act without the consent of the woman.
3. The penalty of *prision correccional* in its medium and maximum periods, if the woman shall have consented.

Art. 257. *Unintentional Abortion*—The penalty of *prision correccional* in its minimum and medium periods shall be imposed upon any person who shall cause an abortion by violence, but unintentionally.

Art. 258. *Abortion practiced by the woman herself or by her parents*—The penalty of *prision correccional* in its medium and maximum periods shall be imposed upon a woman who shall practice an abortion upon herself or shall consent that any other person should do so.

Any woman who shall commit this offense to conceal her dishonor, shall suffer the penalty of *prision correccional* in its minimum and medium periods.

If this crime be committed by the parents of the pregnant woman or either of them, and they act with the consent of said woman for the purpose of concealing her dishonor the offender shall suffer the penalty of *prision correccional* in its medium and maximum periods.

Art. 259. *Abortion practiced by a physician or a midwife and dispensing of abortive*—The penalties provided in article 256 shall be imposed in its maximum period, respectively, upon any physician or midwife who, taking

pain and that the mother is already a fully sentient organism; it exempts from taxation “all lands, buildings, and improvements, actually, directly, and exclusively used for religious x x x purposes x x x”⁷²—thereby further entrenching religion and sending the message that the state is more willing to support its perpetuation compared to other endeavors such as businesses which give more material benefits to the economy; it appropriates public money or property “when [any] priest, preacher, minister, or dignitary is assigned to the armed forces, or to any penal institution, or government orphanage or leprosarium”⁷³ saying, in effect, that the state has an interest in engaging in superstitious prayers to send the souls of the dead to heaven; it allows parents or guardians to indoctrinate and colonize with religious doctrines the innocent minds of their children or wards through the public school system.⁷⁴ In these latter two provisions, it is simply unfair to the atheist, the non-believer or even a person of a different belief-system to be compelled to pay taxes to sustain these religious practices. Why, on earth, should I be forced to contribute to the remuneration of a priest who just mutters nonsense to dying soldier? Why in the universe should public property be used to indoctrinate children who still have no capacity to evaluate these belief-systems? In 1948, the U.S. Supreme Court in *McCullum v. Board of Education*⁷⁵ struck down a school board’s practice of permitting students to attend sectarian classes held in the public schools during school hours by parochial school instructors. According to Justice Black’s majority opinion, it is problematic that public school buildings are used for the purpose of religious education and that the practice “afford[s] sectarian groups an invaluable aid in that it help[s] to provide pupils for their religious classes through the use of the state’s compulsory public school system.” On the other hand, our

advantage of their scientific knowledge or skill, shall cause an abortion or assist in causing the same.

Any pharmacist who, without proper prescription from a physician, shall dispense any abortive shall suffer *arresto mayor* and a fine not exceeding 1,000 pesos.

⁷² CONST., Art. VI, Sec. 28 (3). Charitable institutions, churches and personages or covenants appurtenant thereto, mosques, non-profit cemeteries, and all lands, buildings, and improvements, actually, directly, and exclusively used for religious, charitable, or educational purposes shall be exempt from taxation.

⁷³ CONST., Art. VI, Sec. 29 (2). No public money or property shall be appropriated, applied, paid, or employed, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, sectarian institutions, or system of religion, or of any priest, preacher, minister, or other religious teacher, or dignitary as such, except when such priest, preacher, minister, or dignitary is assigned to the armed forces, or to any penal institution, or government orphanage or leprosarium.

⁷⁴ CONST., Art. XIV, Sec. 3 (3). At the option expressed in writing by the parents or guardians, religion shall be allowed to be taught to their children or wards in public elementary and high schools within the regular class hours by instructors designated or approved by the religious authorities of the religion to which the children or wards belong, without additional cost to the Government. (But there is additional cost: the government bears the depreciation cost for the use of the public property and an opportunity cost, for the said property may be used in other worthwhile activities.).

