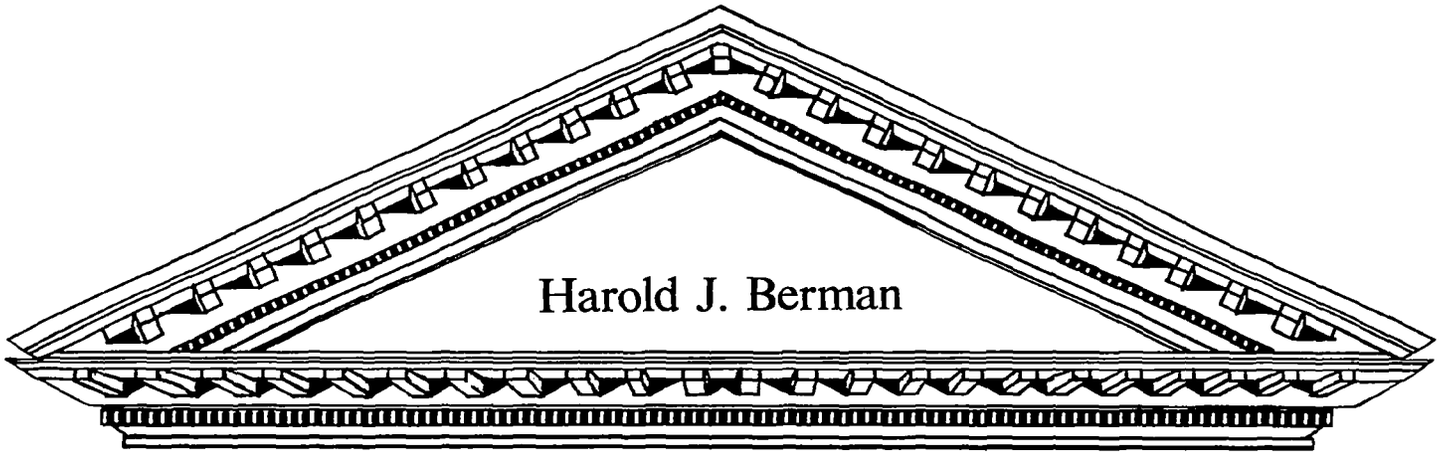

Law, Religion, and the Present Danger

When the word "law" is juxtaposed with the word "religion," an American lawyer today is apt to think immediately of the First Amendment to the United States Constitution with its double protection against any governmental interference in "the free exercise" of religion on the one hand and against any governmental "establishment" of religion on the other. From the standpoint of contemporary American constitutional law, religion has become the personal and private affair of individual citizens or groups of citizens. Indeed, in recent decades our courts, in interpreting the "free exercise" clause, have gone far toward immunizing individual and group activities from governmental control, whether federal or state, whenever they are considered by the persons engaging in them to be of a religious character; and at the same time, under the "establishment" clause the courts have struck down most forms even of indirect governmental support of religion, whether federal or state.

Now, a theologian is apt to respond quite differently to the topic "law and religion." He is apt to think first, not of the Constitution, but of the Ten Commandments, with their implicit assertions that all human law is founded on divine law and that the ultimate purpose of human law is to help create conditions in which love of God and love of neighbor may flourish. From the standpoint of theistic faith, the interrelationship of law and religion is a two-way street. Legal structures and processes serve to protect religion from governmental intervention, while religious structures and processes serve to motivate and give direction to the society as a whole, including its legal system.

It is a profound mistake, I submit, though one that is frequently made, to consider the relation of law to religion solely from a legal point of view, that is, solely in terms of the *legal* foundations of *religious* freedom. It is also necessary to consider that relation in terms of the *religious* foundations of *legal* freedom. Otherwise we shall not do justice to the religious sentiments of the American people, an overwhelming majority of whom state that they believe in God and a smaller number, though still a majority, who state that they adhere to some organized religious community, either Christian, Jewish, or Muslim. Most such believers would say—and many agnostics and atheists would agree—that the very existence of constitutional law in the United States, and therefore of freedom of belief or disbelief, rests ultimately on the religious faith of the American people.

