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The Metalegal God

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This article deals with the relation between God and the secular legal systems of Western liberal democracies. It provides a normative argument for the compatibility of God and secular legal reasoning. In our age, in which believing in God is no longer socially axiomatic and the right to religious freedom protects all kinds of theistic and non-theistic religious beliefs, creeds and first philosophies, it seems contrary to religious neutrality for secular legal systems to single out God. This article instead argues that, although God and religion are inextricably intertwined, they affect the legal system in different ways because they are ontologically different. God cannot be reduced to a mere component of theistic religion. A proper understanding of secularisation might call for keeping God outside the legal system but not for driving God out of the public sphere of democratic societies. Secular legal systems are not atheist legal systems; they are legal systems 'without religion' but not 'without God'. Secularisation implies some degree of minimal recognition of God as a metalegal concept. The specific degree of recognition of God appropriate for any given political community depends on its cultural and communitarian identity and should be subject to the rules of democratic procedures and majorities. This is the metalegal God.

Keywords: freedom of religion, God, legal system, metalegal concept, neutrality, toleration

INTRODUCTION

This article offers a theistically oriented conception of secular legal systems. It formulates a normative argument for the idea that secular legal reasoning should be open to God in order to protect both believers and non-believers. It defends the compatibility of the autonomy of secular legal systems with the idea of God as a metalegal concept. The legal systems of Western democracies can acknowledge God without supposing any 'sacrifice of liberal democratic principles' since God and religion are ontologically different and can be treated by legal systems as separated ideas.[1] In no way does the recognition of God preclude the foundational autonomy of legal systems. Indeed, the deepest connections between God and the secular legal system lie outside legal systems. The meeting point between God and the secular legal system is

1 Against this idea, see K Greenawalt, *Religion and the Constitution II: establishment and fairness* (Princeton, NJ and Oxford, 2008), p 540. He does not conclude, however, that 'the choice is wrong'.

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the human person. He or she is at the centre of the secular legal system. Legal systems should protect the human person not only as a 'subject of rights and duties' but also as an integrated and complex unity that has dignity. Thus they need to be open to transcendence, and specifically to God.

This article refers to God as a unique and infinite supreme being, creator of the universe and source of morality. God is a someone, not just a something – a *He*, not an *it*. He is a personal being but neither anthropomorphised nor limited. He is not a thing (*res*). This is the idea of God as understood by the Abrahamic religions (Judaism, Christianity and Islam) by other forms of transcendent monotheism (such as Zoroastrianism, Sikhism or Baha'i Faith) and even by some kinds of deism. And despite the increasing diversity of worldwide views towards God, this conception of God remains the most popular today.[2] This article is, of course, compatible with any other idea of God or gods. But since Western legal systems have been established and developed for centuries based on the idea of God that I have described, this is the conception that should be central to the discussion.[3]

This article refers to a secular legal system in negative terms, as a non-religion-based system – that is, as one in which there is a strict structural and substantive separation between religious sources and legal sources. Secular legal systems draw solely from legal sources and authorities. For them, revelation and religious authority never constitute proper sources. Here I will set aside constitutional models of monotheistic religious establishment and constitutional theocracies, since they already accord a legal status to God, at least through religion.[4]

Should secular legal systems renounce any idea of God in order to preserve their hallmark of secularity? My response is no. The compelling autonomy of legal sources from revelation and religious authorities does not entail that secular legal systems should marginalise God altogether. It does not make God an inadmissible or deficient concept in legal discourse. Using the famous American expression, we can say that God is on both sides of the 'wall of separation'. The wall of separation divides institutions and ideas, Church and state, religion and law, but not human beings, let alone God. Human beings can be, and should be, on both sides of the wall. God is not a member either of the political community or of the religious community. God is outside both communities but illuminative of both. God embraces and illuminates all kinds of human communities, not just religious communities.

2 See J Micklethwait and A Wooldridge, *God is Back: how the global revival of faith is changing the world* (New York, 2009), pp 12–19.

3 See H Berman, *Law and Revolution, I: the formation of the Western legal tradition* (Cambridge, MA and London, 1983), pp 165–198; and J Witte Jr, *God's Joust, God's Justice: law and religion in the Western tradition* (Grand Rapids, MI and Cambridge, 2006), pp 143–292.

4 For the concept of 'constitutional theocracy', see R Hirsckl, *Constitutional Theocracy* (Cambridge, MA and London, 2012).

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All communities, whether political or religious, are moral by definition and should pursue justice. So if God is considered a source of morality and justice, all political communities should ultimately make a moral decision about living either as if God exists or as if He does not. An affirmative answer does not require making God a legal source. This moral decision, however, has legal implications that justify the recognition of God as a metalegal concept, as we shall see. A negative answer to the question of whether God exists inevitably means excluding God from legal systems.

Secular legal systems can constitute a good framework for the establishment of a society in which believers and non-believers can live together, in peace, under equal conditions and sharing rational legal arguments – provided that these arguments are open to God. The American legal experience has pride of place in my argument because the topic of God's relation to the legal system has been discussed at great length in this country for many years.[5] Moreover, on this issue, the world seems to be moving decisively in the American direction rather than the European.[6] The expression 'under God' in the Pledge of Allegiance and the features of America's 'ceremonial deism' in general (prayers at presidential inaugurations, presidential addresses invoking the name of God, the invocation of God proper to judicial proceedings, the national motto 'In God We Trust') have sparked an interesting academic debate about the use of the name of God, which has been very useful for the development of the arguments expounded in this article.[7]

William O Douglas' famous statement that 'we are a religious people whose institutions presuppose a Supreme Being'[8] can be updated in my opinion to: 'We are now a religious and non-religious people whose institutions presuppose a Supreme Being' or at least 'whose institutions are open to a Supreme Being'. But

5 For an overview, see J Witte Jr and J Nichols, *Religion and the American Constitutional Experiment* (3rd edn, Boulder, CO, 2011). For a European approach to the topic, see J Schmidt, *Religion, Gott, Verfassung: der Religions- und Gottesbezug in der Verfassung pluralistischer Gesellschaften* (Frankfurt, 2010), esp pp 72–94. See also L Zucca, *A Secular Europe: law and religion in the European constitutional landscape* (Oxford and New York, 2013).

