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*by Richard A. Baer, Jr.**

No one who has observed the momentous shift in public attitudes towards racist and sexist language over the past three decades can fail to be impressed with how much America has changed in some fundamental ways. Unless one is willing to risk job and reputation, there are certain terms—wop, hymie, nigger, to name but a few—that one simply does not use in public, whatever one does in private.

Just ask James Watt, Jimmy the Greek, or Jesse Jackson. Their failure to understand that public standards are much higher than they were three decades ago damaged or derailed their careers. Even granting that the media may push the taboo too far at times—there is some disagreement whether the Greek's punishment fit the crime—still overall no sensitive and fair-minded citizen can help but applaud the change.

Given these circumstances, it is noteworthy that one unusually prejudicial term continues to go virtually unchallenged. It can be found on the lips of university presidents, politicians, and church leaders. You will see it in proclamations of the American Civil Liberties Union. And you will read it in a substantial number of Supreme Court decisions.

The term is "sectarian."

Throughout American history, "sectarian" has been used to exclude and to ostracize. It is a term that is used to disparage and marginalize particular groups of Americans and particular kinds of thinking.

That "sectarian" is hardly a flattering term is evident from even a

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cursory look at any standard dictionary.¹ Among its more common synonyms are "bigoted," "narrow-minded," "heretical," "parochial," and "dogmatic." Christians have used the word to describe Pharisees, atheists, and other Christians; Unitarians to put down Presbyterians and Roman Catholics; political liberals and conservatives to insult each other.

Given this range of meanings with consistently pejorative connotations, it is disturbing to note that the mass media regularly use the term "sectarian" to describe and label individual Americans and groups of Americans.² Even more disturbing, however, is its use by the Supreme Court and indeed our entire system of courts. Although the usage dates back to roughly the middle of the nineteenth century, since the end of World War II the highest tribunal of our land has in fact used the term "sectarian," not just as a synonym for "denominational," but as a full-fledged equivalent for the word "religious."³

The formula "religious = sectarian" begins to appear regularly in Supreme Court cases only since the 1947 case of *Everson v. Board of Education*,⁴ but of course the Supreme Court dealt with few first amendment religion cases of any kind before that time.⁵ There are scores of passages where the Court embraces the "religious = sectarian" equation, and I shall mention just a few representative examples. The Court refers to sectarian "opposition,"⁶ "doctrine,"⁷ "dogmas,"⁸ "control,"⁹

¹ Oxford American Dictionary 612 (1980) ("a person adhering to a sect, especially in a bigoted fashion").

² See, e.g., Garrity, *U.S. Jewry: Is the Momentum Gone?*, N.Y. Times, Nov. 26, 1989, § 7, at 5, col. 3 (describing assimilation of ethnic groups as a transition to a more "sectarian, old-fashioned society"); Delbanco, *Abraham Lincoln: Speeches and Writings*, New Republic, Nov. 20, 1989, at 1 (describing American political history as a history of "sectarian politics").

³ Perhaps the most remarkable (and the saddest) usage of "sectarian" as a synonym for "religious" is when church leaders and religious organizations use the term to describe themselves. Such usage reminds me of how blacks in an earlier day sometimes referred to each other or even themselves as "niggers." I also recall the depressing scene from the 1968 (but only recently released) Soviet film *Commisar* that depicted Jewish children acting out violence towards Jews as they played the pathetic game of "pogrom." When a form of persecution or discrimination becomes deeply enough ingrained in a culture, the oppressed may themselves lack awareness of how damaging and unjust it is.

⁴ 330 U.S. 1 (1947).

⁵ This paper does not examine how the term "sectarian" has been used in lower federal courts or in state courts.

⁶ *McCullum v. Board of Educ.*, 333 U.S. 203, 214 (1948).

⁷ *Id.*

⁸ *Id.* at 218.

⁹ *Id.* at 220.

"instruction,"¹⁰ and "teaching."¹¹ It describes schoolchildren¹² and personnel¹³ as "sectarian." It mentions "sectarian schools," "sectarian education,"¹⁴ and "sectarian classes."¹⁵ It writes of states that have "large and varied sectarian populations."¹⁶ It uses the term "sectarian needs" in conjunction with the phrase "the religious nature of our people."¹⁷

The formula "religious = sectarian" enjoys wide acceptance today, so much so that its occurrence seems quite unremarkable to most Americans. But when we reflect on the mean pedigree of the term "sectarian," the usage seems troublesome, to say the least.

The reason is really quite simple. Even though the term "sect" can have the relatively neutral meaning of "a group of persons having the same principles, beliefs, or opinions"¹⁸ or can be employed technically in a non-pejorative sense by sociologists of religion, the ordinary usage of "sectarian" is derogatory. Indeed, "sectarian" more often than not is what we might call "caste language." It is a term that has been used throughout much of American history to keep religious and social "untouchables" in their proper place. Just as ruling elites have used racial and sexual epithets to put down blacks and women, so they have used "sectarian" to exclude and marginalize those individuals and groups whose religious or philosophical beliefs or social practices did not correspond to their own vision of what was appropriate in the cultural marketplace.

It is hardly conceivable that our society could deal justly with blacks and other minorities if we had not decisively rejected terms like "Sambo," "pickaninny," or "Polack." Would not the same logic demand that we stop using "sectarian" as a synonym for "religious?"

"Sectarian" always implies that there exists a contrasting mainstream, a right way of thinking, a common position that deserves to be accepted by everyone. It is unconstitutional for government to prefer one religious denomination or viewpoint over others. But does it not violate the spirit of the first amendment when government discriminates against religious persons by describing the secular person as

¹⁰ *Id.*

¹¹ *Id.* at 226.

¹² *Committee for Pub. Educ. and Religious Liberty v. Regan*, 444 U.S. 646, 649 (1980).

¹³ *Id.* at 658.

¹⁴ *Id.* at 668.

¹⁵ *Id.* at 669.