This was undoubtedly the view of the men who framed the Constitution, including the First Amendment. Thomas Jefferson, perhaps the most free-thinking of the Founding Fathers, said in 1801 in his first message as president that "the liberties of a nation [cannot] be thought secure when we have removed their only firm basis, a conviction in the minds of the people that their liberties are the gift of God." Jefferson was an ardent advocate of freedom for every kind of opinion, but he also believed that, despite all diversity, there was a common core of religious belief that was essential to preserve peace and order in society. For Jefferson the disestablishment of religion was a great "experiment," as he called it, intended to test whether that common core of shared religious belief—which not only he but all the Founding Fathers agreed was necessary to the very existence and well-being of society—could flourish without governmental sanction.

In other words, the authors of the Constitution,

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including those who were personally skeptical of the truth of traditional theistic religion, did not doubt that the vitality of the legal system itself depended on the vitality of religious faith and, more particularly, of the Protestant Christian faith that predominated in the new American Republic.

Moreover, while many, like Jefferson, opposed all governmental control or support of religion, the majority were in favor of such control and support—but at the state level, rather than the federal level. The First Amendment was well understood to be applicable to the federal government alone: "*Congress,*" it said, "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." But nothing was said to restrict the states in this regard. The establishment of religion was not listed among the measures that the states are prohibited from taking under Article I, Section 10. As Justice Story said in his *Commentary on the Constitution of the United States*, "Thus, the whole power over the subject of religion was left exclusively to the State governments, to be acted on according to their own sense of justice, and the State Constitutions." In the early part of the nineteenth century many states did enact laws that had the effect of establishing Christianity—or, more often, Protestant Christianity—as the religion of the state. Thus one may find state constitutional and statutory provisions declaring it to be "the duty of all men to worship the Supreme Being, the great Creator and the Preserver of the Universe," regulating membership in Christian denominations, imposing fines for failure to attend worship services on the Lord's day, requiring elected officials to swear that they "believe the Christian religion, and have a firm persuasion of its truth," and establishing public education for the purpose of promoting "religion, morality, and knowledge."

In New York in 1811 the highest state court upheld an indictment for blasphemous utterances. Speaking for the court, Chief Justice Kent stated that "we are a Christian people, and the morality of the country is deeply engrafted upon Christianity...." The New York State Convention of 1821 endorsed the decision in that case, declaring that the court was right in holding that the Christian religion is the law of the land and to be preferred over all other religions. These statements were confirmed in an 1861 New York case in which the court said: "Religious tolerance is entirely consistent with a recognized religion. Christianity may be conceded to be the established religion, to the qualified extent mentioned, while perfect civil and political equality with freedom of conscience and religious preference is secured to individuals of every other creed and profession."

Similarly, in Pennsylvania in 1822 a man was convicted of blasphemy for saying that "The Holy Scriptures were a mere fable" and that "they contained many lies." The Supreme Court of Pennsylvania, in affirming the conviction, stated: "Christianity, general christianity, is, and always has been, a part of the common law of Pennsylvania...not christianity founded on any particular religious tenets; nor christianity with an established church and tithes and spiritual courts; but christianity with liberty of conscience to all men."

On the same grounds, laws restricting commercial activities on Sundays were upheld by courts of many states. In one such case the Supreme Court of Missouri stated: "Those who question the constitutionality of our Sunday laws seem to imagine that the Constitution is to be regarded as an instrument framed for a State, composed of strangers, collected from all quarters of the globe, each with a religion of his own, bound by no previous social ties, nor sympathizing in any common reminiscences of the past....[S]uch is not the mode by which our organic law is to be interpreted. We must regard the people for whom it was ordained. It appears to have been made by Christian men. The Constitution on the face of it shows that the Christian religion was the religion of its framers...." Similar judicial statements may be found in other states in similar cases involving blasphemy, violations of Sunday laws, and other religious offenses.