⁷⁵ 333 U.S. 203 (1948).

Constitutional Commission chose to explicitly carve the use of public property for religious indoctrination in a permanent document called the 1987 Constitution.

Philippine constitutional space is therefore warped in such a way as to prevent reasonable people from criticizing the irrationalities of religion. The god-fiction destroys freedom of belief because it promotes the imposition of superstition on people. It prevents critical thinking by making compelled ignorance the legal standard of sacred space. Religious doctrines like the existence of god, the virginity of Mary or the resurrection of Jesus Christ—are highly improbable, even ludicrous, to the rational mind. Like *aswangs*, Harry Potter or Bertrand Russell's flying teapot, they cannot be completely disproved, but we know by reason that they almost certainly do not exist.⁷⁶ The non-falsifiability of the existence of god does not legitimize belief in it; in fact, one is worse off believing in the superstition that there is a big dude with bad ass magic who created the universe. And yet, our legal system protects and helps to propagate these logical excrements with real effects in the world. Our constitutional law shelters priests, preachers and other religious propagandists from rational inquiry, and punishes people who simply see that there is something wrong here and speak their mind. Our constitution supports doctrinal abuse by allowing parents to indoctrinate their children into believing these falsities. It is an insufferable exploitation of a child's innocence that he is immediately branded as a Catholic, a Muslim or a Jehovah's Witness without fully knowing the consequences of these names. A child will grow up being religiously deluded; he will spend a significant portion of his life praying, attending masses, giving donations to religious organizations to further "spread the faith"—bad ideas that hijack the brain. He could have grown more critical and intelligent and allocated his resources into more worthwhile activities such as science, family-

⁷⁶ See RICHARD DAWKINS, *THE GOD DELUSION* (2006); HARRIS *supra* footnote 81; DANIEL DENNETT, *BREAKING THE SPELL* (2006); CHRISTOPHER HITCHENS, *GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING* (2007). It is instructive to quote Bertrand Russell at length here:

Many orthodox people speak as though it were the business of sceptics to disprove received dogmas rather than of dogmatists to prove them. This is, of course, a mistake. If I were to suggest that between the Earth and Mars there is a china teapot revolving about the sun in an elliptical orbit, nobody would be able to disprove my assertion provided I were careful to add that the teapot is too small to be revealed even by our most powerful telescopes. But if I were to go on to say that, since my assertion cannot be disproved, it is intolerable presumption on the part of human reason to doubt it, I should rightly be thought to be talking nonsense. If, however, the existence of such a teapot were affirmed in ancient books, taught as the sacred truth every Sunday, and instilled into the minds of children at school, hesitation to believe in its existence would become a mark of eccentricity and entitle the doubter to the attentions of the psychiatrist in an enlightened age or of the Inquisitor in an earlier time.

Bertrand Russell, "Is There A God" in BERTRAND RUSSELL, *THE COLLECTED PAPERS OF BERTRAND RUSSELL*, VOL. 11: *LAST PHILOSOPHICAL STATEMENT*, 1943-68 (ed. John Slater and Peter Köllner) (1997), 547-48. Also quoted in Dawkins, *supra* at 52.

planning, fighting corruption and so on. Indeed, there is always an opportunity cost in whatever we do. Resources spent in building churches are resources lost in other things. He could have helped more in building a better world. Yes, there is always the possibility of choosing to be an atheist given enough maturity. But there is always the difficulty of freeing one's self from religion in an environment that detests such choice. In a social space where most people fervently believe that nonbelievers will suffer the most excruciating pains in hell, it is not hard to imagine why they will do everything in their power to prevent their loved ones from repudiating their religion. It follows that they will also stifle any form of argument that conflicts with their religious convictions and demonizing individuals who dare criticize religion. Convictions, as Nietzsche says, are prisons⁷⁷; and this religious demonization of heretics is suggestive of Bertrand Russell's words: "The infliction of cruelty with a good conscience is a delight to moralists⁷⁸—that is why they invented hell."⁷⁹ Freedom of belief is incredibly difficult in a religious society as consistently shown by history (the Crusades, the Inquisition, the age of colonization, etc.) and the present times. And yet the bulk of society seems always to conveniently gloss over this fact.