¹⁶ *Aguilar v. Felton*, 473 U.S. 402, 416 (1985) (Powell, J., concurring).

¹⁷ *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

¹⁸ 2 World Book Dictionary 1881 (C. Barnhart & R. Barnhart ed. 1980).

"nonsectarian" and the religious person as "sectarian," thus, in effect, proclaiming that what is really common or mainstream in our society is secular rather than religious?¹⁹

Some parents are compelled by conscience to seek a religious education or religious day care for their children. Quite apart from the question of whether government should *pay* for such education or day care, it seems hardly conceivable that any fair-minded person would argue that the state has a right to demean such citizens, their children, and the people who serve them by implying that they are bigoted, narrow-minded, and unorthodox. The spirit of the first amendment suggests that the state should be held totally incompetent to make such pronouncements.

The term "sectarian" carries with it such a generous supply of negative connotations that its use as a synonym for "religious" is inevitably prejudicial, no matter what the writer's intent. Not only do actual dictionary definitions support this claim, but passages from specific court decisions also lend it credence. Whenever "sectarian" is used as a full synonym for "religious," even if no negative meanings are intended, there appears to be a degree of "contamination" from the older, pejorative use of the term, a kind of "bleeding off" of some of the earlier connotations into the newer context. Much of this may take place at a level below that of full consciousness, but it is still significant. This process is facilitated by the fact that right up to the present time the Court occasionally uses the term "sectarian" in its older meaning of "narrow," "denominational," or "particular," in such expressions as "nonsectarian prayer"²⁰ or "the religious and indeed sectarian significance of the creche."²¹ Thus this process of "contamination" does not

¹⁹ This is not to deny that the political structure and operation of our government is secular or nonreligious. Americans have agreed to cooperate with each other politically within a secular framework, but this does not entitle secular morality or secular philosophical and metaphysical comprehensive views of reality to any special status, nor should it entitle government to use the term "sectarian" to describe particular religious persons, groups, or institutions. See discussion *infra* notes 77-85 and accompanying text, including references to the work of John Rawls.

²⁰ *Marsh v. Chambers*, 463 U.S. 783, 819 (1983) (Brennan, J., dissenting).

²¹ *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring). See also *id.* at 717 ("And the creche, because of its unique association with Christianity, is clearly more sectarian than those references to God that we accept in ceremonial phrases or in other contexts that assure neutrality."); *Abington School Dist. v. Schempp*, 374 U.S. 203, 271 (1963) ("[T]he religious aims of . . . educators . . . were comprehensive, and in many cases quite devoid of sectarian bias . . . but were nonetheless religious."); *Board of Educ. v. Allen*, 392 U.S. 236, 253 (1968) (Black, J., dissenting) ("sectarian religious viewpoints"); *Zorach*, 343 U.S. at 324 (Jackson, J., dissenting) ("sectarian religious purposes"); *Everson v. Board of Educ.*, 330 U.S. 1, 32 (1947) (Rutledge, J., dissenting)

arise just from a general consciousness of the term's older, pejorative meaning, or from its pejorative use by society at large, but also from the coexistence of the older and newer meanings within the same decisions.

Even when the Court apparently intends "sectarian" to function as a neutral synonym for "religious," the term is often used in conjunction with other terms of a negative sort. Thus the Court refers to "sectarian exclusivity,"²² "narrower sectarian purpose,"²³ "sectarian division,"²⁴ "sectarian controversies,"²⁵ "political fragmentation on sectarian lines,"²⁶ and "sectarian bickering and strife."²⁷ Terms such as "bitter controversies,"²⁸ "proselytizing function,"²⁹ and "bias"³⁰ are closely conjoined with the term "sectarian." The expression "religious indoctrination" is associated with the phrase "pervasively sectarian environment."³¹ Justice Brennan, concurring in *Abington School District v. Schempp*, refers to public schools as providing "an atmosphere free of parochial, divisive, or separatist influences of any sort."³² He then proceeds to contrast "a public secular education with its uniquely democratic values, and some form of private or sectarian education, which offers values of its own."³³ Finally, he refers to "jeopardizing the freedom of the public schools from private or sectarian pressures."³⁴

Conversely, the Court uses more neutral or even positive language in conjunction with the terms "secular" and "nonsectarian." It mentions "secular, neutral, and nonideological purposes" of a school.³⁵ Implying that the sectarian school's educational functions are ideological, it refers to "secular and nonideological services unrelated to the primary,

("all forms of religious expression, creedal, sectarian or nonsectarian, wherever and however taking place").

²² *Lynch*, 465 U.S. at 700 (O'Connor, J., concurring).

²³ *Id.*

²⁴ *Id.* at 721-22.

²⁵ *Id.* at 722.

²⁶ *Larson v. Valente*, 456 U.S. 228, 252 (1982).

²⁷ *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring).

²⁸ *Lemon v. Kurtzman*, 403 U.S. 602, 645 (1971) (Brennan, J., concurring in part and dissenting in part).

²⁹ *Id.* at 659.

³⁰ *Schempp*, 374 U.S. at 271.

³¹ *School Dist. v. Ball*, 478 U.S. 373, 388 (1985).

³² *Schempp*, 374 U.S. at 242 (Brennan, J., concurring).

³³ *Id.*

³⁴ *Id.*

³⁵ *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 780 (1973).

religious-oriented educational function of the sectarian school,"³⁶ and to "wholly neutral, secular instructional material and equipment."³⁷

Once Americans grasped the social and psychological implications of employing epithets like "nigger" and "hymie," it became utterly inappropriate even to debate their continued use. Fairness demanded that these terms be dropped altogether. Similarly, once the discriminatory and prejudicial nature of the equation "religious = sectarian" is perceived, it becomes a matter of simple justice for public officials to abandon this terminology in public discourse. A reasonable sense of justice demands that this formula not appear one more time in any court decision, except when its usage is unavoidable, for instance, when quoting earlier cases or referring to statements or judgments of parties before the courts. For agents of government to employ such language fundamentally violates the spirit of the first amendment and the genius of the American political experiment.