In addition, states did not hesitate to require the teaching of the Christian religion in state colleges and universities as well as in prisons, reformatories, orphanages, homes for soldiers, and asylums. Also, states required the reading of the Bible and singing of hymns and saying of prayers in elementary and secondary schools. In 1890 the Supreme Court of Illinois considered the case of a student at the University of Illinois who had been expelled because of his refusal to attend daily chapel exercises. He contended that the chapel requirement violated a provision of the Illinois Constitution stating that "No person shall be required to attend or support any ministry or place of worship against his consent." The court held that so long as the rules of chapel attendance were reasonable, permitting excuse on grounds of religious or other conscientious objections, the university had a right to impose the requirement, and the student could not escape it on the mere ground that he considered it unlawful. There is nothing in the Illinois Constitution, the court said, that prevents state colleges and other institutions of learning from adopting "all reasonable regulations for the inculcation of moral and religious principles in those attending them."

With regard to religious exercises and religious education in elementary and secondary schools, the courts of many states went so far as to uphold regulations requiring attendance, on pain of expulsion, regardless even of religious objections. "The right of one sect to interdict or expurgate," the Supreme Court of Maine stated, "would place all schools in subordination to the sect interdicting or expurgating. If the claim is that the sect of which the child is a member has a right to interdict [in fact she was a Roman Catholic who objected to the reading of the Protestant version of the Bible as part of a general course of instruction], and that any book is to be banished because under the ban of her church, then the preference is practically given to said church, and the very mischief complained of is inflicted on others."

I have rehearsed these ancient cases, *not* for their current legal significance—in fact, they have all long since been overruled—but, rather, for

what they tell us about the religious roots of our constitutional guarantees of religious freedom. In 1835 Tocqueville wrote: "There is no country in the whole world in which the Christian religion retains a greater influence over the souls of men than in America." In 1888 James Bryce noted that "the influence of Christianity seems to be, if we look not merely to the numbers but also to the intelligence of the persons influenced, greater and more widespread in the United States than in any part of western Continental Europe, and I think greater than in England."

I myself can testify that even fifty years ago, if you had asked, "Is the United States a 'Christian' country?" the overwhelming majority of Americans would have answered, "Yes." That was certainly what I was taught as a young boy at the Noah Webster School in Hartford, Connecticut. And when, at the Wednesday morning assemblies after readings from the Old and New Testaments, the hymn was "Onward Christian Soldiers," the few of us who were Jewish would sing at the top of our lungs, "Onward *Jewish* Soldiers." We knew even better than the rest that America professed itself to be a Christian country.

In those times if you had asked Americans where our system of law came from, on what it was ultimately based, the overwhelming majority would have said, "the Ten Commandments," or "the Bible," or perhaps "the law of God." John Adams's conception that our law is rooted in a common religious and moral tradition was shared, not only by the Protestant descendants of the English settlers on this continent, and of their black slaves, but also by tens of millions of immigrants from Western and Southern and Eastern Europe, most of whom were Roman Catholics and Jews. Indeed, throughout the entire nineteenth and into the early twentieth century America studied its law chiefly from Blackstone, who wrote that "the law of nature...dictated by God himself...is binding...in all countries and at all times; no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original."

In the past two generations the public philosophy of America has shifted radically from a religious to a secular theory of law, from a moral to a political or instrumental theory, and from a communitarian to an individualistic theory. Law is now generally considered—at least in public discourse—to be simply a pragmatic device for accomplishing specific political, economic, and social objectives. Its tasks are thought to be finite, material, impersonal—to get things done, to make people act in certain ways. Rarely, if ever, does one hear it said that law is a reflection of an objective justice or of the ultimate meaning or purpose of life. Usually it is thought to reflect, at best, the community's

MODERNITY AND THE MEANING OF LAW

Commentary by ***Douglas Sturm*** *at the Conference on Legal and Ethical Aspects of Religious Liberty*

Practicing lawyers seldom think about the nature of law and even less about the relation of the meaning of law to religious faith. Such reflection is not an obvious requirement of their ordinary, everyday work. They are too occupied with doing law to worry about its innermost essence. On Law Day they may reiterate traditional slogans about the importance of Rule of Law, but the slogans have little to do with the actualities of their practice or of the legal process generally.