6 In the same vein see Micklethwait and Wooldridge, *God is Back*, p 25: 'The American model of religion – one that is based on choice rather than state fiat – is winning. America has succeeded in putting God back into modernity partly because it put modernity, or at least choice and competition, back into God.'

7 On the concept of ceremonial deism, see S Epstein, 'Rethinking the constitutionality of ceremonial deism', (1996) 96 *Columbia Law Review* 2083–2174 at 2094–2096, and, more recently, M Nussbaum, *Liberty of Conscience: in defense of America's tradition of religious equality* (New York, 2008) pp 265–272. For the Continental Congress's practice of invoking the name of God, see D Davis, 'The Continental Congress and emerging ideas of Church–state separation', in T Gunn and J Witte Jr, *No Establishment of Religion: America's original contribution to religious libertyi*(Oxford and New York, 2012), pp 183–186.

8 *Zorach v Clauson*, 343 US 36 at 313 (1952). In the same vein, see *School District of Abington Township, PA v Schempp*, 374 US 203 at 213 (1963): 'The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself.'

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it would be a mistake to say that we are a people whose institutions no longer presuppose a supreme being, let alone a people whose institutions should be closed to a supreme being. I agree with Antonin Scalia when he affirms that the 'governmental invocation of God is not an establishment'.[9] The fact that the number of unbelievers is increasing does not justify changing our institutions to the point of deleting any trace of God, but just a more open interpretation of institutions so that the rights of both believers and non-believers can be equally protected by law.

In this article I will first argue that God and religion affect secular legal systems in different ways. Second, I will argue that God, once separated from religion, links with political communities through morality. Third, I will argue that, in secular legal systems, God should be considered a metalegal concept, and that doing so would protect the integrity of the human person as a whole and strengthen the foundations of legal systems from outside. Fourth, I will argue that some degree of recognition of God by political communities is not against religious neutrality. Finally, I will argue that God is not properly a matter of toleration, as religion is, but of recognition.

THE SECULAR LEGAL SYSTEM: 'WITHOUT RELIGION BUT NOT WITHOUT GOD'

The legal distinction between God and religion should constitute a salient feature of secular legal systems. Although the idea of God remains at the heart of the idea of religion, the two ideas differentially affect legal systems just as they do other domains of human knowledge and understanding. God's existence does not evidentially depend on religion, and some religions do not evidentially depend on the existence of God. Moreover, there is no need in God's nature that is not satisfied by God Himself. So God should not be related to the legal system through religion. Just as it makes sense to talk about God without religion and religion without God, as in the sort of 'religious atheism' that Ronald Dworkin defends in his posthumous book,[10] it also makes sense to talk about legal systems with or without religion and with or without God. A legal system with an established theistic religion is a system with God and with religion; one with an established non-theistic religion has religion but not God. A secular legal system (the sort addressed here) can be with God but without religion, or without religion and without God – that is, an atheist legal system, to which this article is opposed.

9 A Scalia, *Dissenting McCreary County, Kentucky v American Civil Liberties Union of Kentucky*, 545 US 844 (2005). Against this view, see T Colby, 'A constitutional hierarchy of religions? Justice Scalia, the Ten Commandments, and the future of the establishment clause', (2006) 100 *Northwestern University Law Review* 1097–1140. To single out God does not imply to constitutionalise a hierarchy of religions.

10 See R Dworkin, *Religion Without God* (Cambridge, MA and London, 2013).

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God and religion are very close in practice, but they are ontologically different. Thus a political community may recognise God without having or imposing uniformity of religion.[11] Legal systems should take into account this essential difference. God is the subject; religion, by contrast, is the object. God is a person (*persona*); religion is a thing (*res*). God is the supreme being and creator. Religion, however, is (in general terms) a path to God or to resolving ultimate questions and concerns about human existence.[12] Using the famous definition of Émile Durkheim in his seminal book *The Elementary Forms of Religious Life*, we can say that religion is 'a unified system of beliefs and practices relative to sacred things … that unite its adherents in a single moral community called a church'.[13] On the one hand, belief in God is insufficient to capture the thousands of religious beliefs, creed and experiences around the world. On the other hand, to have and practice a religion, in the broadest legal sense, is insufficient to capture fully the idea of God. Indeed, many religions do not recognise God.

God embraces the whole reality of the human person, in his or her individual, social and transcendent dimensions; religion, however, does not. If God exists, all dimensions of human life should be ordered according to God: the legal, the social, the political and the religious. However, not all dimensions of human life should be ordered according to religion. There are many aspects of human life and understanding that lie outside religion. Religion is just one expression of human dignity. It is a very comprehensive and demanding human expression, but it does not necessarily have an impact on everything in life, as God does. Politics is not religion. Legal reason is not religious reason. However, politics and legality do not escape God. This might seem like a paradox, but it is not: on the one hand, secular legal systems should by definition be totally separate from religion, but not from God. On the other hand, secular legal systems, although separated from religion, should regulate religious issues (though they cannot, of course, 'regulate' God).

The existence of God is independent of human belief and adherence. Thus it affects not just believers in God but also non-believers. Unlike the existence of God, religion is limited to affecting (directly) religious persons and communities. There is no religion without religious people. Religion may become extinct, at least theoretically, and many religions have. But the extinction of religion would not entail the death of God.

11 In this vein, see R Williams, 'The bloody tenant of persecution for cause of conscience' (1644), in J Davis (ed), *On Religious Liberty: selections from the works of Roger Williams* (Cambridge, MA and London, 2008), p 87.

12 For a legal concept of religion, see K Greenawalt, *Religion and the Constitution, I: free exercise and fairness* (Princeton, NJ, 2006), pp 124–156.

13 E Durkheim, *The Elementary Forms of Religious Life* (New York and Oxford, 2001), p 46.

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The authentic act of adherence to a faith or creed is by nature completely free and personal. So faith can be shared only within a community of voluntary membership, such as the religious community, and not one of compulsory membership, such as the political community. The free 'I believe' can be shared only through an equally free 'We believe'. If every human being has to be a member of at least one political community to satisfy his or her basic needs and to develop his or her personal capacities, but compulsory political community may not regulate transcendent things, then the existence of a dualistic structure that guarantees freedom of religion is a democratic constitutional right.[14] At the heart of any 'secular social contract' is the idea that no political community should make an act of faith in a religious truth, for then citizens would not have the required freedom to practise (or not) a religion. Thus, political and religious communities have by definition different purposes, although both have been established for the sake of the human person. Political communities can share religious values, which do not require the act of faith, but they cannot impose a concrete religious belief as a matter of law. Faith and politics are not compatible because politics by its essence entails limitations of individual freedom for the sake of the collectivity. It is not possible to establish a completely free political community: political restrictions of liberty are necessary conditions of the existence of political communities. The fullness of freedom (*plenitudo libertatis*) can be achieved only in a community of voluntary membership, not one of compulsory membership.