It will not do to argue that "sectarian" has become a technical legal and constitutional term with its own restricted meaning and that the Court means no harm. Both points are true but irrelevant. What is important is that there simply is no way the Court can use it, whatever its intentions, without prejudicial effect.

I. HISTORICAL BACKGROUND

If the problem were merely one of the Court using biased terminology—that is, a case of judicial bad manners—then finding a different way to talk about religion would eliminate the problem. But just as the use of epithets like "nigger" and "hymie" is not simply a matter of rudeness but reflects a deeper understanding of the status of minorities and of the nature of the good society, so the Court's usage of the terms "sectarian" and "nonsectarian" should alert us to the fact that something may be wrong with the way the Justices view the world. Their language is symptomatic of a deeper disease, an underlying distortion in how the Court construes the relation between the religious and the secular.

Indeed, an examination of the historical and philosophical background of the use of "sectarian" as a synonym for "religious" clearly supports this hypothesis. What quickly becomes apparent is that the founding father whom many of us most clearly associate with freedom

³⁶ *Meek v. Pittenger*, 421 U.S. 349, 364 (1975). The term "ideological" may be used in a reasonably neutral fashion, but it typically carries with it pejorative connotations.

³⁷ *Id.* at 366.

of religion and conscience—Thomas Jefferson—must share at least part of the blame for our use of this discriminatory language. In his private correspondence especially, Jefferson regularly referred to orthodox, Trinitarian Christians—those who believed in the deity of Christ and the traditional doctrine of salvation—as "sects" or "sectarians."³⁸ He held that their beliefs were based on dogma, superstition, and revelation. Strongly anti-clerical throughout his life, Jefferson was extremely critical of traditional Christian faith.³⁹ He held that the "sectarian" views of traditional Christians should remain private and not function as part of public education or politics.⁴⁰

By contrast, Jefferson considered his own Unitarian and Enlightenment convictions about morality and religion to be universal and nonsectarian.⁴¹ He firmly believed that his understanding of the life of Jesus and of the early Christians was historically more accurate than that of the orthodox. In emphasizing God as Creator and Sustainer of life and at the same time rejecting the Christology and soteriology of the historical church, Jefferson believed he was emphasizing what was truly common to all Christians and thus "nonsectarian."⁴² Moreover, he considered his own views to be compatible with science and to be grounded in reason and common sense, not in dogma and superstition. Because he was convinced that his views were common to all Christians and were essentially rational and universal, he believed that they

³⁸ See R. Healey, *Jefferson on Religion in Public Education* 95-116, 202-226 (1962). See also R. McCarthy, D. Oppewal, W. Peterson & G. Spykman, *Society, State, and Schools* 81-86 (1981) [hereinafter *Society, State, and Schools*]; R. McCarthy, J. Skillen & W. Harper, *Disestablishment a Second Time: Genuine Pluralism for American Schools* 15-51 (1982) [hereinafter *Disestablishment a Second Time*].

³⁹ See Letter to William Short (Oct. 31, 1819), in Thomas Jefferson: *Writings* 1431 (M. Peterson ed. 1984) [hereinafter *Jefferson's Writings*]. Jefferson hoped for "a quiet euthanasia of the heresies of bigotry and fanaticism ['invented by ultra-Christian sects'] which have so long triumphed over human reason, and so generally and deeply afflicted mankind." *Id.* at 694.

⁴⁰ *Disestablishment a Second Time*, supra note 38, at 42.

⁴¹ *Society, State, and Schools*, supra note 38, at 81-83.

⁴² Jefferson, of course, did not have the benefit of modern critical Biblical studies, which have clearly shown that in both Judaism and Christianity, soteriology precedes any distinctive doctrine of creation. Thus experientially and theologically, the events recorded in Exodus precede and are the basis for Genesis, and the *kerygma* of the early church is earlier than teachings associating Jesus Christ with creation. This is to say that *Heilsgeschichte* (salvation history) is older than and theologically the basis for the doctrine of God as Creator. Precisely because the Hebrews came to know God as the one who delivered them from slavery in Egypt and brought them into the promised land, they reasoned that he must also be the one responsible for the creation of the world and of human beings. Similarly, Christians first experienced Jesus Christ as Redeemer and only afterwards developed doctrines that associated him with creation. See G. von Rad, *1 Old Testament Theology* 105-153 (1962).

deserved to become the basis of public morality and politics.⁴³

Horace Mann, a key figure in the founding of the common school movement, thought much like Jefferson.⁴⁴ He fervently believed that religion should be taught in the compulsory common schools, but it should be of a nonsectarian variety—a religion that he thought was common to all Christians, but that, when all was said and done, looked almost identical to his own Unitarianism.⁴⁵

Similarly, in the great school wars that took place in New York City during the first half of the nineteenth century we find a very similar pejorative use of the term "sectarian." The Free School Society, which wanted control over all tax revenues committed to education, routinely referred to Baptist and Catholic schools as "sectarian," whereas they described their own schools as "nonsectarian."⁴⁶ Founded in 1805 and originally called "The Society for establishing a Free School in the City of New York, for the education of such poor children as do not belong to, or are not provided for, by any religious society,"⁴⁷ the Free School Society was established by an elite group of New York business and civic leaders.⁴⁸ The single strongest influence in the society was Quaker, and its religious orientation was a kind of nondenominational liberal Protestantism.⁴⁹ The Society advertised itself and its schools as "nonsectarian"—even though they taught religion as well as morality.

Conflict in New York City over school funding became intense between 1822 and 1842. The Free School Society opposed Baptist and Catholic demands for a fair share of public monies, arguing the illegitimacy of any public funds going to such "sectarian" schools.⁵⁰ In 1826 the Society changed its name to the "Public School Society,"⁵¹ a move that likewise reflected their confidence that their own "nonsectarian" orientation was of a different order from the parochial, denominational, "sectarian" position of their opponents.