Legal philosophers on the other hand do think about the nature of law, and for good reason. Thinking about the nature of law is a way of getting at fundamental issues of interpretation and evaluation. It is a way of gaining sufficient reflective distance from legal practice to allow for critique, reorientation, and, possibly, even transformation of legal practice. Practice without reflection simply reinforces existing trends.

Analytic jurisprudence is a movement in Anglo-American legal philosophy that has long sought to determine the specific nature and province of law. From John Austin to H. L. A. Hart there have been various efforts to distinguish law from other forms of regulation. The intuitive sense underlying the analytic project is that distinctions are both possible and desirable. There are many things that one ought to do. One ought to refrain, for instance, from belching in another's face, from driving over fifty-five miles per hour, and from breaking one's promises, but the ought in each case is a different sort of ought. Rules of etiquette, rules of law, and rules of morality are not the same. There may be some difficulty in defining with precision what the lines of differentiation are, but not to make the effort is to ignore seemingly obvious differences. Thus distinctions are possible.

But, it is argued, distinctions are also desirable. In the absence of distinctions one may treat some obligations too lightly and others too heavily. To treat rules of law as if they were rules of etiquette, for instance, is to neglect the heavy dependence of social order on conformity to rules of law. Rules of etiquette, after all, may be handled with some degree of indifference, for they are not absolutely vital to social organization. But to treat rules of law as if they were rules of morality is to neglect the necessity for interaction between social change and legal change. It is to sanctify rules that are but the creation, albeit the careful creation, of the human mind. What the mind hath wrought the mind may change, and, under some conditions, the mind should change. Rules of law are not merely matters of convenience, but they must be responsive to changing times and changing needs. Yet, if rules of law were considered as derived directly from, say, divine will, cosmic order, or human nature, they would be fixed and immutable.

Analytic jurisprudence, in seeking to draw lines of differentiation among rules of etiquette, morality, and law, intends both to take legal obligation seriously and to open up the possibility for legal reform. What seems, at first blush, to be merely a pedantic exercise in semantic definition is, in reality, an attempt to lay the basis for critical reexamination of the sense of legal

sense of what is expedient and, more commonly, the more or less arbitrary will of the lawmaker.

This view of law, founded on utilitarianism, goes back to the Enlightenment of the late eighteenth century and to the French and American revolutions, which were the product of the Enlightenment; and it had strong support, especially among intellectuals, in nineteenth-century America. But it is important to remember that prior to World War I, and even up to the Great Depression, Americans *as a people* continued to believe that the Constitution and the legal system were rooted in a Covenant made with God by which this country was to be guided in its mission to be a "light to all the nations." It is only in the last two generations that the Enlightenment concept of law as something wholly instrumental, wholly invented, as contrasted with the pre-Enlightenment concept of law as something ordained, something partly invented but also partly given, has penetrated, not only the ideology of the intellectuals, but also the social consciousness of virtually all classes of the population. Likewise, it is only in the last two generations that the Enlightenment concept of religion as something wholly private and wholly psychological, as contrasted with the pre-Enlightenment concept of religion as something public, something partly psychological but also partly social and historical, indeed, partly legal, has come to dominate our discourse.

The radical separation of law and religion in twentieth-century American thought (I am speaking now, not of constitutional law, but of jurisprudence, of legal philosophy) creates a serious danger that law will not be respected. If law is to be measured only by standards of expedience, or workability, and not by standards of truth or rightness, then it will be difficult to enforce it against those who think it does not serve their interests. It is usually said by those who espouse an instrumental theory of law that enforcement, in the last analysis, is always obtained by threat of coercive sanctions. But this is an unsatisfactory argument. Far more important than coercion in securing obedience to rules are such factors as trust, fairness, credibility, and affiliation. It is precisely when law is trusted and therefore does not require coercive sanctions that it is efficient; one who rules by law is not compelled to be present everywhere with his police force. Today, this point has been proved in a negative way by the fact that in our cities that branch of law in which the sanctions are most severe—namely, the criminal law—has been powerless to create fear where it has failed to create respect by other means. Today, everyone knows that no amount of force the police are capable of exerting can stop urban crime. In the last analysis, what deters crime is the tradition of being law-abiding, and this in turn depends upon a deeply or passionately held conviction that law is not only an instrument of secular policy but also part of the ultimate purpose and meaning of life.