The legal confusion between God and religion ultimately leads either to political atheism or to religious fundamentalism. Indeed, the rejection of God in political life, as if He were a 'religious issue', leads to a kind of political atheism, which makes it hard to protect believers in God. In contrast, the imposition of God in political life through religion leads to 'religious fundamentalism', namely to a political framework unable to establish the dualistic structure required in all political communities to differentiate religion and politics.

Religion is under the secular legal system, since it can be regulated within limits by the latter, but God is not under legal systems, since legal systems aim to protect human persons, not God. If God is infinite and utterly self-sufficient, He does not need any legal protection. Secular legal systems are not under religion since religion cannot regulate legal systems. But secular legal systems are 'under God' in the deepest sense in that God supports and illuminates all human creations and hence all legal systems. If God is really God, nothing escapes God. Moreover, if the end of legal systems is the protection of the human person, individually and socially, and the human person is a

14 For further explanation of this argument, see R Domingo, 'A new global paradigm for religious freedom', (2014) 56:2 *Journal of Church and State* (forthcoming).

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creature, then legal systems cannot close the door to the creator if they hope fully to protect the human person as a whole and not just as a subject of the legal system.

The legal recognition of God that I am talking about does not require either an act of faith (that is, a free and voluntary personal or communitarian response to God) or scientific evidence for the existence of God. A political community can recognise God as a cultural phenomenon with some legal implications – as a metalegal concept – as we shall see, without imposing any act of faith. As Justice Scalia rightly says in a dissenting judgment referring to the American religious experience: 'Historical practices thus demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion.'[15]

Recognising God does not entail believing in God or proving His existence. This might raise a question: how can a legal system recognise God without first proving His existence? Legal systems have the legal tools to do it. As is well known, legal systems use legal fictions, legal presumptions and other legal constructions and tools to identify subjects and objects of legal protection. The key for recognition by a legal system is not scientific evidence of someone or something's physical existence but the legal system's ability to identify the entity in question. Thus the legal systems of most countries can and do presume the death of missing persons, the purchase and sale of future things, the future birth of an heir, and the so-called *cautio damni infecti* to prevent potential damages. To do that, they require a minimum of information about the missing person, the thing to be sold and so on, but not scientific evidence of existence. Since millions of people believe in God as a supreme being and He is unique, the legal system can identify Him. Moreover, there is no scientific evidence that God does not exist and there will not be, unless strong atheistic interpretations of the universe are (erroneously) imposed.[16]

The legal separation of God and religion was very well established in the original right to religious freedom.[17] According to this approach, religious freedom was the political freedom required to accomplish the duty of rendering to God what human beings as creatures owed Him according to justice – or, in the words of James Madison, the father of religious freedom in the United States, 'the duty which we owe our Creator and the manner of discharging it'.[18] So

15 *McCreary County, Kentucky v American Civil Liberties Union of Kentucky* 545 US 844 (2005).

16 In the same vein, see J Ratzinger, *Christianity and the Crisis of Cultures* (San Francisco, 2006), p 85.

17 For an overview of the original framework of the right to religious freedom, see B Tierney, 'Religious rights: an historical perspective', in N Reynolds and W Durham Jr (eds), *Religious Liberty in Western Thought* (Atlanta, GA, 1996), pp 29–57.

18 See J Madison, 'Memorial and remonstrance against religious assessments' (1785) no. 1, available at <http://religiousfreedom.lib.virginia.edu/sacred/madison_m&r_1785.html>, accessed 31 January 2014. See also the Constitution of Massachusetts (1780), pt I, Article II, drafted chiefly by J Adams, available at <http://press-pubs.uchicago.edu/founders/documents/bill_of_rightss6.html>, accessed

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the end of religious communities was understood to be 'the public worship of God, and by means thereof the acquisition of eternal life'.[19] The idea of God was central to the understanding of religious freedom as its own right deserving of special treatment, and different from the rights to freedom of speech, press, association and more. As America's early religious freedom advocate Roger Williams put it, 'God requires not uniformity of religion to be enacted and enforced in any civil state'.[20] And in Locke's words, 'obedience is due in the first place to God, and afterwards to the law'.[21] According to this foundational paradigm, freedom of religion without God did not make any sense, because religion was the path to God, and freedom of religion the capacity of choosing the best path according to one's conscience. But God was outside the right to religious freedom because in no case was God considered a matter of legal protection.

In my opinion, the necessary and widely accepted expansion of the right to religious freedom in order to protect all kinds of religions and beliefs, theistic and non-theistic, should not be taken to make God just an element of theistic religions. Again, God is someone and not just something. Even the protection of the right to 'freedom from religion' and the possibility of freely saying no to God do not imply putting God inside the religious paradigm. Any attempt to reduce God to a mere legal concept is a denial of God's utter sufficiency and infinite being. The right to religious freedom exists to protect religion and personal freedom, not God as such. God should thus be outside the right to religious freedom, even as the right is expanded to protect all kinds of religions, beliefs, creeds and first philosophies.

Considering God a supreme being distinct from religion allows us to address the issue of religious neutrality in a different way from that in which it is currently addressed.[22] Neutrality in the sense of impartiality calls for diversity. So a legal system can be neutral or impartial in religious issues because there are many religions, but it cannot be neutral or impartial towards God (at least about the personal God we are discussing) because God is unique. Neutrality requires by definition at least two positive elements. The dilemma 'to be or not be' – that is, the alternative of affirming or denying – is not sufficient for neutrality because it lacks diversity.[23] So a legal system can be neutral in

31 January 2014: 'It is the right as well as the duty of all men in society, publicly, and at stated seasons, to worship the Supreme Being, the great creator and preserver of the universe.'

19 J Locke, 'A letter concerning toleration', in *The Selected Political Writings of John Locke* (New York and London, 2005), p 134.