Catholic Bishop John Hughes, who led the fight against the Public School Society, attacked the alleged "secularity" and "nonsectarian"

⁴³ See *Disestablishment a Second Time*, supra note 38, at 42-43.

⁴⁴ See C. Glenn, *The Myth of the Common School* 63, 146 (1988).

⁴⁵ *Id.* at 146-78. See also *Disestablishment a Second Time*, supra note 38, at 56-60.

⁴⁶ See *Disestablishment a Second Time*, supra note 38, at 60-70; *Society, State, and Schools*, supra note 38, at 87-92.

⁴⁷ D. Ravitch, *The Great School Wars* 9 (1974).

⁴⁸ *Id.* at 8-9.

⁴⁹ *Id.* at 9.

⁵⁰ *Disestablishment a Second Time*, supra note 38, at 62; D. Ravitch, supra note 47, at 20-21.

⁵¹ D. Ravitch, supra note 47, at 22.

character of the public schools.⁵² He identified what Rockne McCarthy refers to as "the fundamental dilemma created by every effort to maintain a majoritarian, monopolistic public school system in a religiously pluralistic society."⁵³ For Catholics, who were not in favor of individual interpretation of Scripture, the simple reading of Scripture (especially from the King James version) commonly practiced in the "public" schools was anything but a religiously neutral or "nonsectarian" activity. It was an establishment of a majority's religion against a minority's. Moreover, Bishop Hughes noted, if religious instruction were altogether omitted from the school curriculum, this would merely leave students "to the advantage of infidelity."⁵⁴

Looking back on the conflict 150 years later, it seems not unwarranted to conclude that class interests as well as theological differences were at stake.⁵⁵ Historian Michael Katz bluntly comments on the Society: "[M]ake no mistake about it: This was a class system of education. It provided a vehicle for the efforts of one class to civilize another and thereby ensure that society would remain tolerable, orderly, and safe."⁵⁶

Jefferson might be excused for his use of the term "sectarian," for he honestly—even if mistakenly—believed that his own non-Trinitarian religious convictions were of a different and more rational order than those of the orthodox Christians of his day.⁵⁷ He believed that reason, nature, common sense, and man's innate moral sense could show us with clarity and certainty the basic contours of true religion and morality.⁵⁸ He sincerely believed that he had succeeded in distilling the essence of Christ's teaching and that this "nonsectarian" religion, uncontaminated by later theological speculation, would ultimately win out over traditional dogma and superstition. Indeed, he thought that

⁵² *Disestablishment a Second Time*, supra note 38, at 67. See also *American Writings in Popular Education: The Nineteenth Century* 101 (R. Weiter ed. 1971) [hereinafter *American Writings*].

⁵³ *Disestablishment a Second Time*, supra note 38, at 67.

⁵⁴ See Hughes, *The Petition of the Catholics of the City of New York* (Sept. 21, 1840), in 7 *Documents of the Board of Aldermen of the City of New York* (1840-1841), reprinted in *American Writings*, supra note 52, at 104. See also *Society, State, and Schools*, supra note 38, at 90.

⁵⁵ See D. Ravitch, supra note 47, at 3-76. See also *Disestablishment a Second Time*, supra note 38, at 60-70; *Society, State, and Schools*, supra note 38, at 87-92.

⁵⁶ M. Katz, *Class, Bureaucracy, and Schools: The Illusion of Educational Change in America* 9 (1975). See also D. Ravitch, supra note 47, at 10 ("Historians Kaestle and Michael Katz have described [the Society] as a waning elite using its schools to control the lower class.").

⁵⁷ See *Disestablishment a Second Time*, supra note 38, at 16-17.

⁵⁸ *Id.* at 18-19. See also R. Healey, supra note 38, at 107.

his "nonsectarian" beliefs *deserved* to become the basic beliefs of everyone.⁵⁹

Because some of Jefferson's most biased tirades against orthodoxy occurred in his private correspondence, Christians of his day did not clearly realize how prejudiced he was against their religious beliefs.⁶⁰ Also, they were tired of their own doctrinal and ecclesiastical squabbles, and thus were content to see the public life of the nation as nonsectarian (in the limited sense of nondenominational) and even secular.

Horace Mann's ideas were similarly problematic. In *The Myth of the Common School*, Charles Glenn notes that orthodox Protestant theologians, like Charles Hodge of Princeton, rightly understood that the "nonsectarian religion" that Mann promoted in the common school basically ignored fundamental Christian doctrines about human sin and about the person and work of Jesus Christ.⁶¹ But Mann was extraordinarily successful in promoting his vision of a common education that incorporated "nonsectarian religion,"⁶² and many orthodox Protestants seem not to have fully grasped the degree to which Mann's allegedly common and "nonsectarian" religion was foreign to their own deepest convictions. Also, by the late 1840s concern about social disintegration—fears of atheistic belief, Roman Catholic immigration, religious enthusiasm—led to a gradual softening of orthodox Protestant opposition to Mann and other school reformers.⁶³ These other threats apparently seemed more serious than the mistaken theology of the Unitarians and liberal Protestants. Ironically, orthodox Protestants quite overlooked the fact that theologically, if not culturally, they were closer to the Catholic immigrants than they were to the Unitarians.

Rather than being religious or theological, the primary objective of Horace Mann and the other school reformers was social in a broader sense. Glenn writes that they "were not primarily concerned to pro-

⁵⁹ Jefferson and other rationalists

held that only what is common to all religions and all sects . . . is relevant to the being and well-being of the *commonwealth*. This is the theology behind the legal structure of America, the theology on which the practice of religious freedom is based and its meaning interpreted. Under it, one might say, it is religious particularity, Protestant or otherwise, that is heretical and schismatic, even un-American.