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practice. Insofar as that is the case, Harold Berman and others share the motivation of the analytic school of legal thought.

Yet, in their constructive positions on the meaning of law, especially as it relates to the religious factor, Berman represents a view that is diametrically opposed to the analytic school. Where the analyst draws lines of differentiation in order to isolate the uniqueness of law, Berman demonstrates connections in order to depict the full meaning of law. To determine the specific province of law without attention to connections is provincialism, and provincialism is the bane of law's purpose. To be adequately understood and practiced law must be viewed contextually. It is this judgment that underlies Berman's promotion of "a jurisprudence that conceives of law all together as a manifestation of something beyond itself, a witness to something greater, a guide to some historical destiny."

Thus the principle of the autonomy of law is a falsification of the actual condition of law. This point is of relevance to both the theory and the practice of law. In theory, law is to be seen as part of a more encompassing world of meaning. In practice, law is properly viewed as part of a more inclusive pattern of interaction. As such, the contextual thesis is not novel. Its expressions are diverse. The sociological, the historical, and the natural law traditions in jurisprudence, for instance, hold this thesis in common. To understand law as an articulation of social ethos, an utterance of *Volksgeist*, or a representation of World Soul is to reject the principle of the autonomy of law at least in its more extreme form.

An implication of the contextual thesis is that analytic jurisprudence cannot do what it intends and pretends to do. While it is right in its effort to clarify the issue of the basic character and grounds of law, it cannot effect a simple differentiation of law from other forms of thought and action. More generally, contrary to its intention, analytic jurisprudence must itself be part of a more inclusive framework of meaning. And so it is. The analytic method is not without its presuppositions about the character of reality. There is a correlation between method and content. The analytic principle assumes that differentiation is possible and proper. By its nature it presses one to look for (and to find) unique properties of particular entities and distinguishable activities. Its logic is that of clear identity and separable substances. It is, in short, individualistic in its import. As such, it has much in common with modern liberal ideology. It is no accident that analytic jurisprudence is among the dominant forms of legal thought in modern bourgeois society.

The critique of modernity usually assumes a rough sketch of historical development in the West divided into three periods—premodern, modern, and postmodern. Historical periodicity, it must be admitted, is not simply a matter of description. It is a function of social theory and moral concern. Joachim of Flora and Auguste Comte, for instance, in their celebrated tripartite divisions of the major periods of history were not constructing tentative hypotheses for investigation. They were making a point about the good life. They were describing and prescribing. Their interpretations were mandates. While the progress of history toward a new age and a new social possibility was predicted as an ineluctable course of events, that course was

Similarly, the radical separation of law and religion in twentieth-century American thought creates a serious danger for religion—namely, the danger that it will be viewed as a wholly private, personal, psychological matter, without any social or historical or legal dimensions. Jefferson's experiment may be in the process of failing, for though religion is flourishing in America, it is increasingly a "privatized" religion, with little in it that can overcome the forces of strife and disorder in society.

In stressing the dangers of too radical a separation of law and religion, we must of course avoid the opposite dangers of making too close an interconnection between them. Law is surely more directly concerned with social action and social utility, and religion more with personal aspirations and a sense of the holy. Each is therefore in some tension with the other; each challenges the other. Religion, by standing outside the law, helps to prevent legal institutions from being worshipped. Conversely, law, by its secularity, leaves religion free to develop in its own way. The separation of law and religion thus provides a foundation for the separation of Church and State, protecting us against Caesaro-papism on the one hand and theocracy on the other.

Yet the radical separation of legal and religious institutions does not require the radical separation of legal and religious values. It does not require the total secularization of law and the total spiritualization of religion. These two aspects of life have now been separated to the point of disaster. On the one hand we have groups like the People's Temple (many others could also be mentioned), which are given immunity from social control on the sole ground that they are religious. On the other hand our public schools are inhibited from transmitting our common religious heritage on the sole ground that they are secular.