20 Williams, 'The bloody tenant', p 87.

21 Locke, 'Letter concerning toleration', p 155.

22 See A Koppelman, *Defending American Religious Neutrality* (Cambridge, MA and London, 2013), pp 15–45.

23 For more on this argument, see R Domingo, 'A right to religious and moral freedom? A response to Michael Perry', (2014) 12:1 *International Journal of Constitutional Law* (forthcoming).

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religious issues as between theistic and non-theistic religions because these are two different kinds of religions, but it cannot be neutral as between the existence or non-existence of God. Neutrality can treat believers and non-believers in God equally, but not God and his absence.

In order for believers and non-believers in God to receive equal treatment under law, a legal system should be open to God. Otherwise a legal system treats believers in God as if they were non-believers, which would be discriminatory. To regard believers as if they were non-believers promotes uniformity but not truly equal treatment. (It would be like a legal system that, by not recognising marriage, treated both married and single people as if they were single.) If a legal system defends freedom of religion, and some religions are theistic, the system should recognise God in some ways. Otherwise, it is treating theistic religions as if they were non-theistic, which would mean unequal treatment. This is not religious neutrality.[24] It is just a sort of discrimination in favour of non-theistic religious people.

The fact that the existence of God affects the entire life of believers and non-believers is not a reason to deny God so as to keep Him from being imposed on non-believers. The reason is that the God recognised by legal systems does not generate any legal obligations for believers and non-believers beyond the duty of respect and recognition. To assimilate non-believers to believers would also be a sort of uniformity, contrary to equal treatment. But the legal recognition of God in no way treats believers as non-believers because the legal recognition of God does not require an act of faith by citizens. In no case is it an imposition – that would be against the very nature of the secular legal system.

Singling out God does not require the legal system to make any statement about the existence of God, let alone about supposed proofs for the existence of God – that is, converging and convincing arguments for the truth of His existence. Legal recognition of God is not a scientific or philosophical, let alone theological, recognition of God. Legal systems have neither the power nor the tools to produce that. It is not their business. But it is the business of a secular legal system to protect religious neutrality, and the best way, perhaps the only way, to protect theists and non-theists is to single out God as a metalegal concept, as I shall explain.

To put too much emphasis on religious neutrality can be unfair, especially if one compares two ontologically different realities such as God and religion. Statements about God are not subject to a similar analysis as statements about religion. So the fact that there are theistic and non-theistic religions does not entail that God cannot be singled out by a legal system, let alone that the name of God appearing in state constitutions should have only a

24 For a defence of the American specification of religious neutrality, see Koppelman, *Defending American Religious Neutrality*, pp 15–44.

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'historical significance' without representing 'a present and substantial doctrinal statement'.[25]

MORALITY: THE MEETING POINT BETWEEN GOD AND SECULAR LEGAL SYSTEMS

Morality is a constitutive element of the political community and ultimately of the legal system. Behind the foundational structure of each legal system there are critical moral decisions. Even the decision strongly to separate law and morality as two different entities without inherent connections, as analytical legal positivism demands, is not only a legal-philosophical decision but a moral decision: 'the morality that makes law possible', to cite Lon Fuller's famous expression.[26] Political communities cannot avoid morality, just as they cannot avoid legality.

Liberal political communities try to separate justice from the good as much as possible. But this concrete political decision is also a moral decision: the moral decision to consider justice detachable from morality, or at least to give priority to the right over the good.[27] I am not arguing that all political decisions are moral, but just those that have to do with the achievement of the good. Decisions about the colours of a country's flag or the expediency of having one or two parliamentary chambers are political but not moral. However, all political communities have to make ineluctably moral decisions in order to survive as political communities.

The potential meeting point between God and the secular legal system should be not religion but morality. On the one hand, morality and God are intrinsically connected and mutually supporting, especially in theistic religions, since God is the ultimate source of morality. On the other hand, political communities are by definition moral since they have to make inescapable moral decisions. Behind health policies, immigration strategies, capital market regulations, environmental statutes, educational standards, family protections and so on, there are always moral decisions. The fact that all communities are moral does not entail that all political communities should necessarily recognise God, let alone that those political communities that do not recognise God are not moral. As we shall see, the recognition of God strengthens moral foundations of political communities. But this recognition is not a necessary condition for political communities to become moral, even where God is considered the exclusive source of morality (as He is in the most important theistic religions). The rejection of God by

25 See Greenawalt, *Religion and the Constitution II*, p 65 n 27.
26 L Fuller, *The Morality of Law* (New Haven, CT and London, 1969), p 33; also, in a similar way, N Simmonds, *Law as a Moral Idea* (Oxford and New York, 2007).
27 On this see M Sandel, *Liberalism and the Limits of Justice* (2nd edition, Cambridge and New York, 1998).

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political communities, however, weakens the moral foundations of those communities, and there is no moral reason to reject God from political communities, once God is separated from religion.

According to most salient theistic religions, only God – God's existence and action – can fully answer questions about the good, because God is the supreme good.[28] As supreme good, God is the foundational, the ultimate and even the exclusive source and condition of morality. Exclusivity does not mean that non-believers remain outside morality, because morality itself is reasonable, and the human being is rational. Questions about the source of morality and access to morality are, at least conceptually, two different issues. A religion can reasonably argue, as Judaism, Christianity and Islam in fact argue, that God is the sole source of morality, while also arguing that people who do not worship God still have access to morality through reason. In other words, God makes morality known not only through revelation (to which not all humans have access) but also through reason and observation (to which all humans do have access). In this sense, it can be said that God is not just the ultimate source of suprarational moral principles but also of natural moral reasoning itself.

Reason as such – not in a narrow, positivistic sense open only to strictly scientific explanation, but in the broadest sense – can be considered a source of morality to the extent that it is a creation of God. Thus, as Benedict XVI said in his lecture at the University of Regensburg in 2006, 'not to act according to logos is contrary to God's nature'.[29] This affirms, in some ways, Cicero's statement that 'nothing is more divine than reason'.[30] Reason is the meeting point between believers and non-believers. For believers, human reason is a gleam of the divine reason; for believers and non-believers, it is the most powerful human capacity to find the good. This fact justifies the possibility of the establishment of political communities made up of believers and non-believers since it is possible to achieve a common public morality without imposing the idea of God. On the other side, there is no political argument to reject God, once he has been distinguished from religion.