S. Mead, *The Nation with the Soul of a Church* 22 (1975) (emphasis in original).

⁶⁰ See, e.g., Letter to Dr. Thomas Cooper (Nov. 2, 1822), in *Jefferson's Writings*, supra note 39, at 1463-65; Letter to John Adams (Apr. 11, 1823), in *id.* at 1466-69. See also *Disestablishment a Second Time*, supra note 38, at 15-29; R. Healey, supra note 38, at 114-16, 235-238.

⁶¹ See C. Glenn, supra note 44, at 179-206.

⁶² *Id.* at 158-78.

⁶³ *Id.* at 63-85, 179-206.

mote Protestantism or even Unitarianism. That would have been contrary to the elitist and increasingly complacent character of Unitarianism after about 1825 . . ."⁶⁴ They were mainly concerned to inculcate proper social values in the children of the poor and of Catholic immigrants, thereby maintaining social unity and peace.⁶⁵

It is important to be clear that neither Jefferson nor the participants in the Massachusetts and New York City school conflicts of the first half of the nineteenth century considered "sectarian" a synonym for "religious," or considered "nonsectarian" as equivalent to "nonreligious." For Jefferson and Mann—as well as for the leaders of the Public School Society—"sectarian" referred to *the wrong kind of religion*. Rather than sticking to the simple teachings of Jesus that constituted the true "nonsectarian" essence of Christianity that all Christians held in common, the "sectarians" insisted on adding to this common heritage the dogmas and superstitions of ignorant men.

What in effect has happened over the past 150 years is that the bias of Jefferson and Mann and New York City's Public School Society against certain religious people and beliefs (mainly traditional Christians) has been extended to religious people in general. Already in the early 1840s we can find evidence for a critical shift in terminology. In defending its educational views before the New York City Common Council, the Public School Society stated:

We have the right to declare moral truths. . . . We thus undertake in these public schools to furnish this *secular* education, embracing as it does, not solely and exclusively the common rudiments of learning, but also a knowledge of good morals, and those common sanctions of religion which are acknowledged by every body.⁶⁶

Here we find the term "secular" used where we would have expected the term "nonsectarian." But if the secular is equated with the nonsectarian, this leaves open the way for describing the religious as the sectarian—not just *orthodox* or *traditional* religion but *all* religion.

My research does not yet allow me to say with confidence just when the term "sectarian" first appears as a full-fledged synonym for "reli-

⁶⁴ *Id.* at 151.

⁶⁵ *Id.* Glenn argues that this is a case of "false consciousness" in the sense described by Mannheim: "[K]nowledge is distorted and ideological when it fails to take account of the new realities applying to a situation, and when it attempts to conceal them by thinking of them in categories which are inappropriate." See K. Mannheim, *Ideology and Utopia* 96 (1936).

⁶⁶ See V. Lanie, *Public Money and Parochial Education: Bishop Hughes, Governor Seward, and the New York School Controversy* 83 (1968) (quoting W. Rourne, *History of the Public School Society of the City of New York* 242-43 (1970)) (emphasis added).

gious," but we know that by the time of the Civil War the constitutions of five states (Wisconsin, Michigan, Indiana, Oregon, and Minnesota) forbade the use of public monies for "sectarian" (that is, religious) purposes, and various Western states after the Civil War constitutionally forbade religious instruction, usually described as "sectarian," in public schools.⁶⁷

In 1948, Justice Black, writing for the majority in *McCullum v. Board of Education*, stated: "[B]y 1875 the separation of public education from Church entanglements, of the State from the teaching of religion, was firmly established in the consciousness of the nation."⁶⁸ "In that year," Justice Black continues, "President Grant made his famous remarks to the Convention of the Army of the Tennessee."⁶⁹ Grant told his audience:

Encourage free schools, and resolve that not one dollar appropriated for their support shall be appropriated to the support of any sectarian schools. Resolve that neither the State nor nation, nor both combined, shall support institutions of learning other than those sufficient to afford every child growing up in the land the opportunity of a good common-school education, unmixed with sectarian, pagan, or atheistical dogmas. Leave the matter of religion to the family altar, the church, and the private school, supported entirely by private contributions. Keep the church and the state forever separate.⁷⁰

Justice Black noted that "President Grant urged that there be written into the United States Constitution particular elaborations, including a specific prohibition against the use of public funds for sectarian education, such as had been written into many State constitutions."⁷¹ The Republicans won the presidential election of 1876 but were not successful in gaining the necessary two-thirds majority needed in the Senate to ratify the proposed constitutional amendment forbidding public money to be used for "sectarian" schools.⁷² Congress did, however, pass legislation that required all states admitted to the Union after 1876 to adopt in their constitutions a requirement to maintain school systems "free from sectarian control."⁷³

⁶⁷ *Disestablishment a Second Time*, supra note 38, at 71.

⁶⁸ *McCullum*, 333 U.S. at 217.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 218-19.

⁷² See *Disestablishment a Second Time*, supra note 38, at 71-72.

⁷³ *McCullum*, 333 U.S. at 220. See also *Disestablishment a Second Time*, supra note 38, at 71-72.

II. PHILOSOPHICAL AND THEOLOGICAL CONSIDERATIONS

Not only does modern Biblical scholarship contradict Jefferson's understanding of what constitute the genuine words of Jesus or his view of Paul as the arch-corruptor of the authentic teaching of Jesus, but it is also possible to marshal convincing epistemological arguments against Jefferson's conviction—shared also by Horace Mann—that reason and common sense gave special support to his religious convictions as over against those of the orthodox Christians of his day. As Rockne McCarthy concludes, Jefferson's position "was not as self-evident as it was self-serving."⁷⁴ Jefferson and Mann may have thought that their Unitarian and Enlightenment views were based on reason in some unique manner, but a close examination of their views reveals that they depend upon certain epistemological commitments and assumptions just as did the views of the orthodox Christians they so roundly condemned.