In attempting to restate the proper relationship between law and religion, it is important to recognize that the crisis that confronts Western man today—as contrasted with earlier times—is not the danger of excessive sanctification of law or excessive legalization of religion; it is not a crisis of their excessive integration but, rather, a crisis of their excessive fragmentation. At least in the United States of America we are threatened more by contempt for law than by worship of it, and more by an overwhelming skepticism regarding the future than by some great all-embracing totalitarian eschatology. In some other periods of history, and in some other parts of the world today, an emphasis on the tensions between law and religion, or between structural and spirtual values, may be fully justified. Especially where a state attempts to impose a particular system of belief on its people, as is the case in all Communist countries, it is important to oppose such a usurpation of

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nonetheless contingent upon human agency. Through the differentiation of periods people were being instructed about how to act and how to think. History was a lesson in conduct.

The historical periodicity reflected in Berman's argument is likewise prescriptive. But it contains a reversal that has become increasingly modish over the past couple of decades. The Enlightenment, it seems, was not so enlightening after all. The emergence of the modern age was not a giant step for mankind. To be sure, the modern age, at least in its liberal bourgeois manifestation, has been a time in which individuality, rationality, and religious and cultural plurality have been (more or less) honored. And that means, in principle, persons have been liberated from oppressive forces of social conformism, tradition, and dogmatism. But there has been an enormous gap between principle and actuality. The liberation of modernity has been more apparent than real. The release brought about by the forces that produced the modern age has had a negative effect. The modern temper is, in truth, profoundly deficient. This does not mean one proposes a return to premodern ethos, for it too was lacking in important respects. But premodern ethos is instructive in one vital respect: It is a reminder of the essential significance of the religious factor in the construction of an adequate theory and practice of law.

The modern secularization of law, with its release from religious sensibility and traditional constraints, is seen as a source of moral and social crisis. The shift in ideology that characterizes the emergence of modernity, says Berman, is "from a religious to a secular theory of law, from a moral to a political or instrumental theory, and from a communitarian to an individualistic theory." As a result, the modern world assumes a Hobbesian hue. Persons and groups project their plans, jockey for position, struggle for power without any sense of ultimate destiny or overarching purpose.

Within the modern context, law is understood and exploited as merely an instrument to be used to enhance one's power or to secure a modicum of order. It is not a representation of the meaning of life in any profounder sense or the expression of a humane order. It is a technique to be used as interest dictates and fortune permits. Religion, as a consequence, is primarily a matter of feeling and emotion. It is interiorized and privatized. By itself it is innocuous, although it too may be employed for manipulative purposes. But religion is without objective basis. Whatever its public manifestation, it is just an expression of individual desire and personal fancy.

There is, Berman seems to argue, a conjunction between the modern instrumental theory of law and constitutional positivism. At first blush it appears paradoxical to assert, as Berman does, that law is instrumental and yet that constitutional law, within the modern American milieu, is increasingly seen as "an end in itself." But the paradox is dissolved if one views constitutional law as serving to fulfill the function of Hobbes's sovereign. Constitutional positivism means, not honoring constitutional principles as an expression of a higher law, but accepting the constitutional process as a tolerable means of maintaining order and securing peace. Despite the rhetoric of respect for constitutional principles, the maintenance of the legal order is rooted, thinly and precariously, in self-interest. The dominant "religions" of the modern world are the

an essentially religious authority by political leaders and to reassert the inherent right of individuals and of groups to maintain their own spiritual values, their own belief systems. Also where a church attempts to impose its political views on a society, claiming divine sanction for them, it is necessary to oppose such a usurpation of secular authority by religious leaders and to reassert the independence of the state. The dualism of Church and State, spiritual and secular, religion and law, makes sense as an answer to monistic claims of the total state or of the total church. In the United States today, however, and in most countries of Western Europe the principal danger is not that of excessive spiritual claims by political parties or excessive political claims by religious or quasi-religious groups. We are threatened more by anarchy than by dictatorship, and more by decadence and apathy than by fanaticism. Under these circumstances the old dualisms need to be subordinated to a more complex unity that seeks the interaction of secular and spiritual aspects of life rather than their compartmentalization.