If access to morality can be separated from God, then God and morality do not have definitional connections. Thus it is possible to talk about morality with God and morality without God, as it is also possible to talk about religion with God

28 See Matthew 19:17; Mark 10:18 and Qur'an 30.37 ('An-Nafi'') and 52.28 ('Al-Barr'). In the Jewish liturgy, God is referred to as *ha-tov*, 'the good one, whose mercies never end and whose loyalty never stops', in the second-to-last blessing of the Amidah prayer that is recited three times a day. In the same vein, but reinforcing the preponderance of the holy over the good, see A Heschel, *God in Search of Man: a philosophy of Judaism* (New York, 1955), p 17: 'Things created in six days He considered *good*, the seventh day He made *holy*.'

29 See Benedict XVI, 'Faith, reason, and the university: memories and reflections', Lecture at the Great Hall of the University of Regensburg, 12 September 2006, available at <http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/september/documents/hf_ben-xvi_spe_20060912_university-regensburg_en.html>, accessed 31 January 2014: 'Not to act "with *logos*" is contrary to God's nature.'

30 Cicero, *De natura deorum*, 1.14.37: '*nihil ratione . . . divinius*'.

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and religion without God.[31] A good explanation of the morality of secular legal systems can be provided without adverting to the existence of God.[32] So secular legal systems do not have to recognise God as a direct source of morality in order to be moral. That does not mean that God has nothing to do with secular legal systems or that such systems should reject the existence of God as an ultimate source of morality and objective moral value. What it does mean is that the morality of legal systems is detachable from God.[33] Thus there is no reason for legal systems to reject God since the morality of legal systems does not have to be the ultimate condition of legal morality as such. The morality of legal systems is autonomous but not independent. Legal systems are founded on moral principles, but these moral principles are not legal creations but legal and political decisions. This shows that legal systems can be illuminated by other sources of morality located outside the legal system for the sake of protecting the human person.

If God is considered the supreme good and therefore an ultimate source of morality (rational and suprarational morality), and if all political communities are moral by definition, all political communities should make the political and moral decision of recognising or not recognising God, that is, of living as if God exists or as if God does not exist. This is both a moral and a political decision since it is a political community that should make the decision, and the object of the decision is moral (since God is a source of morality). But it is not a religious decision in the strictest sense, although it has religious implications, because we are talking about the moral God and not the religious God. Although God is unique, human beings are able to talk about God according to different dimensions, just as we talk about human persons in different dimensions: professional, familiar, religious, political, cultural and so on.

The political decision to recognise God does not put God inside the secular legal system. It simply acknowledges the intrinsic limitations of moral, political and legal reasoning, thus supporting the possibility of being open to God. This statement is consistent with the idea that morality and objective value can be explained without mentioning the existence of God – an idea which, in turn, is compatible with thinking that further explanation is available, and that the existence of God is the ultimate explanation of morality and objective value.[34]

31 Dworkin, *Religion Without God*.
32 The argument is extensively developed by J Finnis, *Natural Law and Natural Rights* (2nd edition, Oxford and New York, 2011), p 49, and pt 3, pp 371–410.
33 In this vein, see R Swinburne, *The Existence of God* (Oxford and New York, 2004) p 215: 'I cannot see any force in an argument to the existence of God from the existence of morality'.
34 In the same vein, see Finnis, *Natural Law and Natural Rights*, p 49.

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GOD AS A METALEGAL CONCEPT

Metalegal concepts are concepts and ideas beyond legal systems that yet have some legal implications. Two features, one negative and one positive, characterise metalegal concepts. The negative is that such concepts are not legal concepts: that is, they are not legal creations in the strictest sense. The positive is that metalegal concepts have some connections with and implications for legal systems.

Contracts, presumptions, legal procedures, mortgages and international treaties are legal concepts – that is, legal creations or tools of legal systems. They are therefore not metalegal concepts. Legal systems can and should transform, adapt or change the meaning of legal concepts in accordance with their needs. Thus a concrete legal concept can have different meanings and senses in different legal systems: a US mortgage is different from a German mortgage, and a Japanese mortgage is closer to the German mortgage than to a US mortgage but distinct from both. That explains why legal translation is so difficult: the German '*Vertrag*', the French '*contrat*', the Mexican '*contrato*' and the American 'contract' are all distinct. In contrast, holiness and grace, for instance, are not legal concepts because they are not human legal creations. But neither are they metalegal concepts, since they have no impact on secular legal systems. There is no link between holiness or grace and the secular legal system.

An example of a metalegal concept is marriage. Indeed, the concept of marriage is not a legal creation. It is a social, anthropological, religious and cultural concept that affects human beings as a whole, not just as legal subjects.[35] The existence of marriage is prior to the existence of legal systems. However, the legal implications of marriage are obvious: not just in family law but also in tax law, labour law and even constitutional law. Freedoms, dignity, religion and the human person are other examples of metalegal concepts. They are primarily not legal concepts but they significantly shape the boundaries of legal systems.

Some metalegal concepts are so critical for legal systems that they require specific legal definitions. These specific legal definitions do not, nevertheless, transform metalegal concepts into legal concepts. The fact that marriage needs a legal definition does not mean that it is a legal concept and therefore entirely subject to legal reinvention. Specific legal definitions should not necessarily coincide with their metalegal definitions, but they should translate into legal standards the essence of the meaning of metalegal concepts. Legal definitions should express the hallmark of the metalegal concept. It would be nonsense to talk about legal marriage as a concept totally opposed to the metalegal concept of

35 For a deeper explanation see J Witte Jr, *From Sacrament to Contract: marriage, religion, and law in the Western tradition* (2nd edition, Louisville, KY, 2012), pp 1–15; S Girgis, R Anderson and R George, *What is Marriage? Man and woman: a defense* (New York, 2012), pp 48–52.

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marriage: for instance, to classify as a legal marriage the cohabitation of a person with his or her pet. Religion, dignity and freedom are metalegal concepts that used to lack specific legal definition. In any case, they should be legally interpreted insofar as they are frequently used in legal documents, judicial decisions and so on.

Metalegal concepts support and illuminate legal systems since they link legal systems with other dimensions of human knowledge and understanding. They are also sources of legal value. When a legal system treats metalegal concepts as legal concepts, it harms by legal manipulation the political, social and religious development of communities. That happens, for instance, when a legal system tries to use the metalegal concepts of health, religion or dignity as if they were just legal concepts, namely as legal terms completely submitted to legal standards and rules and without a life outside the legal system.