Similarly, in our own day, when the heirs of the Enlightenment attempt to argue that secular reason holds a privileged place *vis-à-vis* religious or theistic reason, their position is not convincing. There are no reasonable epistemological standards that allow us to judge theological thinking as inherently inferior or less reliable than secular or nontheistic thinking. Nor is there a preferred secular mode of moral reasoning that can, without benefit of argument, legitimately exclude religious convictions about morality. Secular and religious thinkers alike stand under the same obligation to engage one another dialectically without *a priori* assumptions of epistemological superiority. All human thinking makes use of tradition, takes place within a particular framework of epistemological and metaphysical assumptions, and entails risk of error. This is true of the secular thinker as well as the religious thinker. Neither possesses some kind of totally objective, neutral, rational algorithm that will give her results that are inherently more reliable than those of the other.

This recognition does not require us to retreat to a position of relativism and subjectivity or hold that different world views are radically incommensurable. Nor does it mean that one cannot be in possession of good reasons for adopting one world view rather than another. Rather, I am calling attention to the fact that secular and theological thinking about morality takes place within particular paradigms or in light of certain central commitments. As in science, one cannot doubt all of these simultaneously, but one is free to question individual commitments within the total paradigm and adjust them if necessary. Also,

⁷⁴ *Society, State, and Schools*, supra note 38, at 83.

as in science, it may be that the tensions between one's central commitments and one's experience may become so great that one will abandon the basic paradigm and adopt another. But this happens precisely because in both science and in secular and theological moral thinking one makes use of critical reflection and does not believe something for no reasons at all.⁷⁵

If my argument is correct, then Thomas Jefferson and Horace Mann were mistaken not only in their assessment of what was truly common among Christians of their own time. Nor did their use of the term "sectarian" simply reflect a certain lack of charity towards their opponents. They also operated in terms of a faulty understanding of human rationality. They lacked conceptual clarity about the nature of human thinking. Likewise, when the Supreme Court today employs the equation "religious = sectarian," and when it gives a special place to secular or nontheistic thinking and values, it is not just acting in an uncivil manner comparable to using sexist or racist language. It is also misconstruing the fundamental relationship between the religious and the secular. Thus, although it is offensive and discriminatory for the Court to employ the equation "religious = sectarian," such judicial "cussing" is really only a symptom of a deeper problem. That deeper problem is that the Court, operating within its present conceptual framework for construing the relationship between the religious and the secular, simply cannot achieve public justice for religious Americans.

My argument assumes that all of our knowing, as finite human beings, entails risk and uncertainty. We can give good reasons why certain religious world views or certain secular world views are more acceptable to us than others. But the question of whether religious world views as a class are epistemologically inferior to secular world views as a class remains unanswered; and to pretend that the matter has been settled in favor of the secular world views is simply a case of intellectual bias or arrogance. Reason has proved incapable of demonstrating that either Jefferson's views or those of the contemporary secularist are neutral, universal, and nonsectarian. If the Court continues to act as if they were, it will do so on the basis of an epistemologically dubious faith commitment rather than on justifiable philosophical and judicial grounds.

Within a particular religious or philosophical tradition, it may be

⁷⁵ See A. MacIntyre, *Whose Justice? Which Rationality?* 1-11, 326-403 (1988); H. Putman, *Reason, Truth and History* 174-216 (1981); T. Spragens, *The Irony of Liberal Reason* 311-395 (1981); J. Stout, *Ethics After Babel* 1-32, 220-265 (1988); Bernstein, *Introduction*, in *Habermas and Modernity* 1-8 (R. Bernstein ed. 1981).

legitimate to think of those who share most of the tradition but also embrace unorthodox views as "sectarians." But to pretend that it is possible to occupy some Olympian high ground from which we can "objectively" and "rationally" characterize the beliefs of others outside of our own tradition as "sectarian" is an example of bad faith. And for government to take this course—that is, to favor secular comprehensive world views or the morality entailed by such world views while at the same time undermining or discrediting religious views—is to violate the fundamental spirit of the American political compact.

It is my contention that using the equation "religious = sectarian" tends to marginalize religious Americans and their viewpoints. Thus, although my argument is essentially philosophical and moral rather than sociological, I find it ironic that all the best polls show that Americans are incurably religious—not a few Americans on the fringes of the culture, but most Americans. Church attendance approaches fifty percent of the population and close to ninety percent of all Americans claim to believe in some kind of God or divine reality.

Thus, if the terms "sectarian" and "nonsectarian" were to be defined empirically in terms of who is the "typical" American or in terms of the dominant beliefs of the culture, it is the secularist who would have to be judged the "sectarian." It is the secularist who is not part of the mainstream, who is atypical, irregular. But if my analysis is sound, then public officials may not legitimately use the term "sectarian" to describe either secular or religious groups or individuals, for to do so is to misconstrue the relationship between the religious and the secular and to categorize one group of Americans as second-class citizens.⁷⁶

III. THE CHANGING ROLE OF GOVERNMENT

I have found no evidence which suggests that when the religion clause of the first amendment was formulated, political and religious thinkers were concerned with the question of whether the secular could rightly be construed as religiously neutral or with the question of the extent to which it could become a competitor with traditional religion. But in light of several significant societal changes that have since

⁷⁶ Whether or not private citizens choose to use the terms "sectarian" and "nonsectarian" should remain a matter of individual judgment. I may not share the religious beliefs which lead Catholics to refer to Baptists as "sectarians," but I do not protest their right to use the term nor even disagree that the term may have a certain technical appropriateness. Note the careful manner in which John Rawls uses the term "sectarian" in Rawls, *The Idea of an Overlapping Consensus*, 7 *Oxford J. Legal Stud.* 1, 20 (1987).

occurred, it is a question with which we should now be concerned. First, state governments became ever more actively involved in public education.⁷⁷ Second, on the basis of the fourteenth amendment, the first amendment came to be interpreted as applying to the states as well as to the federal government.⁷⁸ And finally, since the time of the New Deal, government at both the state and federal levels has become much more deeply involved in programs that impinge on people's moral and religious beliefs and behavior than was previously the case. During much of the first century of its existence the federal government's role was largely confined to matters such as regulating interstate commerce, maintaining an army and navy, operating the postal service, dredging harbors, and developing and implementing foreign policy, and the states were only beginning to become deeply involved in education. Today, however, insofar as both state and federal units of government are involved in the funding and operation of schools, universities, housing and welfare programs, family counseling services, and a host of other programs that affect people's lives morally and spiritually, it cannot help but deal with questions that traditionally have been within the domain of the church and of religion.