The practical danger of any organic theory of society is that it may be used irresponsibly to sanctify and petrify the particular existing laws and the particular existing orthodoxies of a given social order. This danger is particularly acute when law and religion do not carry within themselves built-in principles of change. The danger is much less acute in a society such as our own, in which our religious traditions as well as our legal traditions are founded on the concept of change. Indeed, in the Western tradition it is a fundamental purpose of religion to challenge law to change continually in order to be more humane, and it is a fundamental purpose of law to challenge religion to change continually in order to be more socially responsible. An organic theory of society does not protect the status quo when the theory itself conceives the society in terms of a dynamic process of development.

In America the dynamic character both of law and of religion—the capacity of each to change, to develop, and even to die and be regenerated—makes it possible for them to serve each other without overstepping the constitutional boundaries that separate them. Despite the broad interpretations that have been given to the "free exercise" clause, I believe that our courts would uphold governmental action against religious groups that use duress or fraud to induce support. Also, despite the broad interpretations that have been given to the "establishment" clause, it is clear that the legislature may take some measures to protect the free exercise of religion without necessarily effecting an establishment. For example, it may permit religious organizations to be exempt from taxation; it may permit contributions to religious causes to be deducted from taxable income; it may permit chaplains to be employed by the armed

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cult of self and the cult of society. But these are not authentic religions. They are idolatrous. They are devoid of any sense of transcendence. They are without that apprehension of something beyond that is constitutive of genuine religion.

Both law and religion suffer under the conditions of modernity. On the one hand the efficacy of law depends on trust and respect. But if law is rooted in self-interest, it cannot command confidence in its intrinsic value and meaning. Oliver Wendell Holmes's "bad man" has no respect for the law as such. He obeys only if it is in his interest to obey. The threat of coercive sanction or unpleasant consequence is all that keeps the citizenry from disobedience. On the other hand the sense of religion depends on its functioning as a fundamental source of the meaning and purpose of all life, private and public, individual and social. But if religion is a matter of relative indifference that one may adopt or reject at will, it has lost its importance. There is no good reason for considering religious traditions as instructive in the design and conduct of social institutions or personal life. Not reason but interest dictates whether one will find religious faith appealing.

Berman characterizes the crisis confronting the modern Western world as excessive fragmentation in the separation of law from religion, contempt for law, skepticism, anarchy, decadence, apathy. Berman's alternative to modern pluralism is not the organic principle of pre-Enlightenment social thought but an interactive principle according to which, to appropriate the language of Paul Tillich, religion constitutes the substance of law, and law manifests the public form of religion. According to the interactive principle, religious faith, with its sense of transcendence, calls mankind to consider principles of right conduct—of humanity, justice, mercy, and good faith—above pragmatic calculation; and law, with its concern for form, calls mankind to provide the conditions in which religious faith can flourish.

Berman expresses a deep-seated concern about the principle of religious liberty and argues, curiously, that that principle is jeopardized under conditions of modernity. Religious liberty is better secured in a context of authentic religion than it is in a secularized society. The point is that neither technical rationality nor individualism provides any firm reason to honor religious liberty or to tolerate religious faith. Utilitarianism and pragmatism will tolerate religion only so long as it does not threaten any vital interest. In H. Richard Niebuhr's terms, radical monotheistic faith is a firmer ground for the principle of religious liberty than henotheistic faith. Radical monotheistic faith is confidence in and loyalty to the One beyond the Many and results in a love for the whole world of being in its many-splendored diversity, whereas henotheistic faith is exclusivistic, partial, and jealous of opposition.