God is a metalegal concept: He meets the two features of such a concept. First, God is not a legal concept because he is prior to any human legal creation. God is a religious concept, a metaphysical concept, a theological concept, a cultural concept but not a legal concept, let alone one fixed by the standards of a secular legal system. God's existence as a cultural phenomenon is prior to any legal concept's invention.[36] If God is not a necessary condition for recognising morality within legal systems, even where He is considered the ultimate source of morality, then neither is God a necessary condition for the existence of a legal system. If God is not a necessary condition for the existence of legal systems and God is not a legal subject submitted to the legal system, God is not a legal concept.

Second, the recognition of God has some legal implications since it contributes to better understanding of the more profound features of the human person, whose protection is the end of the legal system. The deeper the legal understanding of the idea of the person, the better will be the quality of his or her legal protection. A poor and reductionist concept of person impoverishes and limits the legal protection of human beings. The recognition of God facilitates proper interactions between and among the various dimensions (individual, social and transcendent) of the human being and avoids the temptation of converting the political power into a kind of god. If a legal system does not recognise God, it is easy for it to take the position that belongs to God alone: a political community without God eventually deifies its own legal system. Sadly, history provides good evidence of it.

The recognition of God is also useful for strengthening the deepest foundations of Western legal systems. With God, it is easier to justify, understand

36 In the case of the US, this is very clearly so, as demonstrated by the famous statement attributed to many politicians (Bismarck and de Gaulle, among others) and quoted by Justice Scalia in his dissenting opinion in *McCreary County v American Civil Liberties Union* 545 US 844 (2005), at para I B: 'God watches over little children, drunkards, and the United States of America.'

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and interpret important metalegal concepts such as dignity, freedom, solidarity and human rights, as well as the connections between legality, morality, religion and politics. It is also easier to defend the validity of certain rights as moral absolutes,[37] and the importance 'to impress upon government the need for humility and restraint' since political authority is not the 'ultimate authority'.[38] This recognition of God does not mean that all secular legal systems should be based by definition on the idea of God, but that Western legal systems are better understood and more securely founded when they are open to God without rejecting him, that is, when they recognise God as a metalegal concept, as a source of external light.

The metalegal God is a 'practical' concept. It is not just a theoretical concept without implications in public life. It really strengthens the moral boundaries of legal systems and helps to protect the dignity of the person as such. The reason is that dignity is the cornerstone of legal systems but also a metalegal concept, so it needs to be protected not just from inside the legal system but also from outside. Thus, since the recognition of God strengthens dignity, the recognition of God is a good way to protect dignity. 'The conviction that there is a Creator God is what gave rise to … the recognition of the inviolability of human dignity in every single person', as rightly affirmed by Benedict XVI.[39] But this argument leads us to another point.

THE RELEVANCE OF RECOGNISING GOD AS A METALEGAL CONCEPT

As I have suggested, the reason that secular legal systems should recognise God is a reason of convenience not of necessity. If the religious God should be outside the secular legal system and the existence of the moral God is not a requirement for recognising the morality of legal systems, the argument for recognising God is based on convenience, not necessity. The metalegal God is not a precondition for the existence of political communities' legal systems. In this sense, the metalegal God does not fit with Lockean political thought, in which God has axiomatic centrality.[40] In Locke, the idea of God is the starting point. The metalegal concept of God instead locates God as an end point. Again, there is no legal reason not to recognise God by secular legal systems, once God

37 See J Waldron, 'The Image of God: rights, reason, and order', in J Witte Jr and F Alexander (eds), *Christianity and Human Rights: an introduction* (New York and Cambridge, 2010), p 234.

38 M McConnell, 'Free exercise revisionism and the Smith decision', (1990) 57 *Chicago Law Review* 1109–1153 at 1152.

39 Benedict XVI, 'Address to the Bundestag', Berlin, 22 September 2011, available at <http://www.vatican.va/holy_father/benedict_xvi/speeches/2011/september/documents/hf_ben-xvi_spe_20110922_reichstag-berlin_en.html>, accessed 31 January 2014.

40 See Locke, 'Letter concerning toleration', p 158: 'The taking away of God, even in thoughts, dissolves all.'

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has been legally distinguished from religion, and thus freedom of religion has been guaranteed. So the argument for God's rejection by the legal systems of political communities is not an argument of necessity *or* convenience, but an arbitrary demand based on the secular liberal dogma that comprehensive doctrines must be restricted in any reasonable political conception.[41]

In my opinion, there are at least two strongly connected reasons for legal systems to recognise God as a metalegal concept. First, if the end and ultimate justification of legal systems is to protect the person and the recognition of God serves to strengthen the protection of the person as a whole, it is appropriate for legal systems to recognise God as a metalegal concept. Second, if the Western legal tradition is firmly founded in the idea of the existence of God, so that the recognition of God's existence strengthens the pillars of Western legal systems, it is useful for legal systems to recognise God as a metalegal concept. Secular legal systems can justify putting God outside the legal system, but not denying or expelling Him without any justification, as if He were a strange element of legal systems.

Let us start with the first point. The end of legal systems is to protect the human person.[42] By protecting the human person as a legal subject of rights and duties, legal systems contribute to the protection of the person as a whole. But this contribution is operative only if legal systems are open to an idea of personhood that is broader than that of a mere legal subject of rights and duties. So the protection that legal systems should provide to the human person should be integral. It has to be focused on the legal but it needs to take into consideration the existence of the other dimensions (aesthetic, religious, moral and so on) of the person. Legal systems should admit that the legal concept of person is reductive by definition since it covers just a part of the person: the legal dimension. When legal systems close the door to other dimensions of the human person, they violate the 'personal status' of the person, namely his or her human dignity, which is the integrative meeting point of all the other dimensions and capacities of the human being.[43]

Legal systems should recognise that if the human person can act outside the legal system it is because there is morality outside the legal system. If there is morality outside legal systems, it is the human person, not the legal systems, who should ultimately integrate moral sources in order to make correct moral

41 See J Rawls, *Justice as Fairness: a restatement* (Cambridge, MA and London, 2001), pp 153–157; J Rawls, *Political Liberalism* (2nd edition, New York, reprint 2005), pp 58–66.