Most scholars do not see this as a serious problem, for they apparently believe that reality can be neatly divided between the sacred and the secular and that government involvement in delivering social services is seldom if ever problematic from a religious perspective.⁷⁹

Granted that even though a persuasive case can be made that theistic faith has relevance for all areas of life (and thus for the Christian, Muslim, or Jew no area of life is completely secular), still the differences between theists and atheists do not normally manifest themselves in such "nonreligious" or "secular" matters as harbor dredging or provisioning the army. As a practical matter, Americans have developed ways to limit religious influence on a broad range of "secular" activi-

⁷⁷ See, e.g., *Karcher v. May*, 484 U.S. 72 (1987) (New Jersey requirement of one minute of silence each school day morning).

⁷⁸ See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

⁷⁹ See Eldridge, *Theology and Agricultural Ethics in the State University: A Reply to Richard Baer*, 2 *Agriculture & Human Values* 47, 49 (1985) ("The Constitution, the Bill of Rights and the Supreme Court seem to have little problem with a secular-religious distinction. Our practices can be neatly divided. Those that are secular in intent and effect are permitted governmental activities; those that are religious are not. This distinction, however, depends on an understanding of 'secular' as being 'non-religious' as opposed to 'anti-religious.'"). Compare *Roemer v. Board of Pub. Works*, 426 U.S. 736, 764 (1976) ("[A]s we have noted, the secular and the sectarian activities of the colleges are easily separated.") with *Schempp*, 374 U.S. at 231 (Brennan, J., concurring) ("The fact is that the line which separates the secular from the sectarian in American life is elusive.").

ties, including many of those carried on by government. In part, this is because we have held so much of our religious and moral tradition in common that it has been relatively easy in a broad range of "secular" matters to presuppose this commonality and not get bogged down in endless controversy over those religious and moral beliefs where we differed. In particular, we have been able to develop what John Rawls refers to as an "overlapping consensus" about the structure of a liberal democracy that will guarantee "justice as fairness" to citizens without limiting ourselves to metaphysical or theological argumentation grounded in any single comprehensive world view.⁸⁰

However, when it comes to the *Big Questions*—questions regarding the meaning and purpose of life, who we are, and how we ought to live in light of our deepest religious and metaphysical commitments—Americans today hold very different views about reality and what is appropriate belief and behavior.⁸¹ Thus, although we do not generally think of a distinctively Presbyterian view of operating the Post Office (although for Presbyterians the Post Office is by no means outside the realm of God's concern and sovereignty), it is not at all difficult to think of a normative Catholic view of abortion, an orthodox Jewish view of the family, or an Evangelical Christian view of marriage and child nurture. And these religious views may compete directly with secular views, for instance those of groups like Planned Parenthood or individuals like Carl Rogers and Sidney Simon.⁸²

When nontheistic and humanistic beliefs serve as the philosophical basis of curricula in government public schools—courses in values clarification and sex education are two notable examples—citizens who take their religious beliefs seriously face a serious problem. Many of

⁸⁰ Rawls, *supra* note 76, at 1-25. See also Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 *Phil. & Pub. Aff.* 223 (1985) [hereinafter *Justice as Fairness*]; Rawls, *The Priority of Right and Ideas of the Good*, 17 *Phil. & Pub. Aff.* 251 (1988) [hereinafter *Priority of Right*].

⁸¹ "Big Questions," as I am using the expression, are questions that one answers in relation to what John Rawls refers to as "comprehensive philosophical, religious, and moral doctrines." His theory of "justice as fairness" is an attempt to offer a way to order the political life of a liberal democratic state without demanding that all citizens accept such particular moral ideals as those of autonomy and individuality. "As found in Kant and J.S. Mill, these comprehensive ideals, despite their very great importance in liberal thought, are extended too far when presented as the only appropriate foundation for a constitutional regime. So understood, liberalism becomes but another sectarian doctrine." *Justice as Fairness*, *supra* note 80, at 245-46; *Priority of Right*, *supra* note 80, at 251-76.

⁸² See, e.g., L. Raths, M. Harmin & S. Simon, *Values and Teaching* (2d ed. 1978); K. Strike, *Educational Policy and the Just Society* 109-127 (1982); K. Strike, *Liberty and Learning* 150-168 (1982); P. Vitz, *Psychology as Religion: The Cult of Self-Worship* 75-81 (1977).

these "secular" courses teach (implicitly, if not always explicitly) that self-fulfillment and satisfying one's personal needs are the goals of human existence. They insist that all value judgments are subjective and matters of personal opinion. They view tradition and traditional wisdom as a hindrance to achieving the good life.⁸³

The important point is that each of these particular secular views, rather than being "wholly neutral," directly competes with orthodox Christian teaching on these issues. Secular instruction can be (and often is) just as "sectarian" (in the sense of narrow-minded, bigoted, one-sided, parochial) as religious instruction.⁸⁴ And if this is the case, then we must ask: Does the state have the right to take a captive group of students and indoctrinate them in beliefs and values that will lead them to defect from the teachings of their church and their parents?