Freedom of belief can only develop where there is a flattening of the passive curvature of constitutional space. It can only flourish where there is a reasonable free market place of ideas. It can never exist in a so-called pluralistic society where people are systematically encouraged to maintain the absolutism of their views. It is unavoidable that religious faith will always evangelize and assimilate other views regardless of the truth or justness of the matter, so long as everything is made in conformity with its dogmas. A belief should stand if it is true or reasonable. Even if we cannot yet determine the truth of the matter, it is only the mark of humility and truthfulness to let propositions be objectively tested and experimented. Even generally accepted truths can still be verified and debunked. This is the beauty of the scientific method which does not obtain in the unquestioning method of religious faith. How in the world are we able to objectively verify a Holy Trinity or Quadrinity or the recent act of the Vatican to strike the concept of "limbo" out of existence?

The sacred-secular divide is sometimes justified on the ground that it does no harm because there is a *de facto* self-correcting market place of ideas. This is indeed a fallacious premise brought by the *laissez-faire* ideology. As mentioned, the free market place of ideas is a norm to be achieved, not an existing condition. The sacred-secular divide and more generally, the god-fiction, are responsible for the market failure. There can be no freedom of belief where some beliefs are imposed rather than freely chosen. As long as there is a sacred space that is impervious to reason, indoctrination will continue. There is an inextricably dialectical relation

⁷⁷ FRIEDRICH NIETZSCHE, *THE ANTICHRIST* (1990), § 54.

⁷⁸ More appropriately, religious moralists, not moralists *per se* for there is an astronomical difference between religion and morality though most religious people fail to see the distinction.

⁷⁹ BERTRAND RUSSELL, *THE WILL TO DOUBT* (1958).

between belief and action—one influences the other. When people engage in the performative act of discourse, their beliefs continually change. By regulating action, the state inevitably restricts belief; by constructively restricting rational criticism, the state is promoting dumb god-belief. Choice, as an act of free will, can only be possible when there is greater consciousness of the world. The god-fiction makes it more difficult for people to transcend their entanglement with religion by preventing critical thinking.

VII. TOWARDS A FREETHINKING CONSTITUTION

The experience of religious apostasy is one of liberation. To be sure, it is not a single moment of epiphany, at least in my case. Rather, it is a slow and gradual process. This is no divine revelation; there is no god here magically revealing some truth. Instead, the disavowal of superstition shows our very situatedness in this world. Becoming an atheist is a slow process because it is difficult to extricate one's self from the determining influence of the space that we inhabit. We are not born *tabula rasa*; the moment we become aware, we are already formed. It is inevitable for us to have preconceived notions about the world; a paradigm has been set for us; social space had been warped in countless ways and continues to be warped. God has been an integral part of the curvature of this space; it is no surprise why much of our reality is constructed in conformity to it. Our legal system is no exception.

Thus, to be an atheist is to defy determinism; it is to defy god. It is to realize the only faculty of understanding that is available to humankind and that is reason. This is the time that we become conscious of our freedom as human beings when we use something that is our own and then we are able to effect a change in the world. We are able to look at the universe more objectively; we become aware that many of the realities that we know are arbitrary and not immutable. God, for instance, has been conceived in numerous ways—from a wrathful and jealous one in the Old Testament to an inanimate being to one who has universal love. It is the height of narrow-mindedness to say that our current conception of it is the true one. In the end, god is incompatible with science and reason. It is a delusion. But that is a lesser problem. The bigger problem is the systems of belief that center on the idea of god that impel people to act. In this way religion is dangerous.⁸⁰ The 9/11 tragedy is about a religion that views Western culture as heretical. In whatever way we may characterize these “jihadists” as “evil” or “terrorists”, the fact is that they are not motivated by evil, but like the Christian Crusaders, the colonial friars or the Inquisitors, “by what they perceive to be righteous, faithfully pursuing what their religion tells them.”⁸¹ The Israeli-Palestinian conflict is to a great extent a fight

⁸⁰ HARRIS, *supra* footnote 34; A LETTER TO A CHRISTIAN NATION (2006).