We are presented with the beginnings of a fundamental critique of modernity and a radical reformulation of the meaning of law and its relation to religion. Whether and how such a reformulation can be brought into contact with the mainstream of contemporary legal thought remains uncertain and whether the practicing lawyer will pay it any mind at all is even more uncertain. But despite those uncertainties, there is no doubt that the reformulation is provocative if not prophetic. WV

forces; it may exempt from military service persons who object to such service on religious grounds; it may give some kinds of indirect support to parochial schools; it may provide programs of released time or shared time in public schools to enable pupils to have religious instruction elsewhere. The legislature may not provide for religious instruction or the saying of prayers as part of public school exercises, but it may provide for instruction about religion—courses in religious history, religious philosophy, religious literature, and the like. The view that law needs religion for its inspiration does not imply that responsibility for the encouragement of religion should be shifted from the people—where it belongs—to the government or to the legal system; it only implies that the government, by law, should cooperate to the extent of its constitutional powers in providing an environment in which religion may flourish.

I have argued that our Constitution, while requiring a high degree of separation of religious institutions from political and legal institutions, also presupposes a high degree of interaction between religious values and political and legal values. It presupposes that an important purpose of the guarantee of religious freedom is to help create conditions in which religious faith can be purified and strengthened; it presupposes further that such purified and strengthened religious faith will help to give motivation and direction to the political and legal system. These presuppositions, or postulates, are part of a jurisprudence that conceives of law all together as a manifestation of something beyond itself, a witness to something greater, a guide to some historical destiny.

In recent decades these postulates have been substantially eroded. Increasingly, law has come to be seen, not as a pointer or witness to the collective fulfillment of a higher aspiration and destiny, but as an end in itself, the very purpose of our national existence, the ultimate bond of our unity as a people. We have come to believe in the Constitution for its own sake—to believe in the "free exercise" clause and the "establishment" clause for their own sake; we find legal neutrality in matters of religion to be *convenient,* and we know of no other principle that would be *acceptable* in a "pluralistic," that is, a First Amendment, society. No other justification is thought to be needed.

This is, I believe, itself a form of secular religion, or idolatry. It involves the worship of a constitutional principle for its own sake, coupled with a high degree of skepticism concerning any justification for such worship other than immediate self-interest, whether individual or collective. Such skepticism concerning the ultimate meaning and purpose of the constitutional protection of religious freedom threatens to undermine that very freedom. On the one hand the cult of self, which is becoming our dominant faith, threatens to make us indeed a nation "composed of strangers...each with a religion of his own, bound by no...social ties, nor sympathizing in any common reminiscences of the past"—or in any common vision of the future. The cult of self has already begun to have the effect both of gradually removing from public education and public discourse all references to traditional religion and of gradually substituting its own jargon and ritual and its own morality and belief system. Thus there is a danger that this new secular religion will, indeed, place all other religions in subordination to itself, inflicting on others the very mischief of which it complains.

On the other hand the cult of society—which in dynamic terms is the eventual consequence of the cult of self, though logically they are in conflict—lurks in the background as an alternative option. It, too, would introduce a state-supported secular religion—the religion of total social involvement, of absolute patriotism—in violation of the spirit of the First Amendment.

It will be said that it is a misuse of the word "religion" to apply it to personal and social philosophies such as those that I have identified as the "cult of self" and the "cult of society." It is this very argument, however, that is used to support both state "establishment" of such philosophies and state interference with their "free exercise." Here the example of the Soviet Union is instructive. The Soviet Constitution provides for the separation of Church and State and for freedom of religion. Since almost all education in the Soviet Union is state education and almost all publication is by state publishing enterprises, the teaching of religion and the circulation of religious literature are severely limited. Moreover, since religion is considered to be the private affair of each citizen, the free exercise of religion is construed to consist merely of freedom of worship. On the other hand the public teaching of so-called scientific atheism is required in all schools and is promoted in the press and elsewhere. Thus atheism, by claiming to be not a religion but a science, or a philosophy, is in fact "established," and traditional religions such as Christianity, Judaism, and Islam are withdrawn from public discourse.

It seems to me that this example shows quite well that it is not, in and of itself, the constitutional guarantee of freedom of religion from governmental control or support that is our final protection against religious oppression but, rather, it is that guarantee coupled with its original purpose: namely, to help create a society in which political and legal values on the one hand and religious values on the other freely interact, so that law will not degenerate into legalism but will serve its fundamental goals of justice, mercy, and good faith, and religion will not degenerate into a private religiosity or pietism but will maintain its social responsibility. WV