Of course, it has no such right. If we take seriously the religion clauses of the first amendment, such actions by the state are quite outside the realm of constitutional legitimacy. Only because the Supreme Court has failed to see that secular views can become direct competitors of religious views and, in attempts to answer the Big Questions, function precisely like religious views, has it permitted such injustice.⁸⁵

⁸³ See Baer, *Values Clarification as Indoctrination*, 41 *Educ. Forum* 155 (1977); Baer, *Teaching Values in the Schools: Clarification or Indoctrination?*, 61 *Principal* 17-21, 36 (1982). Cf. *Schempp*, 374 U.S. at 225 ("We agree of course that the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'") (citing *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)). Unfortunately, the Court has utterly ignored extensive scholarship on values clarification and sex education curricula that conclusively demonstrates precisely such hostility.

⁸⁴ See P. Vitz, *Censorship: Evidence of Bias in Our Children's Textbooks* (1986). Professor Vitz points to a virtual conspiracy of silence regarding the role of religion in American history as this is taught in social studies courses, particularly at the elementary school level. Note also the evidence he presents for extreme bias in how families are described (especially the roles of women) in grades five and six. *Id.* at 36-39. See also R. Baer, *Censorship and the Public Schools* (1985); Baer, *American Public Education and the Myth of Value Neutrality*, in *Democracy and the Renewal of Public Education* 10-12 (R. Neuhaus ed. 1987).

⁸⁵ John Dewey wrote of his own atheistic and humanistic beliefs: "Here are all the elements for a religious faith that shall not be confined to sect, class, or race." J. Dewey, *A Common Faith* 87 (1934). See also Baer, *Agricultural Ethics at State Universities: Why No Input from the Theologians?*, 2 *Agriculture & Human Values* 41 (1985). It would not seem illegitimate, however, for the state to require children to learn about American political and historical traditions or about justice as fairness in the Rawlsian sense. Note the distinction that Rawls makes between "justice as fairness" as a political conception and "justice as fairness" as part of a larger comprehensive religious or metaphysical world view. See *Justice as Fairness*, *supra* note 80, at 223-51; *Priority of Right*, *supra* note 80, at 251-276.

IV. CONCLUSION

The Supreme Court's acceptance of the equation "religious = sectarian" constitutes an unacceptable case of what I have called judicial "cussing." But, more importantly, this usage is both a symptom of and a contributor to the Court's inability to resolve convincingly a host of vexing questions about how religion relates to public life, particularly to education and to politics. So long as one can view religion as that which is "sectarian"—as essentially parochial, narrow, bigoted, idiosyncratic—it becomes relatively easy to dismiss it as marginal or even injurious to the public life of the nation. Just as Jefferson and Mann could label the wrong kind of religion "sectarian" and consider it harmful to public life, so today our courts mistakenly assume that religion in its totality is "sectarian" and thus also either irrelevant or detrimental to public life. Supreme Court decisions over the past four decades have treated religion as a kind of pollutant or contagion, something from which the public must be protected through increasingly effective quarantine measures.⁸⁶

Insofar as our courts have embraced the proposition "religious = sectarian" they are not just guilty of judicial prejudice and unwarranted discrimination. The view of the world that is reflected by such terminology also severely cripples the courts in their ability to think clearly and fairly about how religion relates to culture. They have by and large failed to see how secular views can become direct competitors of religious views, competing for the hearts and minds of citizens, and how such secular views, when sponsored by government, stand in direct violation of the first amendment. Just as poor tools can prevent craftsmen from producing good work, so the unwarranted identification of the religious with the sectarian makes it difficult—I think impossible—for the courts to achieve constitutionally correct decisions on the place of religion in public life in America.

For 200 years Americans have lived with a muddled understanding of how the terms "sectarian" and "nonsectarian" apply to religion and of how the religious is related to the secular. Bad theory has inevitably

⁸⁶ See R. Bork, *The Tempting of America* 125-26 (1990) (discussing *Bowers v. Hardwick*, 478 U.S. 186 (1986)). In *Bowers*, Justice Blackmun, writing for the four dissenters, argues that religious support for the Georgia anti-sodomy statute weakens the statute. He equates such support with "religious intolerance." But such a view, if regularly adhered to, would, in effect, make second-class citizens out of religious Americans, and give special preference to Americans who ground their morality in secular metaphysical views. As Bork argues, Justice Blackmun's position, if followed consistently, would also tend to undermine laws against perjury and murder, for these too are supported by morality based in religion.

produced bad law, and thus it is not surprising that the past forty years of Supreme Court rulings on religion and public life (notably education) have been such an unintelligible and unprincipled morass. Just as the use of "sectarian" by Jefferson, Horace Mann, and the New York Public School Society became a tool of social oppression—a means by which one social class tried to establish its own morality and religious beliefs as the orthodox public beliefs of the new Republic—so today the claim that religion is "sectarian" and that the secular is "nonsectarian," ("nonideological and wholly neutral"), is not only philosophically unjustifiable but also becomes a means of social control. In both cases, rights and interests of ideological and religious minorities are violated and an elite (in our own day this elite—which Peter Berger refers to as "the new information class"—is dominated by the liberal press and other media and by the universities) is permitted to establish its own views as the "nonsectarian," "universal," "public," "secular," "rational" views of society.

A commitment by our courts, other government officials, and by the mass media to abandon the equation "religious = sectarian" would constitute a commendable first step in the move toward nondiscrimination and public justice. Although such a move would not in itself correct the confusion of Supreme Court decisions since *Everson* on the relation of the religious to the secular, it would at the very least improve the climate of discussion. It would help cast doubt on the correctness of the assumptions the courts have employed in wrestling with issues pertaining to religion and public life, and thus conceivably would open up the path to more rational constitutional interpretation.

But quite apart from such useful results of abandoning this terminology, the identification of the religious with the sectarian is intrinsically mistaken. It unfairly discriminates against a particular set of Americans, and it is philosophically unwarranted. Thus it should be abandoned whether or not this produces any long-term beneficial legal consequences. It is a matter not just of law, but of justice.