⁸¹ RICHARD DAWKINS, THE GOD DELUSION (2006), 304.

over a land that people think is holy. Unwilling women are compelled to be pregnant and give birth because of some theological claim that a conceived egg has a soul. Innocent children are indoctrinated and may be deluded for the rest of their lives because they inhabit a space that supports such delusion. Examples abound. Belief and action has actually a blurred distinction.

It is not that people should be compelled to be rational. Some actually choose to remain ignorant in certain matters; some are comfortable to be dominated by their primitive instincts. Some are happy to remain stupid, though they do not want to be called that way. Some like to believe in god and heaven despite the preponderance of evidence against their existence. It does not matter. What is important is that we restructure our space in a way that will promote reason. That is the stuff of regulation: we do not expect people to change by themselves for the good—that is the stuff of moralizing—rather, we change the environment so that the behavior of people will also change for the good. Otherwise, if we continue to rely on the notion that people will just enlighten themselves, then there is no use for regulators or a government in this society. Maybe we can just deploy priests who preach the rhetoric of “self-change” by making belief in religious superstition a necessary prerequisite to goodness.

In any case, rationality must be the basis of our policies because that is the only way by which we can determine the greatest good for a society. It is only through reason that we can objectively evaluate the benefits and drawbacks of a regulatory action. For instance, the discourse on stem-cell research, abortion and cloning has been gravely misguided by religion because of its unfounded dogma that the body has a soul. Thus, most of the debates are centered on the criteria of “personhood” or the beginning of “life” where a soul already enters the body. But biology reveals that what we call “person” emerges piecemeal from a gradually developing brain. As Steven Pinker says: “The demand by both religious and secular ethicists that we identify the ‘criteria for personhood’ assumes that dividing line in brain development can be found. But any claim that such line has been sighted leads to moral absurdities.”⁸² In fact, as Sam Harris explains, a three-day human embryo (a blastocyst) is only a collection of 150 cells whereas there are 100,000 cells in a brain of a fly. “If you are concerned about suffering in this universe, killing a fly should present you with greater moral difficulties than killing a human blastocyst.”⁸³ It is not difficult to see why a religious mind will ignore these facts if its sole concern is merely the preservation of a dogma. Thus we should, as much as possible, prevent the current practice of imposing the unfounded worldviews of religion. This is the essence of the non-establishment clause. It is only an act of fairness and due process that people of differing worldviews are regulated by something that they can all understand, and that is through reason. This is a

⁸² STEVEN PINKER, *THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE* (2003), 227.

⁸³ SAM HARRIS, *A LETTER TO A CHRISTIAN NATION* (2006).

measure of democracy because people can fully participate in the formulation of policies by being more informed and intelligent. Harris continues:

It is time we recognized that the only thing that permits human beings to collaborate with one another in a truly open—ended way is their willingness to have their beliefs modified by new facts. Only openness to evidence and argument will secure a common world for us. Nothing guarantees that reasonable people will agree about everything, of course, but the unreasonable are certain to be divided by their dogmas. This spirit of mutual inquiry is the very antithesis of religious faith.⁸⁴

The 1987 Constitution is just a text, a collation of symbols. As it is, the Anti-Establishment clause is just a collection of words on that document. It is barely a constitutional norm especially if there are numerous provisions in the constitution itself that violates it and a society that ignores it. The Anti-Establishment clause can only be given force and effect if we restructure the larger context of the legal system to be governed by reason and the rule of law. Thus what is important is a deliberate warping of the constitutional space that animates it.

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⁸⁴ Id., 48.