42 See Hermogenian, *Digests*, 1.5.2 (ed T Mommsen and P Krüger, *Digesta: corpus iuris civilis* (Berlin, 1954), vol. 1, 16ª): '*cum igitur hominum causa omne ius constitutum sit* …' ('all law is constituted for the sake of men'). See also *Institutiones Iustinianus* 1.12.12; J Finnis, 'The Priority of Persons', in *Intention and Identity: collected essays II* (Oxford and New York, 2011), pp 19–35.

43 For further explanation about the idea of dignity as status, see J Waldron, *Dignity, Rank, and Rights* (Oxford and New York, 2012); J Waldron, 'How law protects dignity', (2012) 71:1 *Cambridge Law Journal* 200–222 at 201.

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decisions. It is not the political community but the human person, and particularly the human conscience, that serves as the integrative centre of ultimate moral decisions: those that come from the legal system and those that come from other sources of morality. If God is considered an ultimate source of morality, the recognition of God by legal systems facilitates the protection of the human person as an integrated unity. In other words, if the human person has moral life outside the legal system, legal systems cannot ignore this life, although they need to regulate it. Otherwise, it is difficult to serve the human person as the human person needs to be served.

I am not arguing that legal systems should depend on the often capricious personal opinion of each person. What I am arguing is that in case of conflict between elements outside and inside the legal system, it is the person, not the legal system, who should make the ultimate moral judgement, provided that he or she can provide a reasonable justification that can be assumed and evaluated by legal systems. The priority of the person for a legal system means the priority of conscience, the 'most sacred of all properties', as Madison famously said;[44] the priority of the particular over the universal, and of the person over the political community, though the political community, too, has its own rights.[45]

The second reason for legal systems to recognise God is intertwined with the first: the recognition of God strengthens the deepest pillars of legal systems, linking them with the moral, the political, the legal and the religious domains. If there is no God, the legal system might be considered the exclusive source of public morality. If there is a God, the legal system can be considered an autonomous source of morality and justice, as the most binding part of all morality, but not exclusive and completely independent of other domains of morality. Legal systems should not monopolise moral sources, and the idea of God prevents legal systems from moral monopolising.[46] However, to keep God outside the legal system prevents any kind of instrumentalisation of the name of God for political interests.

The metalegal concept of God strengthens human equality since all human beings are created in the image and likeness of God (Gen 1:26–27). This does not mean that secular legal systems should accept the doctrine of the image

44 See J Madison, 'Property', in *National Gazette*, 29 March 1792, availale at <http://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html>, accessed 31 January 2014. See also R George, *Conscience and its Enemies* (Wilmington, DE, 2013), pp 106–114.

45 See J Ratzinger, *Introduction to Christianity* (San Francisco, 2000), p 161.

46 In the same vein, see M McConnell, 'The origins and historical understanding of free exercise of religion', (1990) 103 *Harvard Law Review* 1409–1517 at 1516: 'If government admits that God (whomever that may be) is sovereign, then it also admits that its claims on the loyalty and obedience of the citizens is partial and instrumental. Even the mighty democratic will of the people is, in principle, subordinate to the commands of God, as heard and understood in the individual conscience. In such a nation with such a commitment, totalitarian tyranny is a philosophical impossibility.'

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of God, let alone that legal documents should include a reference to humanity's creation in the image of God. It only means that the idea of God is a supportive argument for making equal dignity a pillar of secular legal systems, and, even more, that this idea of the 'image of God' makes it easier to defend certain rights as moral absolutes – for example, the right not to be tortured, as Jeremy Waldron rightly argues.[47] The US Supreme Court Justice John McLean, in his strong dissent in the case of *Dred Scott*, appealed to the doctrine of the image of God as an ultimate recourse for justice, arguing that 'A slave is not a mere chattel. He bears the impress of his Maker.'[48]

The metalegal God strengthens morality as such, and thus the idea of justice, as the 'chief part, and incomparably the most sacred and binding part, of all morality', since God is the source of morality and political communities cannot avoid having a morality.[49] Morality is a constitutive element of the political community, and ultimately of the legal system. Legal systems can avoid acknowledging the religious God, but not the moral God.

The metalegal God as creator also strengthens solidarity, and this serves to explain the 'spirit of brotherhood' in which the Universal Declaration of Human Rights was created.[50] Indeed, although the Universal Declaration of Human Rights does not mention God, the metalegal concept of God informs the document; its spirit of brotherhood can be most fully understood based on a common paternity, which is that of God, creator and father.[51] The metalegal God helps to define the meaning of human beings as bearers of human rights and responsibilities, since the theory and law of human rights are not secular in origin.[52]

The metalegal concept of God helps us to understand the legal ideas of mercy, compassion, forgiveness and equity, since God, as creator, is benevolent and provident towards His creatures.[53] The metalegal God also helps us to understand the relation between law and religion, and between Church and state,

47 J Waldron, *Torture, Terror, and Trade-off: philosophy for the White House* (Oxford and New York, 2010), pp 261–274.

48 *Dred Scott v Sanford*, 60 US (19 How) 393 (1956) at 550.

49 See J S Mill, *Utilitarianism* (1863) ch 5, in *On Liberty and Other Essays*, ed J Gray (Oxford and New York, 2008), p 195.

50 See Article 1 of the UDHR: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.' For the important of this expression as fundament of human rights, see M Perry, *Human Rights in the Constitutional Law of the United States* (New York and Cambridge, 2013).

51 See Pope Francis, encyclical letter *Lumen Fidei*, 29 June 2013, no 54, available at <http://www.vatican.va/holy_father/francesco/encyclicals/documents/papa-francesco_20130629_enciclica-lumen-fidei_en.html>, accessed 31 January 2014: 'Modernity sought to build a universal brotherhood based on equality, yet we gradually came to realise that this brotherhood, lacking a reference to a common Father as its ultimate foundation, cannot endure. We need to return to the true basis of brotherhood.'

52 See Witte, *God's Joust, God's Justice*, pp 31–48.

53 See T Jackson, *The Priority of Love: Christian charity and social justice* (Princeton, NJ and Oxford, 2003), pp 70–169.

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since God is a source of unity of these essentially differentiated communities. The metalegal God explains why law and religion share such concepts as obligation, mercy, fault, responsibility, duty and marriage, as well as such values as justice and equity, mercy and rule, discipline and love – concepts that protect legal systems against the virus of legalism.[54] We could go on mentioning the many connections between God and the pillars of Western legal systems, but that is not the main purpose of this article.

RELIGION NOT GOD IS A MATTER OF TOLERATION

Toleration refers to practices, attitudes or behaviours of which one disapproves, but which one allows in order to defuse a dispute.[55] Only things (*res*) in the broadest sense, not persons (*personae*), are the subject matter of toleration. Persons tolerate things but they do not tolerate other persons. Persons should be tolerant, especially in our globalised world based on diversity, but people should not tolerate persons as such. People are a matter of respect or recognition, and it is a consequence of this principle that people should tolerate certain attitudes and behaviours of which they disapprove. Personal dignity calls for respect and recognition, not for toleration. A person as such is never objectionable and therefore is not a proper object of toleration. We can object to a concrete attitude or behaviour, but not to a person. We might say that people recognise people but tolerate things. So people should respect or recognise immigrants, but (if they object) tolerate immigration. Republicans and Democrats should respect each other, but they should tolerate different political approaches and understandings of the good life. When we apply the concept of toleration to people, we insult them: 'To tolerate means offending', wrote Goethe in his famous *Maximen und Reflexionen*.[56]

If, according to the metalegal concept of God, God is a supreme being (ie, a personal being), He should never be a matter of toleration by legal systems or by citizens, as if he were a thing (*res*); instead, He should be a matter of recognition and respect. To tolerate God means offending God, we can say, paraphrasing Goethe. So secular legal systems should recognise the metalegal God and not just tolerate Him, for God is not a something but a someone. The new paradigm of religious freedom tries to reduce God to a thing, a tool of theistic religions,

54 J Witte Jr, 'Introduction', in Witte and Alexander, *Christianity and Human Rights*, p 14. See, similarly, H Berman, *Faith and Order: the reconciliation of law and religion* (Grand Rapids, MI and Cambridge 1993), p xi.

55 For an expanded historical overview of the concept, see R Forst, *Toleration in Conflict: past and present* (Cambridge and New York, 2013), pp 1–446.

56 Goethe, *Maximen und Reflexionen*, in *Werke, VI: Vermischte Schriften* (Frankfurt, 1981), p 507: 'Toleranz sollte nur eine vorübergehende Gesinnung sein: sie muß zur Anerkennung führen. Dulden heißt beleidigen' ('Tolerance should only be a temporary attitude: it must lead to recognition. To tolerate means offending').

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and thus an object of toleration. This is an erroneous way for legal systems to treat God.

Religion, in contrast, can and should be tolerated by people.[57] Religion (or non-religion) is a matter of toleration because it is a thing, a spiritual path, an attitude, a behaviour, not a person. Atheism is also a matter of toleration, not a matter of recognition, because the absence of God cannot be identified with God. Atheism is an attitude, a behaviour, which should be tolerated by citizens of political communities. We should respect and recognise theists and atheists as persons, but we should tolerate theism and atheism.[58]

What might seem to be a matter of toleration and not of recognition is the invocation of God in the public sphere, as well as the use of the name of God in legal documents, since these acts reflect an attitude towards God's position in legal systems. This attitude could generate a 'normative substantive objection', as Rainer Forst puts it.[59] I think, however, that there is no justification to reject these practices. Recognition affects the totality; toleration affects just an attitude of a person. So, we can recognise a man but only tolerate his drunkenness. Recognition implies invocation. The mention or invocation of a person affects the entire person as such, so that it should not be a matter of toleration but of recognition. Invocation is external recognition. Thus the possibility of being mentioned is the first consequence of recognition.[60] As a result, the recognition of the metalegal God entails public invocation. Otherwise it is not a real recognition.

CONCLUSION: THE METALEGAL GOD

Secular legal systems should be open to God since they are not technically *atheist* legal systems. Secular legal systems are legal systems 'without religion' but not 'without God'. God and religion are ontologically different. They can thus be treated by secular legal systems in different ways. God links first with the secular legal systems of political communities through morality, not through religion. Since all political communities are moral communities, God can be on both sides of the wall of separation: with politics *and* with religion. Otherwise, He will be not God, but a god.

God cannot be considered by secular legal systems as just a tool of theistic religion. God should be considered by secular Western democratic systems as a metalegal concept. Acknowledging a metalegal concept of God helps protect

57 For a new approach on religious toleration, see B Leiter, *Why Tolerate Religion?* (Princeton, NJ and Oxford, 2013).
58 Against the toleration of atheism, see Locke, 'Letter concerning toleration', p 158.
59 Forst, *Toleration in Conflict*, pp 18 ff.
60 Against this argument, see M Nussbaum, *Liberty of Conscience*, p 12: 'First of all, we should remember that even an apparently nonsectarian reference to God is in fact sectarian and excludes many people.'

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the person as an integrated unity and not just as a legal subject. It also helps protect the moral boundaries of legal systems from outside. The metalegal God strengthens other metalegal ideas such as dignity, solidarity, equality and freedom, which are at the heart of all democratic legal systems.

The recognition of the metalegal God does not require either a personal or a communitarian act of faith, because the metalegal God is God without the religious dimension. The metalegal God does not demand legal protection or a specific legal status because the legal system is for the sake of human beings, not God. The metalegal God is outside the legal system, but He illuminates it since His existence permits a deeper understanding of ultimate connections of legal systems with morality. The metalegal concept of God preserves religious neutrality.

A secular society should be tolerant of both theistic and non-theistic beliefs, creeds and first philosophies. Beliefs, creeds and first philosophies are matters for toleration. The metalegal God, however, should be recognised, not just tolerated. He is a someone, not a something. Religious neutrality is not opposed to the metalegal God, since the metalegal God does not embrace the religious dimension of God. Using American legal terminology, we can say that God is outside the establishment clause of the First Amendment. The recognition of God as a metalegal concept allows the use of the name of God in legal documents, and His invocation in the public sphere without violating religious neutrality. The metalegal concept of God allows us to establish and develop in peace a political community consisting of both believers and non-believers in God, thus protecting and defending the rights of all citizens. In sum, secular legal systems can also have a place for God outside the legal system, and illuminating it, and this is possible through legal recognition. God bless secular legal systems.

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